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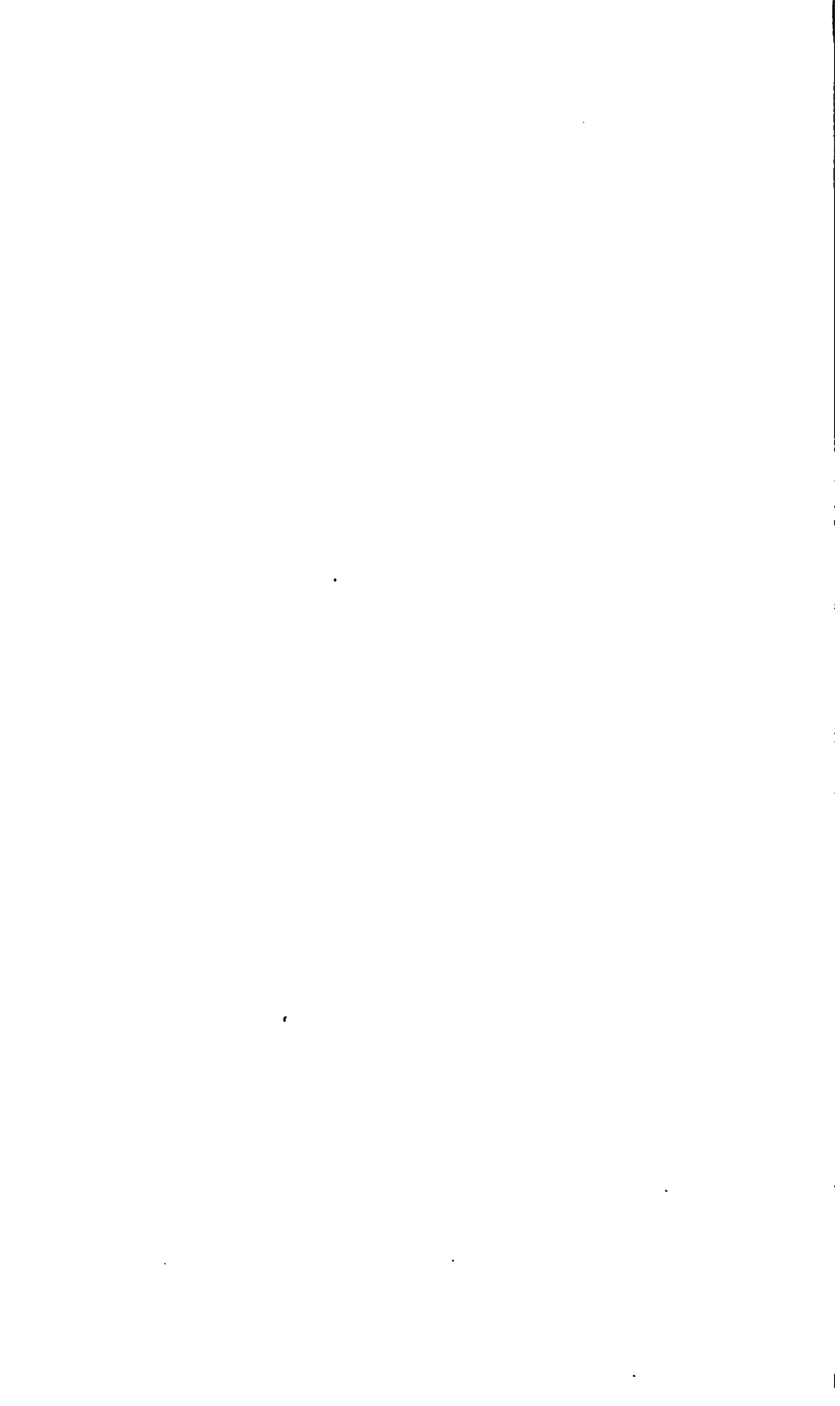
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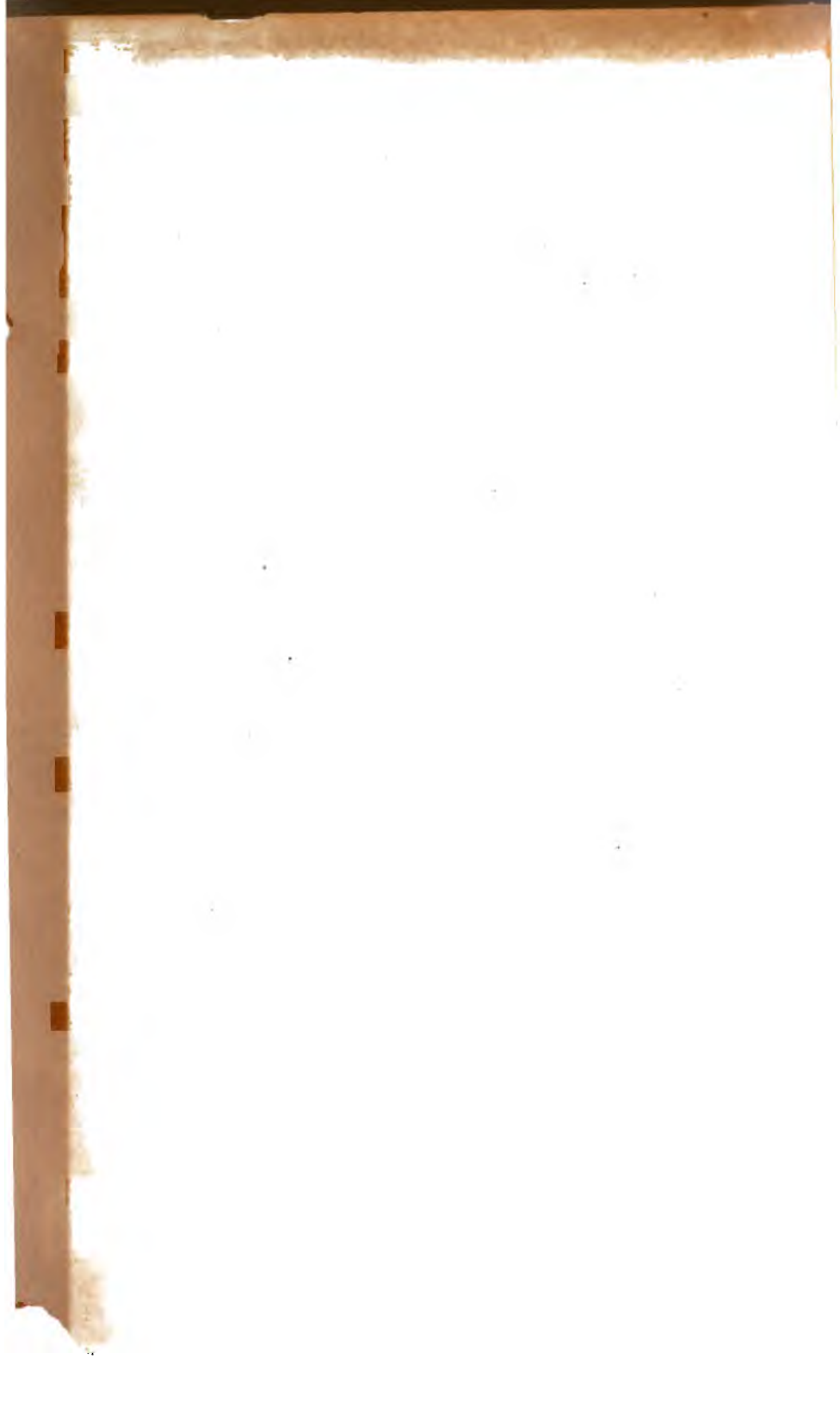
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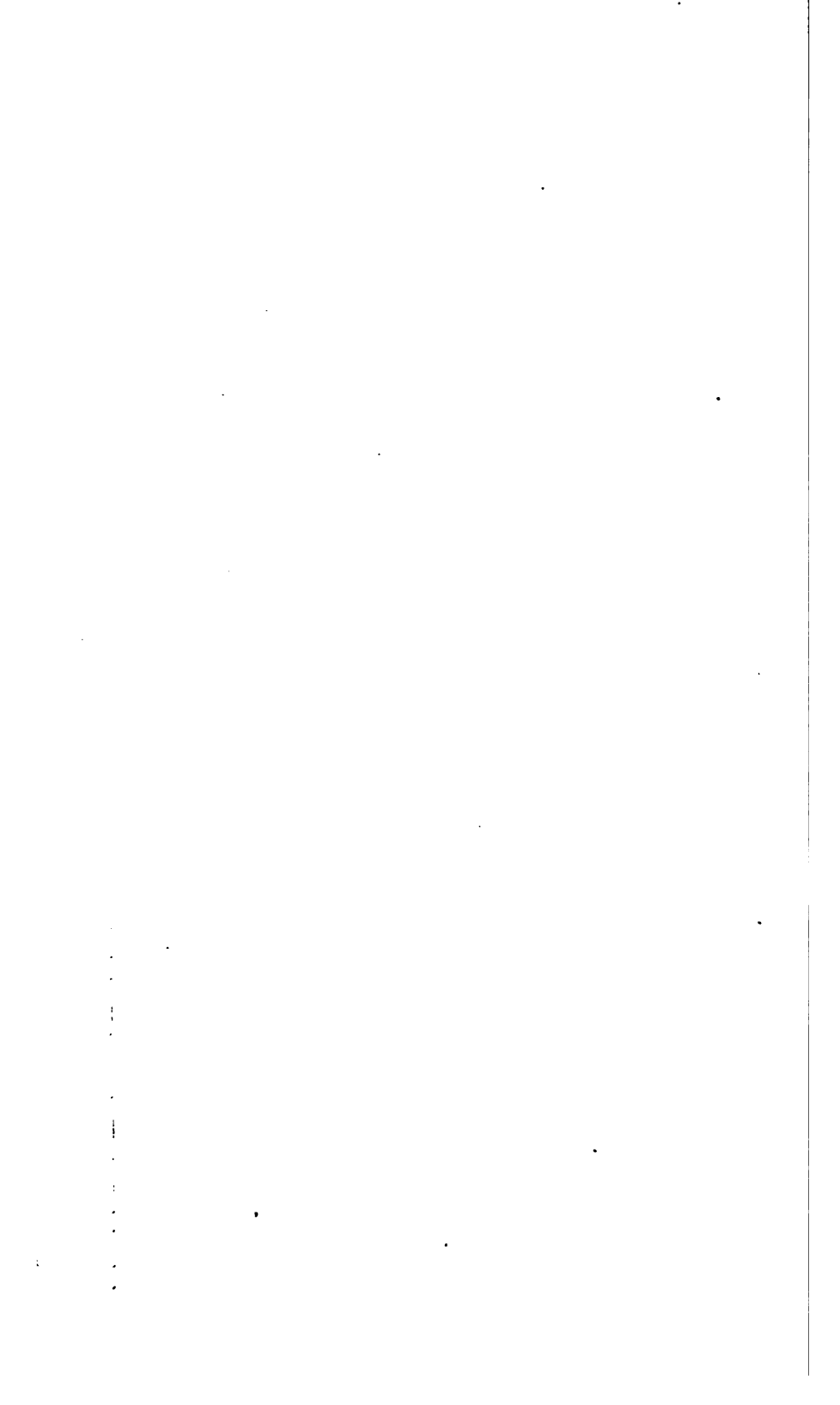












THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. II.

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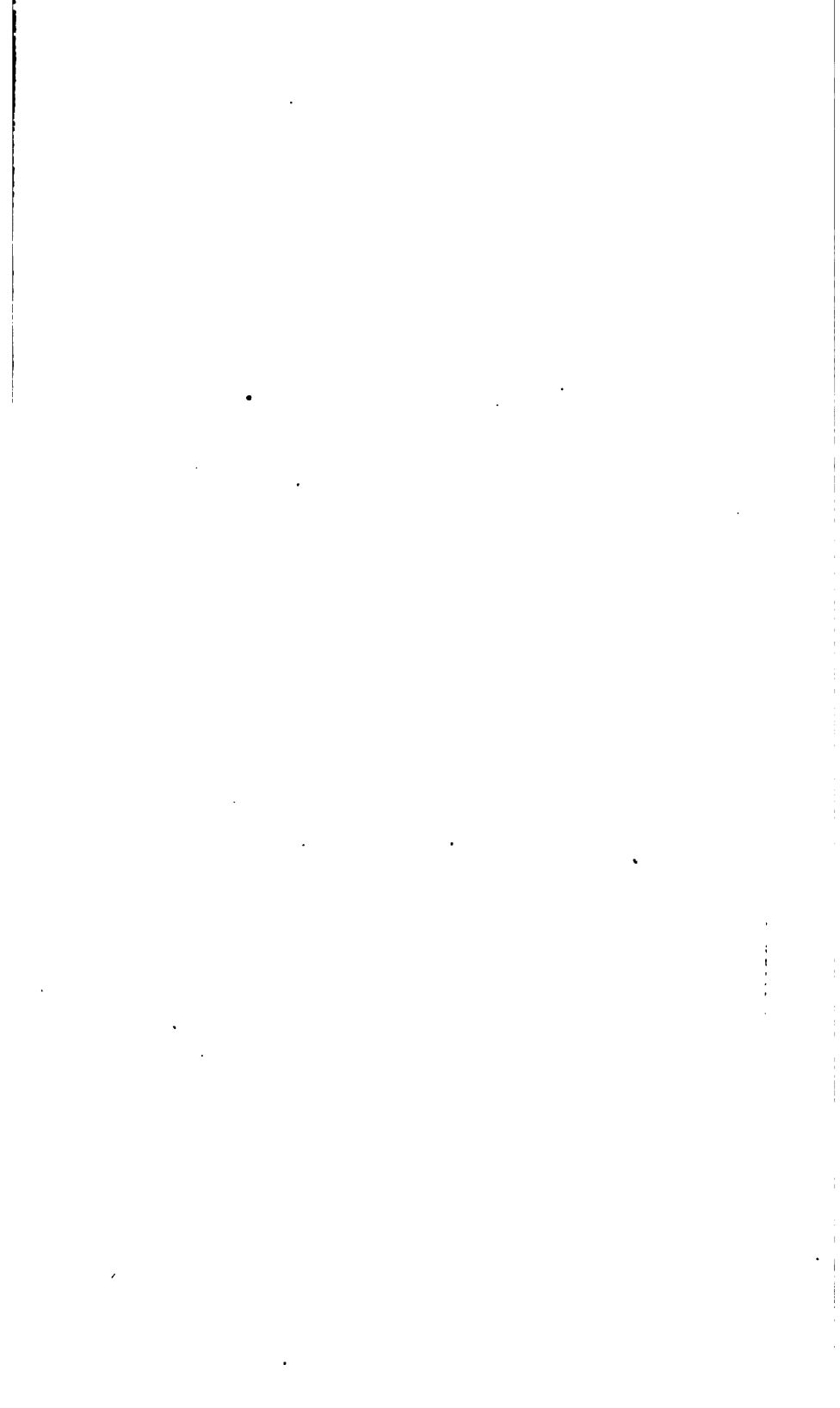
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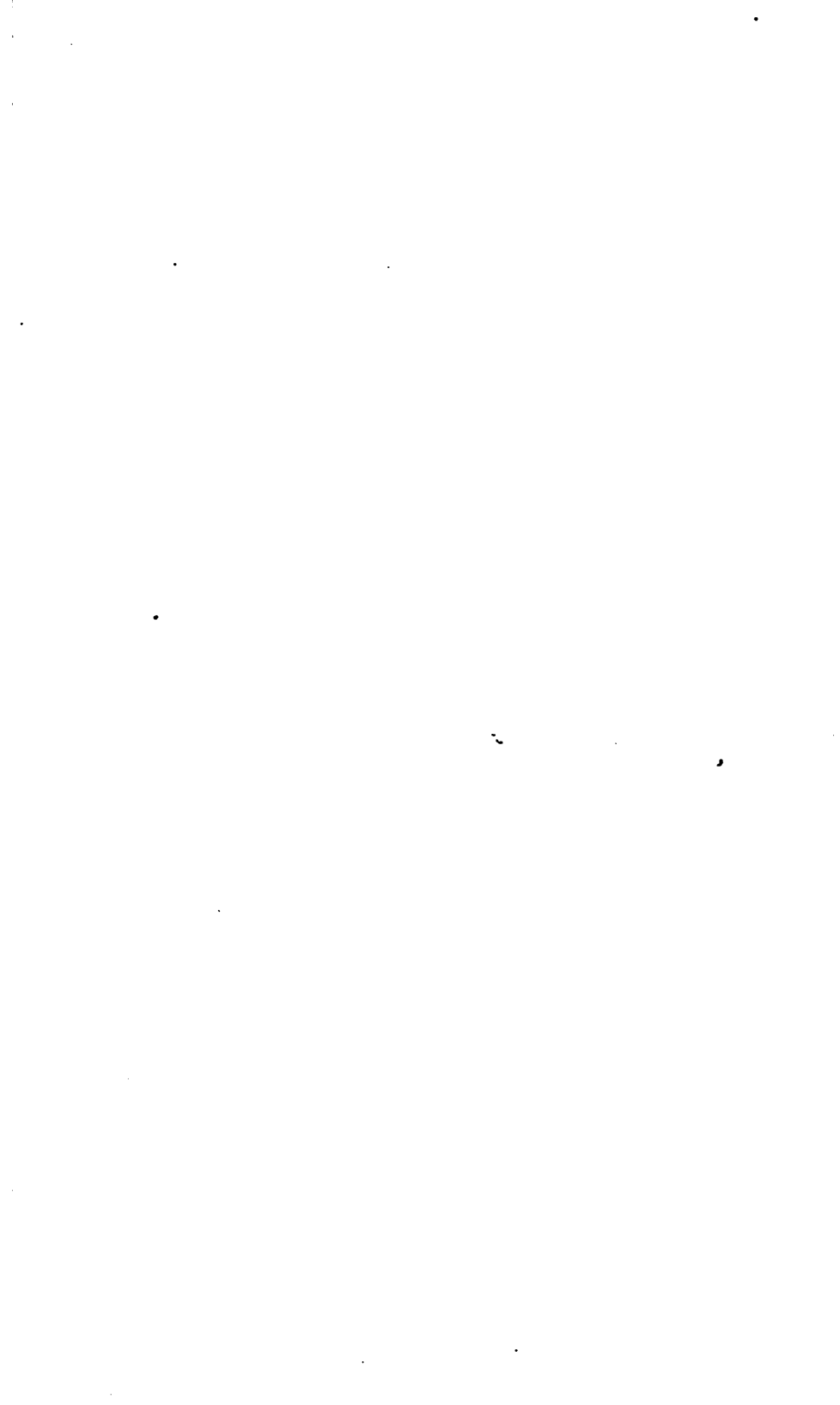
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VOL. II



CASES

IN THE

SUPREME COURT

OF

GEORGIA.

TURNIPSEED *v.* SCHAEFER.

[76 GEORGIA, 109.]

ACTS RELATIVE TO VOLUNTARY ASSIGNMENTS by insolvent debtors are remedial statutes, and, as against the assignor and those holding under him, should be construed liberally in favor of creditors.

ASSIGNMENT FOR CREDITORS. — Incomplete schedule and no schedule differ in degree only.

ID. — OMISSION FROM SCHEDULE of property of little or no value, or of creditors whose claim prelate but a small amount, may not invalidate assignment; but if such omissions are of large sums from assets and from amount due creditors, the case is otherwise.

TO INVALIDATE ASSIGNMENT for benefit of creditors on account of omissions of creditors from schedule, it is not necessary that there should be a guilty intention to make such omissions.

SCHEDULE MUST BE FULL AND COMPLETE to be valid, as no means are provided for perfecting incomplete schedules, and our courts are not authorized to amend such schedules.

GENERAL PROVISION IN ASSIGNMENT FOR BENEFIT OF CREDITORS, that the assignee be directed to take possession of any property of assignor that may have been omitted from assets as named in schedule, is against the policy of the law, especially where details are required to be set forth with particularity.

PREFERENCES IN ASSIGNMENTS FOR BENEFIT OF CREDITORS, although permitted, are not favored. Act of 1885 corroborates sections 1945 and 1946 of the code, and article 1, section 2, paragraph 6, of the constitution of 1877 (code, section 5023), by encouraging all creditors of assignor to use any proper means to detect and defeat any fraudulent concealment or disposition of property of assignor.

ACTION by W. W. Turnipseed and other creditors against George Schaefer and his assignees to set aside an assignment for the benefit of creditors, and for the appointment of a

receiver. George Schaefer, on the 9th of November, 1885, attempted to make an assignment for the benefit of his creditors, and to appoint assignees. Property worth sixty thousand dollars or seventy thousand dollars, enumerated in inventory of assets, was taken charge of by assignees. Ten days later it was discovered that the assignment was invalid, by reason of there being no schedule of creditors. A second assignment was then made to the same assignees, giving certain preferences to certain classes of creditors. Incomplete schedules of assets and creditors were attached to the second assignment. Defendant claimed that such omissions were due to an oversight on his part, and to the supposed worthless character of certain assets, and that some of the property in fact belonged to other parties. Judgment of court was, that the first assignment was void, that the second assignment transferred property to assignees, and that the assignor used ordinary diligence in attempting to make correct list of creditors and assets. Plaintiff excepted.

John L. Tye, J. H. Lumpkin, and G. W. Bryan, for the plaintiffs in error.

Hall and Hammond, James R. Gray, and E. J. Reagan, for the defendants.

By Court, HALL, J. Owing to the practical importance and widely extended application of the principles involved in this and two other records returned to the same term of this court to the mercantile and commercial affairs of the community, we have postponed their determination that we might have time to consider them maturely, and now present the result of our deliberations, without further apology for a delay which seemed to us necessary for their elucidation.

1. The first section of the act of the general assembly, approved September 28, 1881, requires that in voluntary assignments by insolvent debtors for the benefit of creditors, the assignor shall, in all cases, prepare and attach to the deed, or instrument by which the assignment is made, "a full and complete inventory and schedule of all the assets of every kind, held, claimed, or owned by such insolvent person, firm, or corporation at the time of the execution of such deed, or other instrument of assignment, which inventory or schedule shall be sworn to by the person making the assignment, and in case of assignments by firms, the oath may be made by any

member of such firm, or in cases of assignments by corporations, by the chief officer of the corporation"; and it is thereby further enacted (section 2) that the affidavit therein previously provided for may be made before the officer in whose presence the deed of assignment is executed, and that the person or persons making such affidavit shall, upon indictment and conviction for filing a false, deceptive, or incomplete schedule of assets, be liable to the pains and penalties prescribed by law for persons convicted of perjury, and that no deed or other instrument of assignment by insolvent persons, firms, or corporations shall be valid, unless accompanied by the sworn schedule required by the first section of the act: Acts of 1880 and 1881, p. 174; Code, Add., p. x, sec. 1953, d, e.

In addition to the protection afforded to creditors against partial assignments by insolvent debtors, and to prevent them from suppressing or misrepresenting the extent and character of their liabilities, the legislature, by an act approved the 17th of October, 1885 (Acts, p. 100), declared, section 1, that "in all cases of voluntary assignments," made after the passage of the act, "by failing or insolvent debtors for the benefit of creditors, it shall be the duty of the person, firm, or corporation making such assignment to prepare and attach to the deed or instrument by which such assignment is made, at the time of executing the same, a full and complete inventory and schedule of all indebtedness of every kind of such insolvent person, firm, or corporation at the time of the execution of such instrument or deed of assignment, which inventory or schedule shall set forth in detail the names of, the amounts due to, and the residence of each of the creditors of such assignor, and which inventory or schedule shall be sworn to by the person making the assignment"; and in case of assignments by firms, etc., shall be sworn to by a member thereof. Section 2 declares "that no deed or other instrument of assignment by insolvent persons, firms, or corporations shall be valid, unless accompanied by the sworn schedule required by the first section of this act." The assignment in question was made after this last act went into effect, and the uncontradicted averments in the bill, which were fully sustained by the proof, show that there were omissions of assets as well as creditors from each of the sworn schedules attached thereto; but to this it is replied that the creditors omitted were only such to an inconsiderable amount as compared with the entire amount of assignor's indebtedness; that

it was doubtful, at best, whether some of them were creditors at all, and that the assets omitted from the other inventory were trifling in value and amount, and were omitted from oversight and forgetfulness, without any intention whatever, on the part of the assignor, to palm off a false, deceptive, or incomplete schedule, as was evident from a general clause in the deed of assignment authorizing and empowering the assignees to take, hold, and recover, not only the property and assets embraced in the schedule, but everything else belonging to the assignor at the making of the deed; and in addition thereto, the assignor, upon discovering the omissions, stood ready and willing to supply them by an amended schedule duly verified, and actually did so.

We have held that the act of 1881 is a remedial statute, and should be strictly construed, as against the assignor and his assignee, and liberally in favor of creditors: *Crittenden Bros. v. Coleman & Co.*, 70 Ga. 293; *Coggins v. Stephens & Co.*, 73 Id. 414. The act of 1885, being of the same character as the other act, and being in furtherance of the same policy, is subject to the same rules of construction. It is true that, in the first of the cases above cited, the schedule was made subsequently to the execution of the deed of assignment, and instead of being attached, was loosely folded away with it; in the other case, there was no attempt to make out and attach any inventory or schedule whatever. In point of principle, we can see no difference between these cases and one in which the schedule made out and attached is neither "full" nor "complete." The purpose the act was intended to accomplish, and the rights it was designed to secure to creditors, by affording them facilities to detect and expose fraud in such transactions, as clearly set forth by the court in its opinion in the first of the above-cited cases, will condemn such schedules as those now under consideration, as well as that then passed on. The difference between a schedule which is not full and complete and no schedule at all is a difference in degree only, and should not vary the application of the rule prescribed by the statutes.

2. For the first time, we are asked to lay down a rule as to what may be safely omitted from such schedules, either by oversight or inadvertence, and without any intention to do so on the part of the assignor, or purpose to mislead creditors by filing a false, deceptive, or incomplete schedule.

From the very nature of the subject, it is impracticable, if

not impossible, to lay down any rule upon that subject. Generally speaking, the requirements of the law and the conditions it prescribes should be closely followed; at least an honest effort should be made to carry it fully into effect according to its purport and intent. While the omission of some slight and unimportant article of little or no value from the schedule of effects, or some one or more creditors whose claims amounted to a trifle, and which would be probably overlooked or forgotten by the most careful, deliberate, and painstaking person in preparing his schedule, might not have the effect of invalidating the assignment, yet in a case where one party claimed that assets amounting to nearly three thousand dollars were omitted, and the assignor conceded, after these omissions had been brought to his notice by the evidence adduced on the trial, that assets to the amount of nearly thirteen hundred dollars had been omitted from one schedule, and sundry creditors whose undisputed demands were shown to aggregate more than one thousand dollars were omitted from the other, and sought to supply the omission by then amending his schedules in both respects, we think that the consideration pressed would hardly avail to maintain the assignment.

In point of fact, we know that these assignments, especially where they contain preferences to certain favored creditors, are hurriedly made up and executed, especially since the passage of the act by the same legislature which passed the assignment act of 1881, and which was approved on the same day that act was approved, which enables the holder of any matured debt against trading corporations, or traders, or firms of traders, where he has made a demand for his debt and payment has been refused, to file his bill and have the assets of his debtor placed in the hands of a receiver for collection, and which prohibits a creditor, after the appointment of a receiver, from acquiring a preference by judgment or lien on any suit or attachment under proceedings commenced after the filing of the bill, and declaring that all mortgages and assignments executed after that time to pay or secure existing debts shall be vacated, etc.: Acts 1880 and 1881, pp. 124, 125; Code, sec. 3149 a-3149 g. The haste resorted to in this case is probably deducible from the fact that an assignment was executed between these parties only a short time before that in question was made, and which, owing to their ignorance of the act of 1885, contained no schedule of creditors; and fearing the

appointment of a receiver by some disappointed creditor when this was discovered, they lost no time in vacating that and in hurrying up the other. This may not be so, but the attending circumstances might render this view not altogether improbable.

3. We cannot agree with the ingenious view, so urgently pressed and plausibly maintained by the eminent and able counsel for the defendants, that unless these omissions of assets and creditors were intentional, and designed for the purpose of making the schedules false, deceptive, or incomplete, they would not avoid the assignment. It is true that such design, purpose, or intention is a prerequisite, by the act of 1881, to the indictment of the person or persons making the affidavit to the schedule of assets, in order to subject him or them, on conviction, to the pains and penalties of perjury. Usually, in proceedings against a person for violating a criminal or public law, it is essential, in order to sustain the indictment, to prove both the act and guilty intent of the accused; for a crime or misdemeanor consists in a willful violation of the public law, in which there must be a union or joint operation of act and intention, or criminal negligence. This is the rule for determining the affiant's liability on a criminal prosecution. Not so, however, where the question in issue is the validity of the assignment. This criminal clause is not in the act of 1885 which provides for the schedule of creditors, but both acts declare in unmistakable language that unless these schedules are "full" and "complete" the assignment shall not be valid. No provision is made by either of them for perfecting a schedule which is not "full" or "complete," and by that means upholding the assignment.

That this course has been pursued in some of our sister states, notably in New York, Indiana, and perhaps others, under their peculiar statutes, we are well aware. In those states insufficient assignments may be completed at the instance of the assignor, or the assignee, or the court to which they are returned, and in some of them on the application of the creditors. This is a matter of statutory regulation (and may be, perhaps, a good one); at all events, these courts find express authority for their judgment in the provisions of their own state statutes. There are no such provisions in our law, and until the legislature shall so authorize us, we must decline to exercise the power of allowing these schedules to be amended. This would be too great a stretch of judicial legislation for any

court to venture on; it would not be a legitimate exercise of power in construing or interpreting a legislative act, but an addition to one by the arbitrary action of the court.

4. The general clause in the assignment conveying to the assignee such property of the assignor as was left out of the schedule of assets, so far from sustaining the position of counsel for which it was invoked, is rather adverse to it; at all events, it contravenes the policy of the legislature in enacting the laws in question, as was clearly indicated by this court in its judgment rendered in the case of *Crittenden Brothers v. Coleman & Co.*, *supra*. The law looks with distrust upon such sweeping clauses in deeds, especially where particularity of detail is required. Ever since Twyne's case, it has been, if not a recognized axiom, at least a well-settled principle, that "fraud lurks in generalities."

5. In concluding what we have to say on the law of this case, it may be well to remind the profession and the commercial community that, while preferences in assignments are allowed, they are tolerated rather than encouraged, as is manifest from the drift of our legislation from 1881 down to the present day. The principle here announced is emphasized by the acts above cited, and this provision of the act of 1885, to wit, "No assignment shall be set aside, except upon a direct proceeding filed for the purpose, and no creditor of the assignor shall obtain any priority or preference of payment out of the assets assigned on any judgment rendered after the filing of the bill, in case the deed of assignment is set aside and decreed to be void." The act goes further, and carries fully into effect the policy proclaimed in sections 1945 and 1946 of the code, as well as in article 1, section 2, paragraph 6, of the constitution of 1877 (code, section 5023), by throwing wide the doors of the court of equity to creditors of every class and description, whether they have a lien or not, and inviting them to enter and avail themselves of its remedial process and aid, that facilities may be afforded them to "detect, defeat, and annul any effort to defraud them of their just rights," and that they may be enabled to reach the property "concealed" from them by their debtors.

Each of the positions taken in this case will be amply sustained by the authorities cited in the able and exhaustive briefs of counsel, found at the end of the reporter's statement. As there must be a reversal of the decretal order excepted to in this case, it is certainly unnecessary, and might be

improper, to pass upon the other questions made, at least so far as they affect the rights of contesting creditors to the property assigned, and the equities which may exist between themselves and others. The deed of assignment must be set aside for the reasons already given; and that the fund may be preserved for future adjudication and distribution among those who shall appear entitled to it on the final hearing of the bill, the injunction must be ordered and the receiver appointed, as prayed, and upon such other terms as may appear equitable and in accordance with law.

Judgment reversed.

STATUTES AUTHORIZING AND REGULATING ASSIGNMENTS FOR BENEFIT OF CREDITORS usually direct that certain acts shall be subsequently done by the assignor or assignee, such as the filing of a schedule or inventory by the former, or of a bond for the faithful discharge of his duties by the latter. The creditors, however, are the beneficiaries under the assignment, and there is a manifest hardship in permitting the impairing or destroying their rights by any act or omission of the assignor or assignee. Hence, unless controlled by the mandatory terms of a statute, courts have been inclined to hold that an assignment will not be made void by defects in inventories or schedules, or even by the absence of those instruments, when the creditors have not been guilty of any complicity in such neglect: *Hartler v. Tootle*, 84 Mo. 23; *Price v. Parker*, 11 Iowa, 114; *Drain v. Meckel*, 8 Id. 438; *Nye v. Van Huesen*, 74 Am. Dec. 690, and note; *Smith v. Stoker*, 8 Col. 386; *Terry v. Butler*, 43 Barb. 398; *Emerson v. Senter*, 118 U. S. 3; *Siebert v. Mulligan*, 110 Ind. 108.

On the other hand are many cases, doubtless controlled by local statutes, in which the filing of the various instruments designated in the statute are held to be mandatory. Under these decisions, a full and complete inventory or schedule of debtor's property, under oath, is indispensable to validity of assignment: *Hill, Fontaine, & Co. v. Alexander Brothers*, 16 La. 496; *Goggins v. Stephens & Co.*, 73 Ga. 414. Failure to file correct inventory and list of creditors within ten days renders assignment void as to attaching creditors: *Mather v. McMillan*, 60 Wis. 546. Deed of assignment must show on its face that all of debtor's property is included in assignment, and the assignee will not be allowed to take any other property of the debtor not named in deed: *Hays v. Covington*, 16 La. 267. But an omission of property from the schedule, made by mistake and unintentionally, will not avoid an assignment: *Batten v. Smith*, 62 Wis. 96. And a substantial compliance with the provisions of the statute is sufficient: *Rosenbaum v. Moller*, 85 Tenn. 660.

PROPERTY OF DEBTOR OMITTED FROM SCHEDULE, whether by mistake or otherwise, which afterwards comes in possession of trustee, may be held by him as against executions subsequently issued: *Hasseld v. Seyford*, 105 Ind. 534.

RESERVATION OF PROPERTY BY DEBTOR INVALIDATES ASSIGNMENT: *Barnis v. Rice*, 74 Am. Dec. 513; *McClurg v. Lecky*, 23 Id. 64. This is especially true where grantor exacts release from creditors: *Gadsden v. Carson*, 70 Id. 702; *Wilson's Account*, 45 Id. 702; or where grantor continues to hold possession and control of property: *Schufeldt v. Jenkins*, 22 Fed. Rep. 367.

ASSIGNOR CANNOT, AS AGAINST RIGHTS ACQUIRED BY JUDGMENT CREDITORS, show that omission from inventory and schedule was made by mistake: *Southerland v. Brodner*, 39 Hun, 134.

PROVISION FOR PAYMENT OF ATTORNEY'S FEE DOES NOT INVALIDATE ASSIGNMENT: *Hill v. Agnew*, 12 Fed. Rep. 239; *Iaelin v. Dalrymple*, 27 How. Pr. 137; *contra Wolfshoimer v. Rivinus*, 54 Am. Rep. 769. Provision for payment of services of assignee renders assignment void: *Jacobs v. Remsen*, 26 N. Y. 657. An assignment is void as against creditors, which provides for the support of the grantor: *Lawson v. Funk*, 108 Ill. 502; or of his family: *Mackie v. Cairns*, 15 Am. Dec. 477, and note 596. Reservation by grantor of an interest for himself invalidates assignment: *Lawrence v. Norton*, 15 Fed. Rep. 853; or of control of property: *McCormick v. Atkinson*, 78 Va. 8; *Whallon v. Scott*, 10 Watts, 237; *Mears v. Montgomery*, 23 Fed. Rep. 421; *Keevil v. Donaldson*, 20 Kan. 165. Provision allowing an unreasonable delay in winding up estate does not invalidate assignment: *Wert v. Schneider and Davis*, 64 Tex. 327.

FAILURE BY ASSIGNEE TO GIVE BOND, as required by statute, does not invalidate the transfer and restore title of assigned property to assignor: *Brennan v. Wilson*, 71 N. Y. 502; *Thrasher v. Bentley*, 59 Id. 649; *Syracuse etc. R. R. Co. v. Collins*, 1 Abb. N. C. 47; *Worthy v. Benham*, 13 Hun, 176; *Van Heis v. Elkus*, 8 Id. 517; *Van Vleet v. Slawson*, 45 Barb. 317; *Barbour v. Eccroson*, 16 Abb. Pr. 366; *Bostwick v. Bennett*, 74 N. Y. 317; *Furman & Co. v. Fisher*, 94 Am. Dec. 213; neither does a defective bond nor a deviation in the deed from requirements of statute: *Munson v. Ellis*, 58 Mich. 334. Failure to comply with Revised Statutes, section 362, as to statement accompanying deed of assignment, does not invalidate assignment. "The rights of creditors are fixed by the assignment, and without their knowledge or consent cannot be varied by any subsequent act of the assignor or assignee. If valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it: *Douglass v. Cisma*, 17 Mo. App. 61; *Burr on Assignments*, secs. 264-351. Neglect by assignee to file deed, give bond, and make inventory within the time required by the assignment law, does not, as to a creditor with notice, who seek to levy an execution, invalidate the assignment: *Winn v. Madden*, 18 Mo. App. 261; *Rendlemann v. Willard*, 15 Id. 375. Filing schedule and giving bond are conditions subsequent to vesting of title of property in assignee: *Clayton v. Johnson*, 36 Ark. 406.

ATTEMPT BY ASSIGNEE TO CONVEY PROPERTY before filing his bond is a nullity: *Brennan v. Wilson*, 71 N. Y. 502; *Woodworth v. Seymour*, 22 Hun, 245; *contra Dallam v. Fidler*, 6 Watts & S. 323; *Heckman v. Messenger*, 49 Pa. St. 465.

ASSIGNMENT WHICH PROVIDES THAT NO BOND SHALL BE REQUIRED OF ASSIGNEES, as prescribed by statute, is void as to creditors not consenting thereto. To constitute a valid assignment, debtor's estate must be administered and distributed substantially in conformity with the provisions of the statute: *Milligan v. O'Connor*, 19 Ill. App. 487. A provision in deed that assignee shall take possession of property before he has complied with the statute as to giving bond and filing inventory, invalidates such deed: *Eice v. Trayer*, 24 Fed. Rep. 460; *Aaronson v. Deutsch*, 24 Id. 465.

FAILURE OF ASSIGNEE TO GIVE BOND IN AMOUNT EQUAL TO VALUE OF PROPERTY, before taking possession of property, renders assignment absolutely void: *Goll v. Hubbell*, 61 Wis. 293. Omission by assignee to give bonds may be good cause for appointing a receiver: *Porter v. Williams*, 59 Am. Dec.

525, note. Failure of affidavit of surety on bond of assignee to show that such surety is a freeholder, invalidates the assignment: *Asley v. Osterman*, 65 Wis. 118.

FICTITIOUS CLAIM INSERTED IN DEED DOES NOT RENDER ASSIGNMENT WHOLLY INVALID: *Pinneo v. Hart*, 77 Am. Dec. 625. It is void as to such claim: *Market Nat. Bank v. Hofheimer*, 23 Fed. Rep. 13. Defect in certificate of acknowledgment does not invalidate assignment, especially where defect is subsequently corrected: *Camp v. Buxton*, 34 Hun, 511. Nor does it, where defect is in form merely through an error of officer taking the acknowledgment, and it can be shown that the acknowledgment was in fact valid: *Claffin v. Smith*, 35 Id. 374. Failure to obtain assent of assignee, where this is required, renders assignment void: *Schwartz v. Souther*, 41 Id. 323; *Noyes v. Wernberg*, 15 Abb. N. C. 164. Failure to give preference to wages of employees, as required by statute, does not affect validity of assignment: *Richardson v. Herron*, 39 Hun, 537; *Burley v. Hartson*, 40 Id. 121; *Richardson v. Thurber*, 104 N. Y. 606; *Johnson v. Kelly*, 43 Hun, 379.

ASSIGNOR MAY CORRECT DEFECTIVE ASSIGNMENT BY SECOND ASSIGNMENT before the rights of creditors have become fixed: *Gibson v. Chedé*, 90 Am. Dec. 508, note. As to assignor's right to correct defective assignment, see *Ingraham v. Wheeler*, 6 Conn. 277.

DEED OF ASSIGNOR DESCRIBING PROPERTY CONVEYED AS ALL PROPERTY OF ASSIGNOR, and more particularly describing such property in an annexed schedule, passes only property named in such schedule: *Bock v. Perkins*, 23 Fed. Rep. 123; *Mims v. Armstrong*, 1 Am. Rep. 22. The general assignment act of 1877, chapter 466, does not relate to a specific assignment for the benefit of one or more creditors of debtor. Such an assignment, although in conflict with said act, is not void: *Boyer Wheel Co. v. Fielding*, 101 N. Y. 509.

OBJECTIONS TO VALIDITY OF ASSIGNMENT CAN BE MADE BY WHOM: *Richardson v. Herron*. 39 Hun, 540.

ALBANY AND RENSSELAER IRON AND STEEL COMPANY v. SOUTHERN AGRICULTURAL WORKS.

[76 GEORGIA, 135.]

CORPORATION MAY MAKE ASSIGNMENT FOR BENEFIT OF CREDITORS.

CREDITORS' SUIT. — Unsecured creditors may, in certain cases, apply to a court of equity for relief before their claims are reduced to judgment, as where the debtor is an insolvent, and has assigned his property to one who is conspiring with him to defraud his creditors, or where the property was obtained under false representations of which the assignee was cognizant, or where a large supply of goods was procured with a view of making an assignment, or where property of assignor is being disposed of and wasted, — in which cases equity will interpose, and appoint a receiver.

FRAUD. — LAYING IN LARGE SUPPLY OF GOODS SHORTLY BEFORE MAKING ASSIGNMENT for the benefit of creditors, for the purpose of enabling the assignee to carry on the business of the assignor, raises a presumption of an intention to delay, hinder, and defraud unpreferred creditors.

VOID ASSIGNMENT. — Injunction may be issued and receiver appointed to protect from foreclosure mortgages made in aid of a void assignment, at the instance of unsecured creditors, who are not parties to such mortgage.

ACTION by plaintiffs in error against the Southern Agricultural Works, for judgment for amounts due them, for the setting aside of the deed of assignment, for an injunction and the appointment of a receiver, and for general relief. Judgment for defendants.

Abbott and Smith, Candler, Thomson, and Candler, Mynatt and Howell, Harrison and Peebles, and King and Spalding, for the plaintiffs in error.

Hoke and Burton Smith, and Jackson and King, for the defendants.

By Court, **HALL, J.** 1. The most material questions, as respect the legal sufficiency of the assignment in this record, are identical with those made in *Turnipseed v. Schaefer*, ante, p. 17, and to that extent are controlled by the decision therein rendered. Here, as there, valuable assets belonging to this alleged insolvent corporation were left out of the schedule required to be annexed under the act of 1881 to the deed or instrument of assignment at the time it was executed, and here, as there, this deed contained a general clause, conveying to the assignee all property of the assignor, which for any cause was omitted from the schedule.

2. Notwithstanding there are many cases to that effect, we cannot agree with counsel for the complainants, who argued the case with such learning and signal ability, that an insolvent corporation is incapable of making a general assignment for the benefit of creditors, either with or without provisions giving preferences and priority of payment to certain named creditors. The cases relied on go upon general principles of the mercantile and commercial law, and in the absence of statutory provisions like those contained in the act of 1881, under which this assignment is claimed to have been made, may possibly be correct, although there are others to the contrary, and especially the case of *McCallie and Jones v. Walton*, 37 Ga. 613, 95 Am. Dec. 369, in which Harris, J., broadly says: "In Georgia no statute prevents an assignment by an existing corporation." The above-cited act of our legislature in express terms gives the right by name to such corporations, and provides by whom and in what manner the schedules

annexed to the assignment are to be sworn to. The briefs of counsel for both sides will furnish the authorities upon the point.

8. Another question made and argued with much ability and force by the learned and indefatigable counsel for the respondents is, that the complainants, who are creditors without any lien, have no right to invoke the remedial aid of a court of equity until their claims are reduced to judgment; and that such was generally the rule at the time this conveyance was executed is undeniably true; but that special circumstances may exist rendering the rule inapplicable is equally true, and we find that some of those circumstances do exist in this case,—such, for instance, as the insolvency of the debtor, who, it is alleged, has fraudulently transferred his property to one who is in complicity with him in the fraud, and who is rapidly disposing of the property, or where the property is obtained by fraudulent representations with which the assignee is connected: *Cohen v. Meyers, Cohen, & Co.*, 42 Ga. 46; *Cohen & Co. v. Morris & Co.*, 70 Id. 313. And when to these circumstances is added the further fact that large supplies of goods were obtained with a view of making the very assignment in question, to enable the assignee to carry on the business of the party making the assignment for an indefinite period of time, and that these goods are embraced, not only in the deed of assignment, but likewise in mortgages contemporaneously executed to certain of the creditors preferred by the conveyance, including the assignee himself, to aid, as charged, any defects existing therein which might render it void, and thus prevent the accomplishment of the scheme entered into by the parties, we think a strong case is made for the interposition of equity by an injunction and the appointment of a receiver, whether the complainants had reduced their demands to judgment or not. The fact of provision being made to carry on the business by the aid of goods procured for that purpose, and which have not been paid for, raises a presumption, though, perhaps, not a conclusive one, of an intention on the part of the parties to the transaction to delay, hinder, and defraud such creditors as are not favored and preferred by the deed. This looks like an arrangement to coerce them to a disadvantageous settlement, and compel them to submit to such terms as their debtors may see proper to dictate. In support of these positions, see authorities cited in brief of counsel.

But of what avail would it be to declare the assignment

void, as we have done, for its want of conformity to law, if the parties holding these mortgages were allowed to proceed to foreclose them at law, although it might turn out, upon a full hearing of the case, that they were made in aid of this void assignment, and with a view to hinder and delay the creditors of the assignor and mortgagors? The complainants are not parties to these mortgages, and would have no right to intervene to prevent their foreclosure and enforcement at law: Code, sec. 3965, and citations. So they would, in that event, be without any remedy to redress their wrongs and enforce their rights, unless a court of equity should open its doors and invite them to enter. The issues formed by the facts, as they are presented at this preliminary hearing, must be submitted for determination by the court on the final trial; and as the assignment has been declared void, and the property in dispute is to be preserved until it can be finally disposed of by a full decree, settling the rights and priorities of the parties as they existed at the time of exhibiting this bill, an injunction must issue and a receiver be appointed as prayed, or upon such other conditions as may appear to be equitable and proper under the law.

Judgment reversed.

For note respecting assignment for benefit of creditors, see *Turnipseed v. Schaefer*, *supra*, p. 17.

McMILLAN v. KNAPP.

[76 GEORGIA, 171.]

ASSIGNMENT FOR BENEFIT OF CREDITORS IS INVALID, where inventory and schedule in an assignment for the benefit of creditors is not full and complete, and does not contain "all the assets of every kind held, claimed, or owned" by debtor when deed of assignment is executed, and is not verified as required by statute. Omission from schedule of assets by assignor of a right of redemption in certain premises invalidates assignment.

ASSIGNMENT FOR BENEFIT OF CREDITORS. — Affidavit which states that the schedule contains "a true, complete, and perfect" inventory of all the property of which debtor was possessed, both real and personal, including stock in trade, accounts, promissory notes, executions, and real estate, all of which is marked "Exhibit A," and household and kitchen furniture, is defective. Enumeration in schedule of property as of several kinds excludes all property not so enumerated. Oath which states that the property enumerated in schedule is all that the assignor possessed at time assignment is made, is incomplete; the oath must de-

clare that the inventory and schedule is full and complete, and contains all the assets of every kind held, claimed, or owned by assignor when assignment is made.

ASSIGNMENT FOR CREDITORS. — Failure to substantially comply with all the requirements of the statute is a good cause for setting aside such assignment.

S. T. AND E. J. KNAPP had a *feri facias* issued against James G. Watts, and levied on property claimed by F. F. Watts. The property was, by consent of the parties, disposed of, and the funds deposited in court. These funds were also claimed by W. D. McMillan, who was a trustee and preferred creditor, and asserted that the sale of the property to F. F. Watts either was invalid, or passed to the funds held in trust for creditors. The facts were as follows: James G. Watts assigned his stock of goods to F. F. Watts on April 11, 1885, for the benefit of creditors. The goods were subsequently sold by the assignee, and purchased in by himself individually. The amount bid for the goods was indorsed on notes against the estate held by him as trustee for Mrs. Caroline M. Watts and her children. On May 18, 1885, the goods were levied upon by plaintiffs to satisfy a judgment held by them against James G. Watts. The goods were claimed by F. F. Watts individually, and by McMillan, who succeeded Watts as trustee. The following clause was found in the deed of assignment: "And also all, etc." It was asserted by plaintiffs that James G. Watts owned a right of redemption in a certain lot in the city of Savannah which was not included in his schedule of assets. Judgment was rendered in favor of the execution creditors, and holding the assignment void. New trial was asked for by McMillan, trustee, which was denied, from which McMillan appealed.

Lester and Ravenel, and Alfred B. Smith, for the plaintiff in error.

Garrard and Meldrim, J. S. Schley, Richards and Heyward, Lawton and Cunningham, and Charles N. West, for the defendants.

By Court, HALL, J. The assignment in this case was adjudged invalid, because the schedule of assignor's effects was not a full and complete inventory and schedule of "all the assets of every kind held, claimed, or owned" by him at the execution of the deed, and because it was not verified as required by the act of 28th of September, 1881. The property left out of it was the right of redemption which the assignor

had in certain premises conveyed for the security of a debt he owed, and which right of redemption he surrendered to the party holding the deed, shortly after the execution of the assignment.

1. This omission from the schedule was fatal to the assignment, as we this day held in *Turnipseed v. Schaefer*, *ante*, p. 17.

2. The affidavit was that the schedule contained "a true, complete, and perfect" inventory of "all the property of which" the assignor was "then possessed, both real and personal," "including" his "stock in trade, accounts, promissory notes, executions, and real estate, all of which is in schedule marked 'Exhibit A,' and household and kitchen furniture." It will be seen at a glance that this is not the affidavit required by the statute, and that the enumeration of the several kinds of property contained in the schedule excludes that which was left out of the assignment. It goes only to the property actually in his possession and under his control at the time the assignment was made. The oath required by the statute is more comprehensive. The party is required to swear that the schedule attached is a full and complete inventory and schedule of all the assets of every kind held, claimed, or owned by him at the execution of the deed of assignment. The words underscored are conspicuously, and it may be suspiciously, absent from this affidavit. The safer rule in such cases is to follow the words of the act, and to comply substantially, if not literally, with all its conditions and requirements; otherwise the deed may and ought to be set aside.

Judgment affirmed.

For note respecting assignment for benefit of creditors, see *Turnipseed v. Schaefer*, *ante*, p. 17.

CENTRAL RAILROAD v. SMITH.

[76 GEORGIA, 209.]

EVIDENCE OF DOUBTFUL CHARACTER, as a statement made by plaintiff seeking to recover damages for an injury, "that if he did not get better, he would commit suicide," may be submitted to the jury, under proper instructions from the court as to its competency.

EVIDENCE. — REPRESENTATIONS OF SICK PERSONS, of the nature, symptoms, and effects of the malady under which they are laboring, are admissible as original evidence, though not made to a medical attendant. This rule must be restricted and carefully guarded when the declarations are no part of the *res gesta*.

EVIDENCE. — ADMISSION OF DECLARATIONS OF SICK PERSONS IS RESTRICTED to "exclamations of present pain or statements of present symptoms," and does not include statements relating to past occurrences and forming no part of the *res gesta*.

JURY SHOULD BE INSTRUCTED TO WEIGH LIGHTLY DECLARATIONS OF SICK PERSON, where they are doubtful, particularly when made at some period subsequent to time of injury, with a probable view of increasing damages in some suit which may be started.

NEGLIGENCE. — CHARGE TO JURY THAT IF DEFENDANT AND ITS EMPLOYEES USED REASONABLE AND PROPER CARE in providing egress for plaintiff from place where cars stopped, then it would not be guilty of negligence, and that otherwise it would be liable, is correct.

EXCESSIVE VERDICT. — Where instructions of court are not properly considered by the jury, and where, from the undisputed facts, the negligence of the defendant, if any existed, was slight, while that of the plaintiff seemed greater, a verdict of ten thousand dollars is so excessive that it shows either bias in favor of the plaintiff, or prejudice to defendant, or a misconception of the instructions of the court.

PASSENGERS ON BAGGAGE-WAGON OR FREIGHT-CAR IMPLIEDLY AGREE to accept the conveniences there received, both as to the way in which they are carried, and as to the means of entering and leaving such conveyances, when they are such as are ordinarily used with respect to such wagons or cars, when employed in the transportation of freight or baggage.

RAILROAD COMPANIES NEED NOT PROVIDE FOR PASSENGERS ENTERING OR LEAVING CARS AT UNEXPECTED AND UNUSUAL PLACES.

Lawton and Cunningham, for the plaintiff in error.

J. R. Saussey, for the defendant.

By Court, HALL, J. The plaintiff recovered of the defendant ten thousand dollars damages, resulting, as he alleges, from an injury which was occasioned by the negligent conduct of its agent in conducting him from the freight-depot of the company in Savannah to its passenger-depot, whence he had access to the street, where he could obtain a conveyance to his lodgings. The court overruled a motion for a new trial made by the defendant upon the following grounds: 1. Because the verdict of the jury is contrary to law; 2. Because the verdict of the jury is contrary to the evidence; 3. Because the verdict of the jury is against the weight of evidence; 4. Because the verdict is excessive; 5. Because the court erred in charging the jury as follows: "Now, was the defendant negligent, or not, in this case? If the defendant was not negligent, if the defendant used all reasonable care and diligence in taking care of him, if all reasonable and proper care was used on the part of its employees to see that he got from the place where he was put out into the city, then the defendant

would not be guilty of negligence, — would not be liable; but if it did not, then it would be liable"; 6. Because the court erred in admitting in evidence, over the objection of defendant, the following testimony of one of the witnesses: "Indeed, he threatened that if he did not get better, he would take his life; he contemplated suicide,"—the said statements referring to statements made by the plaintiff to the witness, and said statements being no part of the *res gestæ*, and made months after the accident referred to.

To the overruling of this motion the defendant excepted, and these exceptions make the questions on which we are to pass.

1. At most, the competency of the evidence excepted to in the sixth ground of the motion was doubtful; but while this may be so, that is not sufficient of itself, as has been frequently decided, to exclude it from the consideration of the jury. This fact goes rather to its weight than its admissibility, and the jury should have been instructed to consider its doubtful competency as a circumstance bearing upon its credibility in estimating the effect to be given to it. Had the plaintiff's declarations been made in describing his sufferings to a person other than a physician with whom he was consulting at the time, and whose treatment of his complaint he was endeavoring to avail himself of, there would perhaps have been more doubt, to employ the apt and forcible language used by counsel for the defendant, of their being "the baldest hearsay."

The general rule, as laid down by writers on evidence, is, that "the representations by a sick person, of the nature, symptoms, and effects of the malady under which he is laboring at the time, are received as original evidence. If made to a medical attendant, they are of greater weight as evidence; but made to any other person, they are not on that account to be rejected": 1 Greenl. Ev., sec. 102. But this rule, particularly its latter branch, is to be very carefully guarded and restricted in its application, especially where it is apparent that the declarations constitute no part of the *res gestæ*, and may have been made for the purpose of promoting some ulterior scheme, as for the purpose of being used in evidence in a contemplated or pending lawsuit brought to recover damages for the injury from which the party insists he is suffering. The rule seems by some of the cases to be restricted to "exclamations of present pain or statements of present symptoms," and

"all statements made by the sick person relating to past transactions, however closely they may be connected with the present sickness, and, even (it is held in most states) though stating the cause of the sickness or injury, should be rejected, unless the statements are otherwise admissible as part of the *res gestæ*": Cases cited in note *b* to section 102 of Greenleaf's Evidence. The authorities on this point are somewhat confused, and so inharmonious that it would be difficult, if not impossible, to connect them. In *Barber v. Merriam*, 11 Allen, 322, language is used which would seem to imply that the declarations were admissible as to past events when made to a physician for medical advice. It is said, however, "this is an *obiter dictum* in that case, and the general current of authority is contrary": *Id.*

In view of the fact that the tendency of our later legislation is to admit rather than exclude evidence, especially in cases where its competency is doubtful, we cannot go so far as to say that this testimony should have been rejected; but we hold that where doubt is cast by the circumstances attending the declarations, especially where they are made some time after the injury has been done, and where it may be probable that they have been made with a view to enhance the damages the declarant seeks to recover in any suit to be instituted or then pending, the jury should be directed to attach little if any weight at all to them as evidence. Since the party making the statements is a competent witness, there would seem less necessity for relying on such testimony, but considering the injurious effects that frequently flow from it, and speaking only for myself, I sincerely regret that the old rule, which excluded interested testimony from the jury, should have been abolished. Any good that may have been effected by the change is more than counterbalanced by the facilities which it has afforded unscrupulous suitors to commit fraud upon the rights and property of their opponents, especially if such opponents are more conscientious in regarding the obligations of their oath to speak the truth, the whole truth, and nothing but the truth. I speak only in a general way, and certainly do not intend any particular application of the remark to this more than to other cases that have arisen or may hereafter arise; all that I mean to assert is, that the tendency of such rules is generally hurtful to the highest interests of justice, and is promotive of wrong. While the better policy might be to reject rather than admit such evidence as that now under

consideration, still the law is otherwise, and our duty is plain; we must follow its mandates, whether we agree with its policy or not.

2. The charge excepted to in the fifth ground of the motion, as an abstract proposition, is accurate and correct, and when taken in connection with the other instructions given to the jury (which come up with and make a part of the record), fairly submits the rules which would acquit the defendant of liability; viz., its freedom from negligence in the transaction, the want of ordinary care upon the part of the plaintiff, by the exercise of which he could have avoided the consequences to himself, and the rule as to the measure of damages in case of contributory negligence.

3. One thing, however, is apparent to us, that these instructions were not regarded as they should have been by the jury trying this case. Upon the undisputed facts, the verdict for ten thousand dollars, in a case where the negligence of the defendant, if there was any at all, seems to have been but slight, and that of the plaintiff appears to have been greater, is not only flagrantly extravagant, but so excessive as to disclose either bias in favor of the plaintiff, or prejudice to the defendant, or (as our charity inclines us to believe) that the jury wholly mistook and misapprehended the instructions given to them by the court.

The plaintiff took passage on the cab attached to the defendant's freight train, and was safely carried from the point at which he entered this car to his place of destination. He makes no complaint that he did not have all the accommodation and comfort while on the route that his contract entitled him to, or that the cab in which he rode was not carried to its usual place of stopping in the freight-yard of the defendant at Savannah. Thus far it is conceded the contract was faithfully and fully performed; but he insists that it was the duty of the defendant to afford him the means of a safe exit from its freight-yard to the passenger-depot, and that in this respect it was negligent. The law regulating the rights of passengers traveling on such trains, and the liabilities of railroad companies for a failure to accord them these rights, is nowhere, so far as we have been able to ascertain, more definitely and clearly laid down than in *Murch v. Concord R. R. Corporation*, 29 N. H. 9, 42, 61 Am. Dec. 631, quoted in Thompson's *Carriers of Passengers*, 235, in which the court says:—

“The party who makes an arrangement to be carried on a

baggage-wagon or a freight-car impliedly agrees to accept and be satisfied with such accommodations, as it regards carriages and seats, *and places of entering and leaving the carriages*, as may be found in the usual course of the business. If the cars, at the time of his agreeing for his passage and taking his seat, are at a merchandise depot, he is to be satisfied with such means of entering the cars as are provided for rolling in the cask or box on which he is to be contented to take his seat, if nothing better offers. If the cars are at the time standing upon a part of the track where there is no provision *for landing or receiving either goods or passengers*, he is to be satisfied with such means and facilities as may casually be within his reach. The company, considered as owners of the road or as carriers, are not in either case *bound to make landings, or any provision whatever for the reception or discharge of passengers*, where none are expected to be. The duties and obligations of parties are construed reasonably with reference to the nature of their business. . . . It would be of mischievous consequence to adopt a rule which would deprive the railroad companies of the power to accommodate those whose occasions compel them to use these undesirable modes of conveyance." (The Italics are ours.)

When the cab had been stopped at its usual place in the yard, and before the defendant had been landed, it was discovered that the conductor had gone off and left the train, carrying with him his lantern, and that he had neglected to provide a light for the plaintiff to get from the cars, or from the yard, to the depot; and this is the sole negligence attributable to the defendant, and from which it is alleged the injury which is the subject of this suit resulted. To this it is replied that he alighted safely to the yard, and was provided with a train-hand in place of the conductor, who took charge of and carried his luggage, and who undertook to act as his guide, and see him safely to the depot; that he was directed to follow this guide, who was familiar with the locality; that instead of doing this, and without complaining of any obstacles to his locomotion, or asking the assistance or direction of the guide, who was a short distance ahead of him, and could have been easily consulted, he undertook to seek for himself an easier and less obstructed way than that on which he was walking; that the night was very dark; that he wandered off from the track on which he was walking some distance, and in so doing, he encountered a wall erected on the outer edge of

the yard over an arch through which the public road or street from one part of the locality to another passed; that this wall was elevated some two feet above the track, was broad and smooth on the top, and from it he fell, a distance of ten feet, to the road below. That he was greatly shocked by the fall, and deprived of the power of locomotion, is not denied; but there is no evidence that he was otherwise injured; no bones were broken, no joints were dislocated, no bruises were visible, —there was not even an abrasion of the skin. He contends, however, that his nervous system was so affected by this fall as to occasion him intense suffering; that in consequence of it one of his testicles perished away; that it grew smaller all the time, and he considered it entirely lost; that in connection with it he suffered from involuntary seminal discharges, which were a constant drain upon his vital energies, occasioning great debility, and rendering it impossible for him to pursue his accustomed vocation with his usual efficiency; that these injuries, which resulted from this fall, were permanent in their character, and were incurable. In reply to this, the defendant contends that it showed that these effects to his nervous system were not solely attributable to his fall; that he had previously contracted the venereal disease in the form of gonorrhoea; that his other testicle had been swollen and enlarged from this disease, and that it may have occasioned the derangement to his nervous system which he attributed to the fall; that it at least contributed to the damage with which he sought to make it chargeable. He asserted that at the time of this injury he was cured of this disease; but on the other hand, it was shown from his own confessions that he had made use of an instrument called Allen's "bougie," for the purpose of removing from his urethra the obstructions which it had caused; that instead of remedying this difficulty, the use of the instrument had aggravated it, and he avowed his purpose of bringing suit against its proprietors for the injury it had occasioned; that soon after he fell from the wall he abandoned this purpose, and avowed his determination to prosecute this action against the Central Railroad Company. A careful examination of this record leads to the conclusion that the foregoing is an accurate statement of the material facts deducible from the evidence had on the trial.

While, as a general rule, we will not interfere with the discretion of the lower court in granting or refusing a new trial on the ground that the damages found are either inadequate

or excessive, any more readily than upon other grounds where the testimony is conflicting upon the questions involved, yet where it is apparent that the finding is so excessive as to lead us "to suspect bias or prejudice from such excess" (Code, sec. 3067), or to "justify the inference" on our part that the verdict was the result "of gross mistake or undue bias" (Id., sec. 2947; *Savannah, Florida, and Western R'y v. Harper and Wife*, 70 Ga. 122 et seq.), we will not hesitate to interpose and control the discretion where it has been improperly exercised, as we think it was in this case, in denying the defendant another hearing.

On one point in this case there was no conflict of evidence, or at least none such as was apparent, and that was on the question of contributory negligence. The most that can be said in favor of this plaintiff is, that the negligence complained of is attributable to both parties. There was certainly much more on his part than there was on the part of the defendant, and if entitled to recover damages at all, his recovery should have been diminished, not only in proportion to the amount of default attributable to him in going from the freight-yard to the depot, but also to the extent to which his injuries may have been occasioned by the previous disease contracted by his lascivious intercourse with abandoned women, and his own unskillful treatment of that disease. Had this verdict been rendered in view of these considerations, its amount must, upon any fair computation and apportionment, have been greatly less than that returned: Code, sec. 3034, and citations. See particularly *Georgia R. R. v. Neely*, 56 Ga. 540, 543, 544, where this subject of contributory negligence, with the rule for apportioning damages in such cases, is ably treated by Bleckley, J., and from which it follows that this court should feel authorized to control the discretion of the inferior court.

To guard against misapprehension, we desire to be understood as expressing no opinion whatever upon the other questions arising in this case. We do not undertake to determine whether or not the defendant was in the exercise of all ordinary and reasonable care and diligence, or whether the plaintiff, in any measure, either expressly or impliedly, by his conduct, consented to the injury done, or whether it was caused solely by his own negligence, or whether, by the exercise of ordinary care, he could have avoided the consequences to himself, although they might have been caused by the defendant's negligence, or whether it was caused by disease

contracted by his own reprehensible indulgence and illicit intercourse with lewd women, or by his fall from the wall on the edge of defendant's freight-yard, or to what extent each of these causes contributed to his injury. These are all questions for the jury, and with proper instructions from the court should be passed on by them, without bias to one party or prejudice against the other. As the case is to be tried again, it would be improper to influence the finding, or its extent for or against either of the parties, by any such expression of opinion on our part.

Judgment reversed.

STATEMENTS BY INJURED PARTY AS TO HIS COMPLAINTS AND EFFECT OF HIS INJURIES, made to physician for medical treatment, are admissible: *Fay v. Harlan*, 35 Am. Rep. 372; or if made at time of physical examination requested by opposite party: *Quaife v. Chicago & N. W. R. R. Co.*, 33 Id. 821; or made to any person: *Columbus etc. R. R. v. Newell*, 54 Id. 312; *Atchison etc. R. R. v. Johns*, 59 Id. 609; *Matteson v. N. Y. Central R. R. Co.*, 92 Am. Dec. 67; *Werely v. Persons*, 84 Id. 346. Such statements are admissible, though made after action brought: *Brown v. N. Y. Central R. R. Co.*, 88 Id. 353; so are declarations as to cause of injury made to physician: *Ill. Central R. R. Co. v. Sutton*, 92 Id. 81; also declarations of a child half an hour after accident, from which it subsequently died, as to cause of accident, and as to employee's conduct: *Augusta Factory v. Barnes*, 53 Am. Rep. 838; or made by child to his mother immediately after injury sustained; but they are not admissible if made the next day: *City of Galveston v. Barbour*, 50 Id. 519; nor are declarations made several days after injury occurred admissible: *Roche v. Brooklyn etc. R. R. Co.*, 59 Id. 506; nor if made to a physician after injured party has been removed and physician called: *Merkle v. Township of Bennington*, 55 Id. 666; nor are statements as to circumstances of occurrence of accident made by one fatally injured half an hour after injuries occurred: *Waldele v. N. Y. Central etc. R. R. Co.*, 47 Id. 41. Declaration by plaintiff who has been ejected from railroad train, as to manner of such ejection, made to a third person immediately after act occurred, when agent of company was not present, is not admissible: *Sullivan v. Or. R'y & N. Co.*, 53 Id. 364.

EVIDENCE. — Contemporaneous expressions and exclamations, when part of *res gestæ*: Note to *Felder v. State*, 59 Am. Rep. 783; *Frink v. Coe*, 61 Am. Dec. 141, and note; note to *Quaife v. Chicago & N. W. R. R. Co.*, 33 Am. Rep. 828.

RIGHTS OF PASSENGERS ON FREIGHT TRAINS: *Arnold v. Illinois Central R. R. Co.*, 25 Am. Rep. 383; *Lucas v. Milwaukee etc. R. R. Co.*, 14 Id. 735; *Dunn v. Grand Trunk R'y Co.*, 4 Id. 267. Railroad company undertaking to carry passengers in caboose of freight train is held to same liability as a common carrier of passengers on a regular passenger train: See note to *Galena etc. R. R. Co. v. Fay*, 63 Am. Dec. 333. Same liability is required of company carrying passengers on construction train: *Ohio & M. R. R. Co. v. Muhling*, 81 Id. 336. Company is answerable for injury to passenger riding in caboose, against rules of company, where such passenger is presumed to have paid his fare, and injury was caused by negligence of company: *Creed v.*

Penn. R. R. Co., 27 Am. Rep. 693. Carrier stopping at freight depot instead of passenger depot is bound to provide a safe egress for passengers, and is liable for not so doing, if passenger is injured after alighting from the cars, on account of there not being proper platforms and lights: *Stewart v. International etc. R. R. Co.*, 37 Id. 753. Carrier is liable for injuries sustained by a passenger in leaping from a freight-car from which there was no means of descent at termination of journey: *Evansville etc. R. R. Co. v. Duncan*, 92 Am. Dec. 322. Carrier of passengers by water permitting a passenger to go ashore before he reaches the end of his journey is liable for injuries sustained by such passenger, resulting from negligence of company to provide proper lights: *Dice v. Willamette etc. Co.*, 34 Am. Rep. 575. Passenger riding on freight train, against rules of company, cannot recover for injuries sustained: *Houston etc. R. R. Co. v. Moore*, 30 Id. 98. Passenger takes on himself risk of mode of travel he adopts: *Galena etc. R. R. Co. v. Fay*, 63 Am. Dec. 323. Passenger riding on baggage-car, as to liability of company for injuries sustained thereby: See *Kentucky Cent. R. R. Co. v. Thomas's Adm'r*, 42 Am. Rep. 206; *Houston & T. C. R. R. Co. v. Clemmons*, 40 Id. 799; *Penn. R. R. Co. v. Langdon*, 37 Id. 651; *Jacobus v. St. Paul etc. R. R. Co.*, 18 Id. 360; *Ingalls v. Bills*, 43 Am. Dec. 366.

EXCESSIVE DAMAGES, VERDICT FOR MAY BE SET ASIDE: *Pullman Palace Car Co. v. Reed*, 20 Am. Rep. 232; *Nashville & G. R. R. Co. v. Starnes*, 24 Id. 296; *Ross & Co. v. Innes*, 85 Am. Dec. 381; see collection of cases in *St. Martin v. Desnoyer*, 61 Id. 494, and note; *Schlenker v. Resley*, 38 Id. 100, and note. Excessive damages in an action of slander will not warrant a new trial, unless so flagrantly outrageous and extravagant as manifestly to show that the jury acted corruptly or under the influence of passion, partiality, or prejudice: *Douglas v. Tousey*, 20 Id. 616, and note. Where amount of damages is not capable of definite computation, but depends on general estimate which is peculiarly within knowledge of jury, verdict will not be set aside as excessive: *Doyle v. Dixon*, 93 Id. 80. One thousand dollars not excessive for assault by conductor of railroad company: *Crooker v. Chicago & N. W. R. R. Co.*, 17 Am. Rep. 504.

STEWART v. SWIFT SPECIFIC COMPANY.

[76 GEORGIA, 280.]

PUBLICATION IS DEFAMATORY AND LIBELOUS which has a tendency to subject a person to contempt or ridicule. Making public a statement as being voluntarily given to a reporter by plaintiff, wherein the latter is said to have represented that her mother had been bitten by a cat, and would purr and mew, and get down on the floor to catch rats, like a cat, and would hate the sight of water, and that her mother had been cured by a certain medicine sold by the defendant, called "S. S. S.," is a defamatory and libelous publication of such person, and may support an action by plaintiff for such libel.

ACTION for libel by Louise Stewart against the Swift Specific Company and J. W. Rankin, for the alleged false and malicious publication of an article of and concerning plaintiff's mother, in the Atlanta Constitution and the Atlanta

Journal, for the purpose of advertising a medicine called "S. S. S.," which article was a means of bringing plaintiff into contempt. The substance of the publication, as alleged in the complaint, is stated in the opinion. Case dismissed on demurrer.

Hopkins and Glenn, and Reuben Arnold, for the plaintiff in error.

Reed, Reinhardt, and O'Neill, and Haygood and Martin, for the defendants.

By Court, JACKSON, C. J. This action was dismissed on demurrer. The question, therefore, is, Are the words published of and concerning the plaintiff libelous? The publication is made in the newspapers, and consists substantially of statements reported by the reporter of the newspaper as having been made to him by the plaintiff concerning her mother; the singular conduct of that mother while under the influence of a cat-bite; the wonderful cure of this disease by a certain medicine called "S. S. S.," sold by defendants, who caused and procured the publication of the reporter in the Atlanta Constitution. The singular conduct of the mother is represented as consisting of acts like a cat, of purring and mewing like a cat, of assuming the attitude of a cat in the effort to catch rats, and of similar cat-like acts on the part of the mother. Her disease is described as similar to hydrophobia. She dreaded the approach of water, suffered extreme pain, and was much swollen in body and members. The question made is, whether such a publication, altogether false, given to the reporter by the daughter voluntarily, concerning her own mother, makes a libel upon the daughter.

By our code, "a libel is a false and malicious defamation of another, expressed in print, or writing, or pictures, or signs, tending to injure the reputation of an individual, and exposing him to public hatred, contempt, or ridicule."

In Odgers on Libel and Slander, page 20, it is thus defined: "Any words will be presumed defamatory which expose the plaintiff to hatred, contempt, ridicule, or obloquy, which tend to injure him in his profession or trade, or cause him to be shunned or avoided by his neighbors."

By Lord Holt, in the case of *Cropp v. Tilney*, 3 Salk. 225, it is said: "Scandalous matter is not necessary to make a libel; it is enough if the defendant induces an ill opinion to be had

of the plaintiff, or to make him contemptible and ridiculous; as, for instance, an action was brought by the husband for riding Skimmington, and adjudged that it lay, because it made him ridiculous and exposed him." See also *Villers v. Monsley*, 2 Wils. 403, to the same effect.

And Baron Parke, in *O'Brien v. Clement*, 15 Mees. & W. 435, said: "Everything printed or written which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been."

So in his Commentaries, book 3, page 125, Blackstone says: "A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like, which set him in an odious or ridiculous light, and thereby diminishes his reputation."

And in our own reports, in *Giles v. State*, 6 Ga. 283, Chief Justice Lumpkin said: "At common law, any publication is a libel the tendency of which is to degrade and injure another person, or to bring him into contempt, hatred, or ridicule, or which accuses him of a crime punishable by law, or of an act odious and disgraceful in society; and by the penal code of this state, a libel is defined to be a malicious defamation, expressed either by printing, or writing, or signs, pictures, and the like, tending to blacken the memory of one who is dead, or the honesty, virtue, integrity, or reputation of one who is alive, and thereby expose him or her to public hatred, contempt, or ridicule."

Therefore, the authorities are numerous, it appears, to the effect that any publication which tends to expose a person to contempt or ridicule is defamatory and libelous; and the question before us resolves itself into this, Do these words, published concerning this plaintiff, as being furnished by her for a public newspaper of very wide circulation, to the reporter of that newspaper, have a tendency to bring her into public contempt or ridicule, they being voluntarily given to the reporter by her for publication concerning her mother?

That they tend to bring the mother into public ridicule and laughter and fun is very clear. It is rather difficult to read it without a sort of pity, which explodes in laughter, when the old woman is mewing like a cat, and fixing to spring upon rats and mice. To publish a thing of the sort about a woman certainly tends to make her the subject of ridicule,—a sort of butt for laughter and fun, which even her pitiable condition,

her excruciating pains, and swollen limbs and body can hardly repress. If such be the effect of such a publication about the mother upon her, what is the effect upon the daughter's character, who hastens to apologize for her mother's age and slowness of speech, and glibly tells the reporter, for publication in the Constitution, such a tirade about the antics of her own mother? A feeling of contempt for one so eager to spread before the world such ridiculous conduct of her own mother rises spontaneously to the human breast, and leads to the belief that she cannot be a very grateful and dutiful daughter, or tends to the conjecture that money must have drawn the narrative from her, either because of extreme poverty or avaricious hunger. If, then, a libel be that publication which tends to load with public contempt the person who is falsely charged with furnishing the matter voluntarily for print, and which tends to lower her reputation as a sensible, modest, and dutiful daughter, because she furnished for publication such foolish and ridiculous conduct of her mother, then this publication is defamatory and libelous of this plaintiff, and she has the right to go before a jury upon the complaint she makes of its falsehood.

Judgment reversed.

PUBLICATION WHICH TENDS TO BRING ONE INTO PUBLIC HATRED, CONTEMPT, OR RIDICULE IS LIBELOUS: *Lansing v. Carpenter*, 76 Am. Dec. 281, and note; *Miller v. Butler*, 52 Id. 768; or to bring one into shame and disgrace, or to hold such person up as an object of scorn or ridicule: *Adams v. Lawson*, 94 Id. 455; *Rice v. Simmons*, 31 Id. 766; or likening a person to certain animals, such as imputing to him their qualities, or calling a man "swine," in writing: *Sakerson v. Peterson*, 54 Am. Rep. 607. For collection of terms that have been held libelous, see case last cited.

STORY TOLD IN COMPANY BY PLAINTIFF AGAINST HIMSELF was published by the defendant to amuse his readers, defendant assuming that plaintiff would not object. This was held libelous: *Cook v. Ward*, 6 Bing. 409. Publication in jest as the result of banter between a reporter and another, subjecting the latter to ridicule, was submitted to a jury to determine whether it constituted libel: *Sullings v. Shakespeare*, 46 Mich. 408; see note to *Aldrich v. Press Printing Co.*, 86 Am. Dec. 92.

PUBLICATION, FOR SENSATIONAL PURPOSES, OF FALSE AND INJURIOUS ARTICLES, LIBELOUS: *McLean v. Scripps*, cited in note to *Aldrich v. Press Printing Co.*, 86 Am. Dec. 92.

LIBEL, CONSTRUCTION OF, IS FOR JURY: *Beasley v. Reid*, in note to *Fagan v. Connolly*, 69 Am. Dec. 460.

SWINT v. CARR.

[76 GEORGIA, 322.]

USURY LAW CANNOT AFFECT PRE-EXISTING INDEBTEDNESS.

CONSIDERATION FOR COMPROMISE. — A doubt as to the ability of one to collect a debt by reason of its being barred by the statute of limitations is not a sufficient consideration for a compromise of such debt, if accompanied with a threat that if the compromise is not effected, the son of the person to whom the debt is owing will be prosecuted for a criminal offense.

SPECIFIC PERFORMANCE OF ACT WHICH IS "ILLEGAL, HARD, AND UNCONSCIONABLE," will never be decreed.

DURESS. — Where an illiterate person has entered into a contract, and has subsequently been induced by threats and misrepresentations to surrender part of his rights under the same, a decree enforcing the contract as originally made will not be disturbed.

ACTION by Swint against Carr for the specific performance of an instrument. Plaintiff alleged that he gave a deed to defendant in 1875, as security for the payment of a debt; that thereafter defendant gave a bond by which he was to reconvey the property to plaintiff upon a satisfaction of the debt; that in 1882 the parties had agreed that \$182.50 was the amount then due, for which a note was given, due December 25, 1882; that a tender of amount due on note had been made to plaintiff, who refused to accept the same, or to reconvey property to plaintiff. Defendant's answer stated that he, being an illiterate man, supposed that \$182.50 represented the correct amount then due him; that plaintiff made him believe that the original notes were outlawed, and threatened to bring a criminal action against his son; and thereby induced him to surrender the original notes, and to take a note in their place for a much smaller amount. Defendant claimed that when he learned that he was entitled to the original amount, he demanded the old notes, offering to return the new one. The jury found that complainant was entitled to a deed upon the payment of \$424, principal, with interest from January 3, 1882. Plaintiff's motion for a new trial was denied, and he excepted.

J. T. Jordan, for the plaintiff in error.

James A. Harley and R. H. Lewis, for the defendant.

By Court, **HALL, J.** In order to dispose of this case finally and effectually, it will be necessary to consider only a single question made by the proofs and pleadings, viz., that the contract which the bill sought to have performed was the result

of an illegal, fraudulent, and unconscionable agreement, by which a larger debt due from complainant to defendant, and for the security of which the defendant held a defeasible deed from complainant to the premises in question, was reduced. There is no doubt as to the validity of the debt which complainant held against the defendant. There is no pretense that it was infected with usury, for at its creation there were no usury laws in existence in this state; and we are unable to understand how a deed given to secure the payment of this debt, after the restoration of the usury laws, can be said to have been infected with usury. It is quite immaterial, too, whether the doubt suggested by the complainant to the defendant of his inability to enforce the collection of the notes given for this debt, by reason of the bar of the statute of limitations attaching in his favor, was a part of the inducement that led to the compromise, since it was not the only, or indeed the principal, inducement, but was coupled at the same time with a threat to prosecute defendant's son in the United States court for removing and storing distilled spirits that had not been gauged by the proper officers, unless this reduction of the debt was made. It is manifest that the compromise was extorted from defendant's fears, and that, being an ignorant and illiterate man, he was otherwise overreached and duped into this arrangement by the complainant, all of which fully appears from the record, and especially from the clear and able judgment pronounced by the presiding judge in overruling the motion for a new trial. Nothing is better settled than that a court of equity will never decree the specific performance of a fraudulent, illegal, or "hard and unconscionable" bargain: 1 Story's Eq. Jur., secs. 769, 750 a, and citations in notes. The defendant was willing to submit to the performance of the original contracts, and a decree rendered in accordance with the terms thereof was proper. The amount found, which the complainant was to pay as a condition upon which the premises were to revert to him, was actually less than was due the defendant; but to this he does not, and his opponent cannot, object. There is no other material error either in the instructions or several rulings of the court.

Judgment affirmed.

SPECIFIC PERFORMANCE WILL NOT BE ENFORCED in case of fraud or of hard or unconscionable bargains: *Old Colony R. R. Corp. v. Burns*, 66 Am.

Dec. 394; *Trigg v. Read*, 42 Id. 447; *Pomeroy's Eq. Jur.*, sec. 400, and collection of cases there cited; *Freeman v. Sedwick*, 46 Am. Dec. 650. Equitable relief denied where inadequacy of consideration is coupled with other circumstances showing fraud or unfairness: *Seymour v. Delancy*, 15 Id. 270, and note 301.

GRIMSBY v. HUDNELL.

[76 GEORGIA, 378.]

STATUTE OF LIMITATIONS. — Infant, though represented by a guardian, when a cause of action accrues, may maintain an action thereon at any time within four years after reaching her majority, as provided in sections 2926 and 2727 of the code.

ACTION by Charles M. Hudnell and Leola Hudnell against Richard B. Grimsby for an accounting and general relief. The bill was subsequently dismissed as to Charles M. Hudnell. It asserted that the father of plaintiff, Jared Hudnell, died in 1865, leaving surviving heirs, a widow and ten children; that the widow's death soon followed; that her father's estate was valued at twenty-five thousand dollars; that in February, 1866, her brother, Patrick Hudnell, was appointed administrator, and in November following was made the guardian of plaintiff and other minor heirs; that by permission of the court he invested the funds of the estate in a plantation called "Speight place," in Earle County, the price of which was twelve thousand dollars, four thousand dollars being paid down; that loans of large amounts belonging to the estate had been made by him; that in 1867 he died, and was succeeded as administrator by the defendant, who came into the possession of the plantation and other property of the estate; that the defendant, from 1867 to 1873, sold the crops raised on the plantation, and finally all the personal property thereon; that payment has been demanded of him by the complainant, which he has failed to make, and that he has failed to show what disposition he has made of the funds of the estate. The mortgage on the plantation was foreclosed in 1873, and the place was sold under levy. Defendant, as administrator, made certain returns, showing amounts received and expenditures, and also set up the statute of limitations. The auditor to whom the case was referred found in favor of plaintiff, to which report defendant filed exceptions, twelve of which were stricken out on demurrer. The remaining three were submitted to the jury who sustained the auditor's report, from which defendant appealed.

John C. Wells, A. Hood and Son, and J. H. Lumpkin, for the plaintiff in error.

G. W. Warwick and W. D. Kiddoo, for the defendant.

By Court, BLANDFORD, J. 1. This case arises upon exceptions filed to an auditor's report.

The first assignment of error is, that the court held that defendant in error was not barred by the statute of limitations, because she was an infant when her right of action accrued, and her action was brought within four years after attaining her majority, although she had a guardian during her minority, and this ruling is the main error complained of.

The right of action in this case was in the infant, and although her guardian might maintain the action in the infant's name, the title or right was in her. If the legal title had been in the guardian, and the infant had the beneficial interest in the cause of action, then perhaps, as the guardian would have been barred, the infant would also have been barred. This is the rule applied in cases of executors, administrators, and trustees, the beneficial interest being in infants: *Wingfield v. Virgin*, 51 Ga. 142; 43 Id. 288, 290.

We see nothing in this case to take it out of the exceptions as laid down in sections 2926 and 2927 of the code.

2. The next assignment of error is, because the court sustained a demurrer to all of the exceptions filed by plaintiff in error to the auditor's report but the three last. In this we think the court did right, because the three last exceptions embrace fully the other exceptions stricken out and go to the entire report, and the case could have been, and was doubtless, tried fully on the three last exceptions. There is no motion for new trial in this case, and no exceptions to any rulings of the court upon the trial of the case.

Judgment affirmed.

RIGHTS OF INFANT CESTUI QUE TRUST is not prejudiced by failure of trustee to sue within time limited by statute of limitations: *Anding v. Davis*, 77 Am. Dec. 658; *Fearn v. Shirley and Wife*, 66 Id. 575.

STATUTE OF LIMITATIONS, having run against an executor, administrator, or other trustee, of an infant's personal property, the infant is also barred: *Coleman v. Walker*, 77 Am. Dec. 166, and note. *Cestui que trust* is barred when trustee is barred: Note to *Miles v. Thorne*, 99 Id. 398.

STATUTE OF LIMITATIONS AS BETWEEN TRUSTOR AND TRUSTEE: *Miles v. Thorne*, 99 Am. Dec. 384, and note; see note to *Fraure v. Kenny*, 12 Id. 372. The rights of infant the title to whose property is in trustee, guardian, or

executor, how affected by statute of limitations: See note to *Moore v. Armstrong*, 36 Id. 68.

EXECUTOR OR ADMINISTRATOR CANNOT SET UP STATUTE OF LIMITATIONS as against heirs or representatives of deceased: See note to *Miles v. Thorne*, 99 Am. Dec. 394.

MILLER v. WALLACE.

[76 GEORGIA, 479.]

FATHER HAS RIGHT TO CONTROL OF HIS MINOR CHILD, and this right can be given up or forfeited only in a manner prescribed by law, as where the father fails or is unable to provide for the support of his child, or abandons or cruelly treats it, or by his immoral character renders himself unfit for the rearing of such child: Code, secs. 1733, 1793, 1794, 1795.

CUSTODY OF CHILD, AWARDING OF, IN DISCRETION OF COURT. — Where a writ of *habeas corpus* is sued out to obtain the control of a child, it is in the discretion of the court, upon the evidence produced, to award the custody of such child to any proper party, or even to a third person: Code, sec. 4024.

DISCRETION OF COURT RESPECTING CUSTODY OF CHILD is a legal discretion which should be guarded by the principles of law, and not by the notions and fancies of the court.

FATHER IS PRIMA FACIE ENTITLED TO CONTROL OF HIS MINOR CHILD, and before this right can be taken away the sanctity of the paternal relation demands that the reasons for so doing be obvious and satisfactory, and be established beyond doubt.

FATHER MAY, BY CONTRACT, RELEASE HIS RIGHT TO CUSTODY OF HIS CHILD; but the terms of such contract, to be effective, must be shown to be clear, distinct, and definite.

PRECAUTION TAKEN BY FATHER OBTAINING POSSESSION OF HIS CHILD by stratagem, for the purpose of evading an unpleasant controversy, especially when followed by a letter of explanation to his mother-in-law, from whom he had taken his child, should not be so construed as to make it appear that he conceded that he was unlawfully exercising a power that he knew was not his.

FATHER MUST SUPPORT HIS MINOR CHILD; and where he is in a better position to do so than is the grandmother of such child, who is in destitute circumstances, the court will not take such child from him and award it to her.

EXERCISE BY COURT OF LEGAL DISCRETION may be reviewed and reversed on appeal.

PETITION for writ of *habeas corpus* by William and Caroline Wallace to procure from James T. Miller the custody of his child, four years of age, which, upon the death of its mother, had been by its father intrusted to its grandmother. Miller contributed to the support of the child, and finally took it from its grandmother, and placed it in his family with his

mother and sister. The presiding judge awarded custody of the child to petitioners, from which defendant appealed.

King and Spaulding, for the plaintiff in error.

Hillyer and Brother, for the defendant.

By Court, HALL, J. The question in this case is, whether, under the facts in evidence, the judge abused his discretion in taking the minor child, Etta Wallace Miller, from the custody of her father, James T. Miller, who was the respondent in this *habeas corpus* proceeding, and ordering her to be remanded and delivered, and to remain in custody of petitioners for the writ, William and Caroline Wallace, her maternal grandfather and grandmother. The solution of this question turns upon the point whether the father, by a voluntary contract, released his legal and parental right to the control of his child to these petitioners, or either of them, or whether he consented to her adoption by them, or either of them; for it is not pretended that he forfeited his right to her custody and control, either by a failure or inability to provide necessities for her, or by abandoning her, or by cruel treatment, or that, by reason of his bad character and immoral habits, he could not be trusted with her rearing and education without detriment to her well-being. The defendant and his wife (the father and mother of the infant) lived together in harmony until the death of the mother. There appears to have been no domestic infelicity or jars between them. There was nothing, in short, as long as they lived, that could by any possibility afford a ground of contest as to the control or custody of their infant child by either to the exclusion of the other; neither was there anything tending to show that the dead wife, in her lifetime, distrusted her husband's capacity or fitness to have control of the rearing and education of their child, or evincing a desire on her part to see him deprived of his power and authority in this respect.

1. It is indisputable that the father, under the law, has the control of his minor child, and that this can be relinquished or forfeited only in one of the modes recognized by law, including those above specified, with some others not applicable to the present *status* of this case: Code, secs. 1733, 1793, 1794, 1795.

2. It is equally clear that in all writs of *habeas corpus* sued out on account of the detention of a child, the court, on hearing all the facts, may exercise its discretion as to whom the

custody of such child shall be given, and shall have power to give such custody of a child to a third person: Code, sec. 4024.

The discretion to be exercised in such case is not an arbitrary and unlimited discretion like that confided to the Roman pretors; but, as remarked by Lord Mansfield in *Rex v. Wilkes*, 4 Burr. 25, 37, is such a "discretion as, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular." In *Rooke's Case*, 5 Coke, 99 b, it is said: "And notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceeding ought to be limited, and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colorable glosses and pretenses, and not to do according to their wills and private affections; for, as one saith, *talis discretio discretionem confundit*." As is stated by Lord Coke, 4 Inst. 41: "*Discretio est discernere per legem quid sit justum*"; and by Sir Joseph Jekyll, M. R., in *Cowper v. Earl Cowper*, 2 P. Wms. 753: "Though proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked, *Vir bonus est quis?* the answer is, *Qui consulta patrum qui leges juraque servat*; and as it is said in *Rooke's Case*, 5 Coke, 99 b, that discretion is a science not to act arbitrarily according to men's wills and private affections, so the discretion here is to be governed by rules of law and equity, which are not to oppose but each in its turn to be subservient to the other. This discretion in some cases follows the law implicitly, in others assists it, and advances the remedy; in others again it relieves against the abuse, or allays the vigor of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with."

Dr. Broom in his *Legal Maxims*, 84 et seq., in treating of the kind of discretion intrusted to courts and judges, pointedly and aptly remarks: "It is held the duty of the judge, in a land jealous of its liberties, to give effect to the expressed sense or words of the law, in the order in which they are found in the act, and according to their fair and ordinary

import and understanding; for it must be remembered that the judges are appointed to administer, not to make, the law, and that the jurisdiction with which they are intrusted has been defined and marked out by the common law or acts of Parliament. It is, moreover, a principle consonant to the spirit of our constitution, and which may be traced as pervading the whole body of our jurisprudence, that *optima est lex quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi*: that system of law is best which confides as little as possible to the discretion of the judge; that judge the best who relies as little as possible on his own opinion." And he emphasizes and enforces this view by adopting and declaring, in the language of Maule, J., that "there is no court in England which is intrusted with the power of administering justice without restraint. That restraint has been imposed from the earliest times. And although instances are constantly occurring where the court might profitably be employed in doing simple justice between the parties, unrestrained by precedent or any technical rule, the law has wisely considered it inconvenient to confer such power upon those whose duty it is to preside in courts of justice. The proceedings of all courts must take a defined course, and be administered according to a certain uniform system of law, which in the general result is more satisfactory than if a more arbitrary jurisdiction was given to them. Such restrictions have prevailed in all civilized countries, and it is probably more advantageous that it should be so, though at the expense of some occasional injustice": *Freeman v. Tranah*, 12 Com. B. 413, 414; 74 Eng. Com. L. 406. The citations in the foot-notes of Broom, at the pages quoted, furnish many other instances of the practical and indispensable application of these principles.

The rule of discretion as applicable to *habeas corpus* cases did not originate with the compilers of our code; they took it from the common law, and in adopting it, they adopted also the meaning and limitations placed upon it by the venerable sages and authorized expounders of that noble system. Under the "discretion" vested in him, no judge has authority to disregard or even to impair any acknowledged or established right of a party by its exercise, and if he does so, it would seem to follow as a necessary consequence that he abuses that discretion. As was well remarked by the court in *In the Matter of Mitchell*, R. M. Charl. 493, "the power ought to be exercised in favor of the party having the legal right, unless the

circumstances of the case, and the precedents established, would justify it, acting for the welfare of the child, in refusing its aid." Again (Id. 495) it is said that "the court will draw no inference to the disadvantage of the father, but will act from positive proof." The authority of this case has been expressly recognized by this court in *Boyd v. Glass*, 34 Ga. 258; 89 Am. Dec. 252. It is a well-considered and ably argued case, is in point with the present case, and decides every question made by it, is sustained by copious references to such authorities, both English and American, as existed at the time it was made, 1836, and by subsequent text-writers and adjudicators.

Prima facie, the right of custody of an infant is in the father, and when this right is resisted, upon the ground of his unfitness for the trust, or other cause, a proper regard to the sanctity of the parental relation will require that the objection be sustained by clear and satisfactory proofs. "A clear and strong case" must be made to sustain an objection to the father's right: *Commonwealth v. Briggs*, 16 Pick. 205. This was determined in a contest on *habeas corpus* between the mother and father who had separated. The discretion to be exercised by the courts in such contests is not arbitrary. The rights of the father on the one hand, and the permanent interest and welfare of the infant on the other, are both to be regarded, but the right of the father is paramount, and should not be disregarded, except for grave cause. The breaking of the tie that binds them to each other can never be justified without the most solid and substantial reasons established by plain proof. In any form of proceeding, the sundering of such ties should always be approached by courts "with great caution and with a deep sense of responsibility": *State v. Richardson*, 40 N. H. 274, 275. *Taylor v. Jeter*, 33 Ga. 195, 203, 81 Am. Dec. 202, is fully in point. Jenkins, J., speaking for the court, there declares that the ground of objection to the right of the father should have "been distinctly alleged," and that "there should have been direct satisfactory proof adduced to sustain it." Where it is insisted that the father has relinquished his right to the custody of his child to a third person by contract, which he might undoubtedly have done, yet the terms of the contract, to have the effect of depriving him of its control, should have been "clear, definite, and certain": *Drumb v. Ken*, 47 Iowa, 435, 437.

Tested by these rules, this case seems to fall far short of

their requirements. The most favorable light to the petitioners in which these facts can be regarded leaves it more than doubtful whether the defendant ever consented to relinquish the control of his child, or whether he was only making an arrangement, in the exigency in which his wife's death placed him, for its temporary care and nurture. In the alleged contract, no length of time is expressed during which he is to relinquish his right; nothing is said about abandoning his control; in these particulars, there are no express stipulations, and it would be improper to deduce them from conduct on his part, which, at most, could only be regarded as respectful and deferential to his mother-in-law. It is certain that he availed himself of the opportunities which his business afforded to be with his child, and to caress and care for it; he supplied its wants, furnishing its food and raiment, procuring for it medical attendance, and meeting and defraying the expenses incurred on that account, and for a considerable portion of the time he maintained and supported its maternal grandmother, while her husband was off in a distant state pursuing ambitious plans, in looking after the political promotion of his friend, rather than giving his time and attention to his family. He never at any time assented to claims set up by its grandmother, by act or word, to its exclusive custody and control, but always, when such issues were raised, denied her authority by courteous and deferential conduct and language; indeed, he avoided, as far as he could, such disagreeable topics; but it is obvious that he never meant by his forbearance to surrender his rights and privileges as a parent. This is shown by the letter addressed to her after he had obtained the custody of the child. We take it that the device to which he resorted to carry it to his own home was suggested rather to avoid a painful scene and angry controversy than for any other purpose; and that it would be going quite too far to infer from what then occurred that he had recourse to this contrivance to escape even an implied acknowledgment of her authority over this child, to the exclusion of his own. The case of *Drumb v. Keen*, *supra*, is much like this in its circumstances. There the party, at the request of a dying mother, and with the consent of the father, took her infant to "raise"; and in commenting on this word, the supreme court of Iowa say that if the lower court intended by it that it was the understanding of both parties that defendants were to have the custody of the child until it attained its

majority, "then we think the finding is so clearly against the evidence that it must be set aside, because there was no evidence to support it." The husband, in view of the impending death of his wife, in accordance with her expressed wish, delivered the child to the respondents in the writ of *habeas corpus*. This offer was accepted, and the child was sent, at their expense, from Missouri to their residence in Iowa. On the effect of this arrangement, the court says: "Conceding this offer and acceptance to have the force and effect of a contract, we are clearly of the opinion that it does not import that the plaintiff thereby deprived himself of the right to the care and custody of the child for any length of time. It may be admitted such a contract may be made, but certainly it should be clear, definite, and certain." To the same effect is the case of *Wishard v. Medaris*, 34 Ind. 168. In neither of these cases did the parent bear any of the expense of the nurture of the child or of the maintenance of the person having its care and custody; and for this reason this case is stronger in favor of the right of the father than was either of them.

It is insisted, however, by the able and learned counsel for the plaintiffs in *habeas corpus*, that this court has adopted a different rule, as appears from its later, if not its earlier, decisions, and he cites and confidently relies on *Janes v. Cleghorn*, 54 Ga. 9, 14 (same case in a different form of proceeding, and with parties reversed, 68 Id. 87), *Bently v. Terry*, 59 Id. 555, 27 Am. Rep. 399, and *Smith v. Bragg*, 68 Id. 650, as sustaining this position. But the marked differences between those cases and this will not justify the conclusion he seeks to draw from them. A careful comparison will show that they are not in conflict either with the earlier decisions of this court, or those relied on by opposing counsel from other courts, or with the principles announced by the text-writers. The first of these cases was a contest for the custody of an infant, between the next of kin of the father, who was then dead, and the next of kin of the mother, who had been placed in charge of it in accordance with her wishes expressed on her death-bed, and which had been carried out by the father who survived her. The superior court, upon proof that the father had changed his mind and expressed a wish that his sister, one of the contending parties, should have the care of his child, awarded it to her. There was no proof, however, that the father ever took steps to consummate and effectuate this change of purpose, and

there was proof that the husband of the father's sister had obtained the custody of the child by carrying it to his home for a visit, with an express promise to return it at the end of a week, which promise he violated. This court reversed that decision, and remanded the child to the custody in which it had been placed by its parents in their lifetime, holding in reference to the particular facts in the case, where the parental authority over an infant child is released to another, such release is not revocable without some sufficient legal reason therefor, and that the evidence in the case did not disclose that the father ever did revoke his consent to the arrangement made for the custody of his infant. So that the discretion of the lower court seems to have been controlled by this court because it had disregarded the plain rights of these custodians. The case was again brought here upon a contest between these parties for the guardianship of this child, which was instituted in the court of ordinary, when it was held that the parties in whose custody the child was left by its parents were entitled to the guardianship in preference to the father's next of kin, thereby reaffirming what was decided when the case was first here.

In *Bently v. Terry, supra*, the contention was between the father and mother of the child and an aunt and her husband, to whom its custody was committed, as they and their witnesses testified, by a contract, but as was denied by the father and mother. According to one set of witnesses, the contract was definite, complete, and certain, and the contrary was shown by the opposite parties. On this vital point there was a direct conflict of evidence. The court below refused to change the custody, and this court affirmed the judgment, holding that it was not an abuse of the discretion with which the judge was invested, and further ruling that such a contract, sustained as was this by a sufficient consideration in the entire cost of support, maintaining, and care of the infant, which was incurred and borne by the uncle and aunt, was not revocable, except for sufficient legal reason. In the head-notes of this decision, the court did say: "Large discretion is vested in the judge of the superior court in *habeas corpus* cases, and this court will not interfere with his judgment on law and facts, except it be manifestly abused"; and in the judgment pronounced, "wide" is used instead of "large," but we apprehend that, by the use of these qualifying adjectives, it was never the intention of the court to change, or in the slightest

degree to modify, the nature or character of the discretion that we have seen must be observed in such cases, or to intimate that it was competent by the exercise thereof to impair or overturn the rights of parties as established by law. Indeed, when taken in connection with the context and the facts set out, those superadded words would seem to indicate no such purpose on the part of the court or of the judge delivering the opinion, and what is true of this case is true of the others therein cited: *Lindsey v. Lindsey*, 14 Ga. 657, and *Boyd v. Glass*, *supra*. "Flagrant abuse of discretion," as used in each, means nothing more or less than a failure to follow plain rules of law, or to recognize rights clearly established by such law. The case at bar, and *Bentley v. Terry*, *supra*, seem to us as variant in their leading circumstances as two cases can be.

Taking the version of the plaintiffs in *habeas corpus* as true, and without any reference whatever to the respondent's account, it does not clearly appear that the respondent ever relinquished the custody of his child, or that he ever contracted to do so; it is wholly uncertain upon these vital points, and therefore there are no disputed facts upon which any conflict can arise, and which necessitate a resort to discretion in determining the dispute. While this is so, it is true beyond controversy that the respondent did supply food and raiment for his child, that he furnished medicine and medical attendance for it when necessary, and that he was looked to for and required by the grandmother, in whose care it was left, to do these things, and if the provision was not always as bountiful as she thought it should be, she sharply reproved him for his alleged shortcomings in what she esteemed his duty in this regard.

3. It is quite apparent that he stood somewhat in dread of her reprimand for failing to observe what she deemed her proper rule and right supremacy; and hence, to avoid a scene and painful controversy, he resorted to a stratagem to get possession of his child, and place it under his own roof and in the midst of his family. This precaution to ward off an angry altercation, so far from being discreditable to him, and consequently detrimental to his rights, should place his conduct in a more favorable light than that in which it seems to have been viewed by these parties, and in which it would appear to have been regarded by the court. At all events, as explained by the letter addressed to his mother-in-law, it could not be construed into an acknowledgment that he was

asserting by indirection an authority that he was conscious he did not possess.

4. The defendant's means of taking care of his child are more certain and ample than the means of those who would deprive him of her control. The grandmother is wholly destitute of means, and neither her husband nor son are under any obligation, which could be enforced at law, to appropriate their earnings to its rearing and nurture; the father can, if he fails voluntarily, be forced by law to do this. The child is in the care of his mother and sisters, who are a part of his family, and who are shown to be in every respect proper persons to direct her education and to be intrusted with her management. The plaintiffs seem not to regard them as socially their equals, and look upon them rather as their inferiors in point of culture and refinement, but this estimate of their character and fitness for this delicate trust is not borne out by others who have testified in the cause. The plaintiffs are evidently prejudiced against the defendant and his family, and if his child is committed to their exclusive care and management, there is danger, at least, that they may instill it with their prejudices, and create aversion and distrust instead of the love and confidence she should habitually cherish for him, and which, according to the laws of both God and man, is his due.

5. She is now in a position where his intercourse with her can be more frequent and unrestrained than it has formerly been, and where he can support with less inconvenience and expense and more constantly overlook and direct her, and for her own welfare and interest we think it is best for her to remain. She is in the custody that the law recognizes, and should, in our opinion, be suffered to continue, at least until some sufficient reason can be shown for removing her. We conclude that the discretion vested in the court was, to say the least, not exercised in a cautious, circumspect, and therefore in a legal manner, and so thinking, we order the judgment reversed.

RIGHTS OF FATHER TO CUSTODY OF CHILDREN ARE PARAMOUNT TO THOSE OF MOTHER: *Magee v. Holland*, 72 Am. Dec. 341, and note. Father ordinarily entitled to custody of his minor children: *State v. Libbey*, 82 Id. 223. Father has no power to confer on a stranger the right to the custody of a child which will be operative against its mother after his decease: *Moore v. Christian*, 31 Am. Rep. 375. Recent decisions relax the rule that the father has the paramount right of the custody of his infant child: See cases cited in note to *Chapeky v. Wood*, 40 Id. 327.

FATHER CANNOT ALIEN HIS RIGHT TO CUSTODY AND CONTROL OF HIS CHILD: *State v. Baldwin*, 45 Am. Dec. 399; *contra: Bently v. Terry*, 27 Am. Rep. 399.

APPLICATION OF FATHER FOR CUSTODY OF CHILD DENIED: *Heinemann's Appeal*, 42 Am. Rep. 532; *In the Matter of Bort*, 37 Id. 255; *Chapeky v. Wood*, 40 Id. 321.

APPLICATION OF MOTHER DENIED, WHERE CHILD WAS GIVEN BY ITS MOTHER TO HER PARENTS "to raise" until the death of the grandmother: *Bonnett v. Bonnett*, 47 Am. Rep. 810. Welfare of child is the paramount consideration: *Mercein v. People ex rel. Barry*, 35 Am. Dec. 653, and extended note 668; *James v. Daurall*, 53 Am. Rep. 545; *Sturtevant v. State*, 48 Id. 349. Child given by its father to its mother's parents, to be cared for "until at least she passed her first decade in life," was at the age of seven awarded to the father: *In Matter of Scarritt*, 43 Id. 768.

AS TO WHOM CUSTODY OF CHILDREN WILL BE AWARDED UPON SEPARATION OF PARENTS: See *McKim v. McKim*, 34 Am. Rep. 698, and extended note. Person having custody of his grandchildren may maintain an action against one who wrongfully takes such children from him: *Clark v. Bayer*, 30 Id. 593. Custody of children, awarded to the mother on divorce, on account of the father's unfitness, may, on death of the mother, be transferred to father, upon a showing that he is a proper person: *Bryan v. Lyon*, 54 Id. 309. A father is under obligation to support his children, whether divorced from their mother or not, and is entitled to their services and earnings: *Gilley v. Gilley*, 1 Am. St. Rep. 307.

FALVEY v. GEORGIA RAILROAD.

[76 GEORGIA, 597.]

RAILROAD COMPANIES ARE COMMON CARRIERS, AND RESPONSIBLE AS SUCH. RAILROAD COMPANY, RECEIVING GOODS CONIGNED TO PLACE BEYOND TERMINUS OF ITS OWN LINES, undertakes to convey same safely to point of destination, and will be liable for loss of such goods on connecting lines.

CONNECTING RAILROADS SHOULD ARRANGE AMONG THEMSELVES LOSSES occurring on their respective lines, and each should consider the other his agent for the purpose of forwarding goods shipped. Section 2084 of the code, in regard to liability of connecting railroads for goods lost, does not change the liability of such railroads as common carriers which existed at the time such section was adopted, but declares the liability to be the same as it had been where there was no contract by first carrier to convey goods to place of destination. Its effect is to give consignee a cumulative remedy.

RAILROADS—CONNECTING LINES.—In determining whether contract was made by first carrier to convey goods to place of destination, the jury may take into consideration the bill of lading, the payment of freight, and the apportionment of the same among the different lines, if any, and the routes over which goods are to be transported. Dissenting opinion in *Bangle v. McDaniel*, 42 Ga. 642, adopted.

Broyles and Johnston, for the plaintiff in error.

Hooper Alexander, for the defendant in error.

By Court, **BLANDFORD, J.** Falvey sued the railroad company for damage done to a certain lot of goods shipped by him from Atlanta, Georgia, to certain parties in Wilmington, North Carolina, upon a contract with defendant, and showed by the bill of affreightment that the goods were received by defendant in good order, and were consigned to certain persons in Wilmington, North Carolina. He showed also that the goods were received as through-freight; that the whole freight was made up and charged by the Georgia Railroad; and that it designated the connecting lines of railroad over which the goods were to be transported, and the proportion which each road was to receive of the whole amount charged by the Georgia Railroad; and that there were other routes connecting with defendant's road, over which the goods could have been carried. The goods were to be delivered at Wilmington to the consignees by the plaintiff.

These goods became damaged, and the consignees refused to receive them, whereby the plaintiff was damaged.

These are the main facts relied on by the plaintiff for a recovery in this case. The same being referred to the presiding judge in the court below, without the intervention of a jury, for his determination, he adjudged in favor of the defendant. To this ruling, decision, and judgment the plaintiff excepted, and error thereon is assigned to this court.

1, 2. The statute of this state declares that railroad companies are common carriers, and liable as such: Acts of 1855, p. 155; Code, sec. 2083.

What is the rule of such liability, can be determined by an examination of the decisions of this court. In *Cohen and Merko v. Southern Express Co.*, 45 Ga. 148, *Mosher & Co. v. Southern Express Co.*, 38 Id. 37, *Southern Express Co. v. Shea*, 38 Id. 519, *Southern Express Co. v. Purcell*, 37 Id. 103, and *Southern Express Co. v. Newby*, 36 Id. 635, it will be seen that this court adopted the English rule laid down in *Muschamp v. Lancaster R. R. Co.*, 8 Mees. & W. 421, which is: "When a common carrier receives goods to be transported beyond the terminus of his own line, he undertakes to transport them to the point of destination, either by himself or competent agents, and if the goods are lost beyond the terminus of his own line, he will be liable therefor."

We think the rule of liability thus stated is reasonable; that any other rule would lead to great inconvenience and detriment to the public; and, as was said by Lord Abinger, chief

baron in the case cited from Meeson and Walsby, "it is better that those who undertake the carriage of parcels for their mutual benefit should arrange matters of this kind *inter se*, and should be taken each to have made the others their agents to carry forward."

This is the rule of liability as to common carriers, whether such carriers be railroad companies or others, unless modified or changed by the statutes of this state.

3. It is insisted by the counsel for the defendant in error that section 2084 of the code, which provides that, "when there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to the connecting road; the last company which received the goods 'as in good order' shall be responsible to the consignee for any damage; . . . such companies shall settle among themselves the question of ultimate liability," — changes the rule of liability of railroad companies as common carriers as the same existed in this state at the time of the adoption of this section of the code. We do not think so; but the statute merely declares the rule of liability to be the same as that theretofore existing where there was no contract, express or implied, general or special, by the first carrier to carry and transport the goods to their final destination; and the only change which this statute makes is to give the consignee a remedy against the last road receiving the goods "as in good order," which he might not have had before the adoption of this section of the code. This is a cumulative remedy existing and established in addition to those remedies which he had already.

4. When goods are received by a carrier to be transported beyond the terminus of its line, and delivered at a particular place and to particular persons at such place of destination, without more, a contract is implied that the carrier will cause such goods thus delivered to it to be carried to the place of destination safely, without damage or hurt, and it will be liable to the consignor for failure to perform its contract, for any damages which may arise therefrom to the party injured. In order to ascertain if any contract was made by the first carrier with the shipper to transport beyond its line to the place of destination, the bill of affreightment may be looked to; *aliunde* evidence may also be introduced, such as the payment of all the freight charges to the first carrier, the way-bill, and desig-

nation of the lines of road over which the goods are to go, and the apportionment by the first carrier of the amount which each line is to be paid for such carriage; and from these facts the jury may determine whether any contract was made, express or implied, whereby the first carrier engaged to carry the goods to the point of destination. And such was the decision of this court made by a full bench composed of Lumpkin, C. J., Lyon and Jenkins, JJ., in the case of *Rome R. R. Co. v. Sullivan, Cabot, & Co.*, 32 Ga. 403, the opinion being delivered by Jenkins, J., and concurred in by the other judges. This decision is on the points made by the record, and has never been reversed or set aside by any decision made by a full bench.

In the case of *Baugh v. McDaniel and Strong*, 42 Ga. 642, the majority of the court, McKay, J., and Lochrane, C. J., held "that a contract will not be implied, but must appear to have been distinctly made." Warner, J., dissented, and held that such contract might be implied; and from the facts of that case, such contract did exist, on the part of the carrier, to carry the goods to their destination beyond the terminus of the road. But the majority held that if a special contract had been made by the first carrier to deliver the goods beyond the terminus of its road, it would have been bound. In the case now before us, this court, as now composed, hold and decide, if a railroad company contracts, generally or specially, expressly or impliedly, to transport goods beyond the terminus of its own road, it is bound thereby, and would be liable to the party injured for such damages as he might sustain by reason of its failure to perform such contract.

We think the court below was probably misled by the decision referred to of the majority of the court, and that he ruled this case upon the authority of the case referred to. But it must follow from what has been said that the judgment of the court below must be reversed. The case is remanded for another trial.

Judgment reversed.

CARRIER MAY CONTRACT TO DELIVER PERSONS OR PROPERTY BEYOND TERMINUS OF ITS OWN LINES: *Perkins v. Portland etc. R. R. Co.*, 74 Am. Dec. 507, and note; see note to *Wells v. Thomas*, 72 Id. 230; *Wheeler v. San Francisco and Alameda R. R. Co.*, 89 Id. 147; *Williams v. Vanderbilt*, 84 Id. 333; *Najac v. Boston & L. R. R. Co.*, 83 Id. 686.

CARRIER CONTRACTING TO DELIVER GOODS AT PLACE OF DESTINATION, beyond terminus of its own line, will be liable for loss occasioned by con-

necting line: *Peet v. Chicago & N. W. R. R. Co.*, 91 Am. Dec. 446; *Erie R'y Co. v. Wilcox*, 25 Am. Rep. 451; *Mulligan v. Illinois Cent. R'y Co.*, 14 Id. 514; *Mobile and Girard R. R. Co. v. Copeland*, 35 Id. 13; *East Tennessee etc. R. R. Co. v. Rogers*, 19 Id. 589. Associated companies are liable for loss occurring beyond terminus of their respective lines: *Nashua Lock Co. v. Worcester & N. R. R. Co.*, 2 Id. 242; *contra*, *Hot Springs R. R. v. Trippe*, 48 Id. 65. Carrier receiving goods consigned to place beyond terminus of its own lines is liable for the destruction of goods by fire at such terminus: *Irish v. Milwaukee and St. Paul R'y Co.*, 18 Id. 340; *Condon v. Marquette etc. R. R. Co.*, 54 Id. 367; or for non-delivery of such goods to connecting line: *Lawrence v. Winona etc. R. R. Co.*, 2 Id. 130, and note; but carrier is bound only to seasonably deliver to connecting carrier: *Crawford v. Southern R. R. Ass'n*, 24 Id. 628.

RECEIVING GOODS MARKED TO PLACE BEYOND TERMINUS, EFFECT OF: *Pennsylvania R. R. Co. v. Schwarzenberger*, 84 Am. Dec. 490, and note; see extended note to *Wells v. Thomas*, 72 Id. 232.

FOR CASES IN WHICH CARRIER IS NOT LIABLE FOR LOSS OF GOODS occurring beyond its own route, see *Hodd v. United States and Canada Express Co.*, 36 Am. Rep. 757, and note; *Knight v. Providence & W. R. R. Co.*, 43 Id. 46; *Pittsburgh etc. R. R. Co. v. Morton*, 28 Id. 682; *McMillan v. Michigan etc. R. R.*, 93 Am. Dec. 208; *Baltimore etc. R. R. v. Schumacher*, 96 Id. 511. Carrier is liable only as a forwarder after arrival of goods at terminus of its line: *Burroughs v. Norwich & W. R. R. Co.*, 1 Am. Rep. 78.

POWER OF CARRIER TO LIMIT ITS RESPONSIBILITY TO ITS OWN ROUTE: *Merchants' Despatch & T. Co. v. Moore*, 30 Am. Rep. 541; *Phifer v. Carolina Cent. R. R. Co.*, 45 Id. 687; *Taylor v. Little Rock etc. R. R. Co.*, 29 Id. 1; *Cincinnati etc. R. R. Co. v. Pontius*, 2 Id. 391; see extended note to *Wells v. Thomas*, 72 Am. Dec. 231.

LIABILITY OF CARRIER FOR LOSS OF BAGGAGE ON CONNECTING LINE: *Louisville & N. R. R. Co. v. Weaver*, 42 Am. Rep. 654, and note 664; *Baltimore & O. R. R. Co. v. Campbell*, 38 Id. 617; *Hawley v. Screven*, 35 Id. 126; *Candee v. Pennsylvania R. R. Co.*, 94 Am. Dec. 566.

THROUGH-CONTRACTS, WHAT ARE: See note to *Wells v. Thomas*, 72 Am. Dec. 240.

LAW OF PLACE WHERE LOSS OCCURS GOVERNS RIGHT OF PARTIES: *Gray v. Jackson*, 12 Am. Rep. 1, and note 40.

STROHECKER v. IRVINE.

[76 GEORGIA, 639.]

HOMESTEAD.—Attorney has lien of homestead for services rendered in protecting it against creditors. Such services are in the nature of labor done, or purchase-money paid on such homestead.

H. F. STROHECKER had execution issued against E. D. Irvine, and levied on certain personal property belonging to the latter, for the purpose of satisfying his attorney's lien which had been foreclosed, said lien being for services performed in defending a homestead from creditors. The rights

of the wife and child of defendant to the property were asserted. Judgment for defendant; plaintiff appealed.

Gustin and Hall, for the plaintiff in error.

No appearance for defendant in error.

By Court, BLANDFORD, J. The question here is, whether the lien of an attorney for services done and performed in defending a homestead against creditors, and in preserving the same for the benefit of the beneficiaries therein, is good and binding on the property so set apart. We answer that it is. It is in the nature of labor done and purchase-money thereon. Public policy demands this answer. Without some security of this sort, those who are entitled to homestead exemptions might entirely fail of their rights without the benefit of the services of a lawyer; these services in procuring the land are as sacred and important as the services of the carpenter in building the house thereon, and stand upon the like footing of justice and equity.

Judgment reversed.

THERE APPEARS TO BE SOME INCONSISTENCY IN THE PRINCIPAL CASE, from the fact that a lien is adjudged by the court to exist in favor of an attorney for services performed in defending a homestead, when the levy in controversy was upon certain personal property. The constitution of that state, adopted in 1877, exempts from execution realty or personalty, or both, to the value in the aggregate of sixteen hundred dollars. Doubtless, in the principal case, the services of the attorney were in having set aside both real and personal property, which in the aggregate did not exceed the limit fixed by the constitution; and the property so set apart, personal as well as real, was spoken of as a homestead, or a homestead exemption.

ALLEN v. ELDER AND SON.

[76 GEORGIA, 674.]

BILL TO REFORM MORTGAGE BY ADDING SCROLL OR SEAL OF MORTGAGORS, and to foreclose it as reformed, may be sustained, though the statute of limitations has run against the mortgage, if it be regarded as a simple contract, and not as a specialty.

EVASIVE AND DISINGENUOUS ANSWER TO BILL IN EQUITY, taken in connection with facts admitted, may entitle complainant to the relief prayed for.

MISTAKE, RELIEVABLE IN EQUITY, is defined by the code of Georgia to be some unintentional act, omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence. It may be either of law or of fact.

EVIDENCE TO JUSTIFY RELIEF ON GROUND OF MISTAKE must be clear, unequivocal, and decisive as to the mistake.

MISTAKE OF LAW IS NO GROUND FOR RELIEF, under the code of Georgia, if it consists of mere ignorance of law on the part of complainant. It is otherwise, if there is an honest mistake of law on the part of both parties respecting the effect of an instrument, whereby the one suffers a gross injustice, and the other gains an unconscientious advantage.

EQUITY HAVING TAKEN JURISDICTION FOR ONE PURPOSE will retain it for others necessary to the final settlement of all matters involved in the litigation between the parties, growing out of and connected with the subject-matter of the suit.

ACTION for the reformation of a mortgage defectively executed, and for its foreclosure when so reformed.

M. V. McKibben and W. W. Anderson, for the plaintiff in error.

A. D. Hammond, for the defendants in error.

By Court, **HALL, J.** The complainant exhibited her bill on the equity side of the court, praying the reformation of a mortgage, which she alleged was defectively executed, in that it had no scroll attached to the signature of the mortgagors, although it was stated on its face that it was "sealed," as well as "signed and delivered"; that it was her intention, as well as that of the mortgagors, to make the instrument a good, valid, and legal mortgage, and that they failed in so doing in consequence of a mutual mistake of the law upon the subject. She further prayed that when so reformed and made to speak the intention of the parties, the paper might be foreclosed as a mortgage. Discovery was prayed as to these matters from the defendants, and for the purpose of making it full, specific interrogatories, which they were required to answer, were propounded. They filed an answer, but it was not full, and the response to the statements in the bill, and to the interrogatories, was evasive and insufficient. They also filed a demurrer setting up the statute of limitations to the paper, which the bill sought to have corrected, in which they insisted that in its present form it was a simple contract, and not a specialty, and that the suit on it was not brought within six years from the time it was due. They denied that its insufficiency was the result of a mutual mistake of the law, but answered that it was the result of mutual ignorance of the law. There was no denial, however, of the intention charged in the bill to make this a good, valid, and sufficient deed of mortgage. This disingenuous and insufficient answer, with what appeared on the

face of the instrument, admitted enough, under the rules of equity, to have entitled the complainant to the decree she prayed; and these issues, on this evidence, should have been submitted to the jury. When the complainant had closed her case, the court sustained the demurrer, holding that the instrument was not a deed under seal, but a simple contract, and the suit thereon was barred by the statute of limitations.

Whether, abstractly considered, this was a correct decision under the law, it is needless to inquire; it is enough that no such question was made by the pleadings and the proof. The bill admitted that this was not a contract under seal, but prayed that inasmuch as it was the intention of the parties so to make it, and that such intention failed to be carried into effect on account of their mutual mistake as to the law, it might be made to speak their real intention, and decreed to be an instrument under seal, and be foreclosed as a mortgage.

The bill made no such point as that decided by the court; it did not seek the enforcement of the contract in its present form; it conceded that this could not be done under the law, but it insisted that it should be put into the form originally intended, and that then it should be enforced in accordance with its real purport and effect.

1. Our code, section 3117, defines a mistake relievable in equity as some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence. It adds that the power is exercised with caution, and to justify it, the evidence must be clear, unequivocal, and decisive as to the mistake. The relief will be granted, as between the original parties, and their privies in law, in fact or estate, except *bona fide* purchasers for value without notice: *Id.*, sec. 3119. It is further declared that mistakes may be either of law or fact: *Id.*, sec. 3120.

2. And while it is true that for mere ignorance of law on the part of the party herself, where the facts were all known, and there was no misplaced confidence, and no artifice or deception or fraudulent practice used by the other party to induce the mistake of law, or to prevent its correction, equity will not intervene and grant the relief prayed: Code, sec. 3121. Yet if there be an honest mistake of the law as to the effect of an instrument on the part of both contracting parties, especially where it operates as a gross injustice to one, and gives an unconscientious advantage to the other, such mistake may be relieved in equity: *Id.*, sec. 3122.

A careful examination of this record might, we think, authorize a jury to conclude that the defendants, in acting as they have been shown to have done, were guilty of fraudulent practices in order to prevent the correction of the mistake of law, which they admit resulted, not only from their own ignorance of law, but likewise that of the complainant; or else that they were both honestly mistaken as to the legal effect of the instrument, and being so mistaken, gross injustice would be done the complainant, and they would be enabled to retain an unconscientious advantage, unless the relief prayed was decreed. The discharge in bankruptcy set up by one of the defendants was matter of defense, and was not reached in the progress of the trial, and we have no means of determining whether it would have been available. Justice seems to require that there should be a fuller investigation of the case, especially in view of the fact that the defendants, and particularly William A. Elder, who claims that the title to the property mortgaged was solely in him, seems, from a statement in their answer, to be doubtful as to the propriety of their conduct to the complainant; for they express regret that she "has seen fit to resort to law to accomplish what might have been done by a voluntary submission of her rights in the premises to their kindness and liberality, which they claim they have ever shown and are willing now to show her." From the consequences of such signal favor and boundless liberality, a conscientious, upright, intelligent, and just jury may have felt it their duty to relieve her. That the intention of the parties is to govern in ascertaining the character of the contract, see *Williams v. Greer*, 12 Ga. 459. Besides, it was the right of the complainant under the law to resort to equity for the foreclosure of her mortgage; and having taken jurisdiction for this purpose, the court will retain it for others necessary to the final settlement of all matters involved in the litigation between the parties growing out of and connected with the subject-matter of the suit: *Clay v. Banks*, 71 Ga. 363, 374.

Judgment reversed.

JACKSON, C. J., stated that he concurred *dubitante*.

MISTAKE OF LAW, EFFECTS OF, UNDER VARIOUS CIRCUMSTANCES: See extended note to *Black v. Ward*, 15 Am. Rep. 171. Mistake as to legal liability of a surety will not avoid a new note given by him in place of an old one which could not be enforced: *Churchill v. Bradley*, 56 Id. 563. Pure

mistake of law, unattended by other circumstances, will not generally be relieved against in equity: *Emerson v. Nacarro*, 98 Am. Dec. 534. Where parties understand the facts, an erroneous deduction of law is no excuse for annulling contract: *Fisher v. May*, 5 Id. 626. Relief will be granted against a mistake of law: *Lawrence v. Beaudin*, 23 Id. 155.

MONEY PAID UNDER MISTAKE AS TO LEGAL LIABILITY CANNOT BE RECOVERED BACK: *Needles v. Burk*, 51 Am. Rep. 251; *Norton v. Warden*, 32 Am. Dec. 132.

MISTAKE OF ATTORNEY AS TO LEGAL BEARING OF CERTAIN FACTS upon the title to property is not a ground for the recovery of purchase-money of such property: *Burkhauser v. Schmitt*, 30 Am. Rep. 740.

PROMISSORY NOTE, BEARING INTEREST AT RATE GREATER THAN LEGAL RATE, which rate the parties intended note should bear after its maturity and until paid, cannot be reformed by equity to meet the intention of the parties, although the excess after maturity, if paid, cannot be recovered back: *Rector v. Collins*, 55 Am. Rep. 571.

MISTAKE OF LAW AND FACT, EQUITY WILL RELIEVE AGAINST: *Griffith v. Townley*, 23 Am. Rep. 476.

DISTINCTION BETWEEN MISTAKE OF LAW AND IGNORANCE OF LAW: *Lawrence v. Beaudin*, 23 Am. Dec. 155, and note.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

WEBER v. CHRISTEN.

[121 ILLINOIS, 91.]

DELIVERY OF DEED IS ALWAYS ESSENTIAL TO ITS OPERATION AND VALIDITY. SIMPLEST MODE OF DELIVERING DEED IS MANUAL TRANSFER OF IT by the grantor to the grantee, with intent of transferring title to the property and of relinquishing all control over the instrument.

DELIVERY OF DEED MAY BE EFFECTED without actually passing the writing from the grantor to the grantee, as where, while the instrument is in the presence of both parties, the grantor directs the grantee to take possession of it, with intent to transfer the property, and the latter expresses his willingness so to do.

ESCROW. — Deed in the hands of the grantee is never treated as an escrow.

DELIVERY OF DEED. — Act and intention are two elements essential to the delivery of a deed.

DELIVERY OF DEED IS NOT EFFECTED BY SIGNING, ACKNOWLEDGING, AND RECORDING IT, without the knowledge or assent of the grantee, if he is an adult, unless it is shown that the grantor intended thereby to give effect and operation to, and to relinquish all control over, such deed, and that the grantee, on being informed, assented.

ASSENT OF GRANTEE TO DEED NEED NOT BE SHOWN, if it is a voluntary settlement, or he is not *sui juris*.

DEED SIGNED, ACKNOWLEDGED, AND PLACED ON RECORD, without any intent to part with the deed or the land (the grantors retaking possession of the deed as soon as recorded, and ever thereafter retaining such possession, and the grantees having no knowledge of the deed at the time, nor any possession or control of the deed at any time), is not delivered, nor is the title of the grantors divested thereby.

EJECTMENT against Amalia Christen, widow of Ludwig Christen, to recover certain lands claimed by the plaintiffs under a conveyance signed and acknowledged by Christen and

wife, and by him filed for record. Judgment for defendant. Plaintiffs appealed.

Joseph Pfirsching, for the appellants.

Smith and Forch, for the appellee.

By Court, MULKEY, J. The appellants, Herman and Bruno Weber, brought an action of ejectment in the superior court of Cook County, against Amalia Christen, for the recovery of certain lots and parcels of land, which it is conceded formerly belonged to her husband, Ludwig Christen, now deceased. There was a judgment for defendant in the court below, and the plaintiffs appealed to this court.

It appears that Christen and wife, on the 15th of January, 1884, executed two deeds, which, together, purported to convey the premises in question to the plaintiffs, who are nephews of Mrs. Christen, one of whom was at the time a minor. One of the parcels of land constituted the homestead premises of the grantors, but the deed covering it contained a formal release and waiver of the right of homestead therein. The deeds were properly acknowledged before a notary on the day of their execution, and on the following day were filed for record in the proper office. Having been recorded, they were shortly afterwards taken out of the office by Christen, and were kept by him or his wife until his death, which occurred in March, 1885. After that time she had exclusive possession and control of them up to the time of the commencement of this suit. Christen left no children or descendants of children. The appellants had no knowledge of the making of the deeds in question, or of the filing of them for record. The father of the grantees testifies, however, that Christen, on a certain occasion, informed them of what he had done, and that they expressed their approval by thanking Christen for it. On the other hand, the evidence tends to show that the real object in making the deed was to put the property beyond the reach of Christen's creditors. Christen stated to the notary, as the latter testifies, that the deeds were made without consideration, and assigned as a reason therefor that he and his wife had been in trouble and did not wish to get into any more; that they had had to pay a judgment, and that he was afraid they would have to pay another; that "they wanted to convey the property, so the courts could not get hold of it." When cautioned by the notary, and told that it was dangerous to transfer their property that way, Christen replied "that they

relied perfectly on their relatives, and they would take all the responsibility of conveying them the property, because it would not hurt them any."

Assuming this testimony to be true (and there is nothing in the record to the contrary), it is very clear that Christen did not, by the making and recording of these deeds, intend to deprive himself of the property which they purported to convey. His purpose was evidently to make the public record show the title in his wife's nephews, without any intention of parting with the property itself, and by this means protect it from legal process.

The question then arises, whether the making and recording of the deeds, under the circumstances and for the purpose stated, had the effect, notwithstanding the grantors purposely retained possession of the deeds, of passing the title to the premises to the grantees; or in other words, the question is, Do the facts stated show a delivery of the deeds? This is the only question in the case.

That a delivery, in every case, is essential to the operation and validity of a deed, is conceded by all; but whether the facts relied on to establish a delivery in a particular case are sufficient for that purpose often presents a difficult question to determine. This results from the fact that the law does not afford any universal test, applicable alike to all cases, by which the question of delivery may be certainly determined. The ordinary and simplest mode of delivering a deed is, of course, the actual tradition or manual transfer of the instrument from the grantor to the grantee, for the purpose and with the intention of passing the title from the former to the latter, and of relinquishing all power and control over the instrument itself. But it is well settled that this actual passing of the deed from the hands of one to that of the other is not absolutely essential in any case. Other acts, accompanied with a clear intention to pass the title from one to the other, are equally efficacious in establishing a delivery. Thus, where the grantor in a deed lying in the presence of the parties to it, with the intention of passing the estate and of divesting himself of all power over the instrument itself, directs the grantee to take possession of it, and the latter signifies his assent, the delivery will be complete without either of the parties actually touching the deed. Or if, in the case supposed, the grantor should, with a like purpose and intent, pick up the instrument and hand it to the grantee without saying any-

thing, the delivery would be equally good. Hence the oft-repeated saying in the books, that a deed may be delivered by some act without words, or with words without any act of delivery, or by words and acts both. The statement, as here formulated, is the substance of what is to be found in all the books which treat of this subject, yet it may be doubted whether it is not liable to misapprehension.

Act and intention are the two elements or conditions essential to a delivery. The act may, as we have just seen, be a manual transfer of the instrument, with or without words, or it may be a purely verbal act, as, where the grantee is simply directed to go and get the deed already prepared for him. It is the intention, however, which gives vitality, force, and effect to the act, whatever that may be. There is this diversity, however: in the case of an actual delivery of the instrument by the grantor to the grantee, though accompanied with a verbal understanding that it is not to take effect except upon certain conditions, the title will nevertheless pass, upon the well-settled principle that a deed voluntarily placed in the hands of the grantee is never to be treated as an escrow: *People v. Bostwick*, 32 N. Y. 445.

As the deeds in this case were never actually delivered by the grantor, the question arises, What act or acts of his, verbal or otherwise, can be regarded or treated as an equivalent or substitute for such actual delivery? If the acknowledgment and recording of the deeds cannot be so regarded and treated, then, of course, there is nothing in the record that can be. It is to be regretted that the decisions on this subject cannot be fully harmonized on any well-recognized principle. We think, however, that the crucial test, in all cases, is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery were done. This intent, of course, is to be gathered from the conduct of the parties, particularly the grantor, and all the surrounding circumstances. We think, in the case of an adult grantee, the acknowledging and recording of the deed without his knowledge or consent does not, of itself, according to the weight of authority, amount to a delivery: *Parker v. Hill*, 8 Met. 447; *Jackson, Demiss of Eames, v. Phipps*, 12 Johns. 418; *Woodbury v. Fisher*, 20 Ind. 388; 83 Am. Dec. 325; *Parmelee v. Simpson*, 5 Wall. 81; *Herbert v. Herbert*, Breese, 354; 12 Am. Dec. 192. Yet if, from all the circumstances in such a case, it appears the grantor, by these acts, intended to give effect and operation to the deed, and to

relinquish all power and control over it, we think it clear the law would give the deed effect accordingly,—in other words, such acts would, in law, amount to a delivery. This would certainly be so in the case of a voluntary settlement, or of a conveyance in trust for the benefit of creditors, or of a conveyance to a person who, from any cause, is incapable of making a valid contract: *Tompkins v. Wheeler*, 16 Pet. 106; *Younge v. Guilbeau*, 3 Wall. 636; *Masterson v. Check*, 23 Ill. 72; *Bryan v. Wash*, 2 Gilm. 557.

It is also true, as a general proposition, where nothing appears to show a contrary intention, that if the owner of an estate makes a conveyance of it, and places the deed upon record without the knowledge of the grantee, the title will nevertheless pass, if the latter, on being informed of the transaction, assents to it. And where the conveyance is a voluntary settlement, or to one who is not *sui juris*, a formal assent need not be shown, as it will, if nothing further appear, be presumed.

In the present case, it will be remembered, the deeds were made and put on record without the knowledge of the grantees, who were subsequently informed of the fact by the grantor. When so informed, according to the testimony of their father, they both expressed their assent and satisfaction at what had been done, but as one of them was a minor, no significance can therefore be attached to his approval of the conveyance. If nothing further appeared in the case than this, we would have no hesitancy in holding that the appellants acquired a good title to the property. But such is not the case. From what has already appeared, we are fully satisfied there was no original intention on the part of Christen or his wife to part with the deed or the estate in the land. This is not only shown by his declarations to the father of the grantees, and the notary who took the acknowledgment, but also by the fact that he never parted with the custody or control over the deeds during his lifetime. He did not even permit them to remain in the clerk's office but a few days for the purpose of having them recorded. They were left at the office on the 16th of January, and taken out on the 5th of the following month.

We think, all the facts considered, this case is clearly governed by the case of *Union Mutual Ins. Co. v. Campbell*, 95 Ill. 267, 35 Am. Rep. 166, in which will be found an extended discussion of the questions herein adverted to, and a general re-

view of the authorities bearing upon them; and we therefore specially refer to that case, as containing a full expression of our views on the subject.

While the case in hand is, in some respects, a close one, yet, upon the whole, we think the finding of the lower court is correct, and that the judgment should therefore be affirmed.

Judgment affirmed.

DELIVERY OF DEED IS ESSENTIAL; and the intention to have delivery made on the grantor's death, and leaving it in an envelope with directions for delivery, do not dispense with the necessity for an actual delivery: *Stone v. French*, 1 Am. St. Rep. 237, and cases there cited; *Davis v. Cross*, 52 Am. Rep. 177. Recording a conveyance is *prima facie* a delivery thereof: *Burke v. Adams*, 50 Id. 510; *Tobin v. Bass*, 55 Id. 392.

ESCROW.—A deed can never be delivered to the grantee in escrow, or upon conditions. If the grantor undertakes to make such a delivery, the deed becomes operative at once, and the conditions are nullities: *Worrall v. Munn*, 55 Am. Rep. 330, and note. If a deed is put in escrow, and is fraudulently obtained from the custodian by the grantee, who thereupon sells the property to an innocent purchaser, the latter acquires a good title, because, where one of two innocent persons must suffer, it should be the one whose act or neglect put it in the power of the wrong-doer to do the wrong; in other words, "He who trusts most must suffer most": *Quick v. Milligan*, 58 Am. Rep. 49.

FRAZER v. FRAZER LUBRICATOR COMPANY.

[121 ILLINOIS, 147.]

TRADE-MARK.—GENERALLY ONE, BY USING HIS OWN NAME as a trade-mark, cannot deprive another having the same name from using it in conducting his business, provided the latter resorts to no device or artifice to create the impression that the goods manufactured or sold by him are manufactured or sold by the former.

ONE MAY GRANT EXCLUSIVE RIGHT TO USE HIS NAME TO ANOTHER in connection with the manufacture and sale of a product of a certain kind and quality; and if he does so, he will be enjoined from subsequently using his own name in connection with the manufacture and sale of a like product.

SELLER OF ESTABLISHED BUSINESS, with the right to use his name in connection with such business, cannot afterwards resume it in carrying on the same business.

BILL to enjoin the defendant Samuel Frazer, and others, from using his name. Decree for the complainant, and defendants appealed.

Sheehan and McHugh, for the appellants.

McClellan and Cummins, and *M. W. Fuller and L. L. Bond*, for the appellee.

By Court, MULKEY, J. The appellee, on the thirtieth day of August, 1884, exhibited its bill in the superior court of Cook County, against the appellants, to enjoin the latter from using the name of "Frazer," "Samuel Frazer," "S. Frazer," or "S. Frazer & Co.," or the name "Frazer," "in any way, in the manufacture of axle grease, according to the process and of the ingredients used by the appellee in the manufacture of Frazer's Axle Grease, or of axle grease of any kind whatsoever," etc. The court, upon the hearing, rendered a decree in substantial conformity with the prayer of the bill, and the defendants appealed to the appellate court for the first district, where the decree was affirmed. By the present appeal, the record of the proceedings in the lower courts is brought here for review.

In 1856, or thereabouts, appellant, Samuel Frazer, commenced, at Galena, Illinois, the manufacture and sale of an axle grease, known and designated in the trade as "Frazer's Axle Grease." It was also called "Frazer's Grease," and "Frazer's Lubricator." The process of manufacturing this grease is Frazer's own discovery. The product of the discovery is obtained by combining rosin oil, lime, sal-soda, palm oil, and water in certain proportions. The rosin oil used for this purpose is produced by the distinctive distillation of rosin, also a discovery of Frazer's, for which he received a patent in 1860. In 1868, with a view of changing the location of his business from Galena to Chicago, he formed a copartnership with George B. Swift, Edward Hunter, and Otis S. Favor, under the firm name of Frazer, Swift, & Co., which was subsequently changed to that of the Frazer Lubricator Company. In February, 1870, John A. Packard became a member of the firm, and Frazer retired from it. The terms and conditions upon which this change in the partnership was effected are fully shown by the following written agreement, which was duly signed and sealed by all the parties thereto:—

"This agreement, made and entered into the seventh day of February, A. D. 1870, by and between Samuel Frazer, of Galena, Illinois (now temporarily residing in Chicago, in said state), party of the first part, and Edward Hunter, John A. Packard, Otis S. Favor, and George B. Swift, of said Chicago, parties of the second part:—

"Witnesseth: That for a valuable consideration, and the further consideration of ten dollars to the party of the first part paid by the party of the second part, the receipt whereof

is hereby confessed and acknowledged, the party of the first part hereby sells, assigns, transfers, and conveys unto the said parties of the second part all his right, title, and interest in and unto certain letters patent (and the invention thereby secured), which were issued to the party of the first part by the United States of America, on the twelfth day of June, in the year of our Lord one thousand eight hundred and sixty, bearing thereon the number of said patent, to wit, No. 28,663, said letters patent embracing and covering, in general terms, 'a new and useful improvement in distillation of oils from rosin,' said invention being particularly described in the schedule and diagram attached to said letters patent, and of record in the patent-office in the city of Washington, in the District of Columbia. The party of the first part, for the consideration aforesaid, hereby authorizes the parties of the second part, their assigns, successors, heirs, administrators, executors, or legal representatives, to use his name, so far as it may be necessary to use it, as a trade-mark, or as indicating the material or product which has heretofore been manufactured under said letters patent, and generally known and called 'Frazer's Axle Grease,' 'Frazer's Lubricator,' or 'Frazer's Grease,' and confers the authority to use his name, as aforesaid, upon the parties of the second part, their assigns, successors, etc., exclusively, and binds himself to confer that authority upon no other person or persons, corporation or association, whatsoever; and he hereby sells, assigns, and transfers, for the same aforesaid consideration, unto the said parties of the second part, their assigns, successors, and legal representatives, all interest, right, and title which he may have in any renewals or extensions of said letters after the expiration thereof, and hereby expressly agrees and binds himself unto the said parties of the second part, their assigns, successors, or legal representatives, to make in his own name, but for the benefit of said parties of the second part, all or any applications, petitions, or requests in writing, or otherwise, which may be required by said parties of the second part for the purpose of obtaining any renewal, extension, or reissuance of said letters patent, and without charge therefor, provided said parties of the second part assume and pay all costs and expenses attendant thereupon; and said party of the first part agrees and binds himself not to engage hereafter in the manufacture, directly or indirectly, of the product or material secured by said letters patent and known as aforesaid, and not to use, or

authorize the use of, his name as a trade-mark, or otherwise, for the manufacture of said lubricator, axle grease, or grease, or any other product made under said letters patent. The parties of the second part hereby agree to hold said party of the first part harmless against all or any costs or liabilities arising from the use of his name, as aforesaid."

Frazer received for his interest in the business and assets of the concern, and the rights secured under the above agreement, in property and money, altogether, seventeen thousand five hundred dollars, most, if not all, of which was paid by Packard, who took his place in the firm. On the 29th of April following, the members then composing the firm of the Frazer Lubricator Company became incorporated under the same name, and the corporation thus formed, being the present appellee, succeeded to all the rights, property, and assets of the concern. Since that time the same business has been successfully carried on, and so extended by the company until it has become one of vast proportions, and highly remunerative to the stockholders. At the time of Frazer's withdrawal from the business, the process of making the axle grease was known only to himself and one or two others, and even now it appears to be known to but few.

In 1879 Frazer obtained a patent from the government for what he claimed to be an improvement in the manufacture of the axle grease, in which patent reference is made to the patent of 1860. In the following year he applied for and obtained a second patent for another discovery and improvement upon the process of making said axle grease. Armed with these additional patents,—or rather the last one, as he claims the first was issued by mistake,—he, in 1884, in connection with others, under the name of "S. Frazer & Co.," commenced again, at Galena, the manufacture of axle grease, which was put up and sold in packages marked "Superior Axle Grease." Below this brand or mark was the name of the firm, "S. Frazer & Co.," in good-sized capitals. While these packages differed, in a number of particulars, from those put up by appellee, yet in other respects, it must be admitted, there was a striking resemblance between them, which, when taken together with the name "Frazer," was well calculated to mislead dealers not knowing there was more than one company engaged in the same kind of business, or not familiar with the marks by which the packages of the two establishments were distinguishable. Appellee regarding the business

of appellants, in the manner carried on by them, as an invasion of its rights, filed the present bill, for the purpose and with the result already stated.

Able and elaborate arguments, presenting the respective contentions of the parties, have been filed in the case, which exhaustively treat of every question of law or fact presented by the record that has either a direct or remote bearing upon the merits of the controversy. In addition to this, there have been filed with the briefs of counsel written opinions in the case in the superior as well as in the appellate court, in both of which the salient and controlling features of the case are ably and fairly presented. We fully concur both in the reasoning and conclusion of those opinions.

Under the circumstances stated, entertaining the opinion we do, it would be a useless task to go over the whole ground again, which would necessarily be in the main but a repetition of what has already been so well said by the lower courts. We shall therefore content ourselves with briefly noticing a few of the points upon which appellants seem to place most reliance, and calling special attention to some of the provisions of the contract above set forth, and upon which the conclusion we have reached is mainly rested.

Among other things, it is complained that the lower courts committed an "unpardonable error" in finding the two greases are substantially the same. We do not think the facts warrant the strong terms in which this complaint is made. It is an undisputed fact that both greases are made from a combination of rosin oil, lime, sal-seda, and water. In this respect they are certainly alike. So far as the product is concerned, from the evidence produced, it is, to say the least of it, doubtful which, if either, is the better grease. Viewing the question, then, from a practical aspect, we think the lower courts were fully justified in finding the two greases were substantially the same. It is true, the analyses which were made—being four in number; by as many different chemists—show some differences in the relative proportions of the ingredients used in making the two greases, but the diversity in this respect, conceding it to exist, is not, in our judgment, so great as to materially affect the rights of the parties to this controversy. So far as these analyses are concerned, it is worthy of note that no two of them are alike.

It is also earnestly contended that there can be no trademark in the name "Frazer," and hence it is concluded there

was error in the decree in enjoining Frazer from the use of his own name in connection with the business of the firm of which he was a member. It is certainly true, as a general proposition, that one cannot, by using his own name as a trade-mark, deprive another having the same name from using it in conducting his own business. But even here the latter will not, under cover of using his own name, be permitted to resort to any device or artifice by which the public will be led to purchase his goods or manufactured products under the belief that they are those of the former. In the view we take of the case, we do not think it important whether the expression "Frazer," "Frazer's Grease," or "Frazer's Axle Grease," is, strictly speaking, a trade-mark or not. The important question, in our opinion, is, whether, under the facts averred in the bill and proved on the hearing, Frazer and those associated with him in the business have the right to use his name in connection with the manufacture and sale of axle grease of the kind and quality made and sold by them. This conclusion we rest upon the contract itself. Before the making of the contract, Frazer, like any other person who had not voluntarily parted with it, had the right to use his own name in conducting his own business, either by himself or in connection with others, provided it was done in a proper and legitimate way. The right to thus use his name was a valuable one, rendered doubly so in his case, because it was that of the discoverer of a valuable and popular article of trade then being manufactured and sold on the market by himself under that name. But this right, like most other property rights, was the subject of sale and transfer, and, as we have already seen, he did, for a valuable consideration, so dispose of it. The question now is, Will equity permit him, and those acting in concert with him, to defeat the right and title thus disposed of, in the hands of the assignee of his grantees?

The principle seems to be well settled, that where a party sells out an established business, and with it his own name, to be used in connection with such business, he cannot afterwards resume it in carrying on the same business: *Gillis v. Hall*, Cox's American Trade-mark Cases, 596; *Witt v. Corcoran*, Cox's Manual of Trade-mark Cases, 423; L. R. 2 Ch. 69; L. J. 45 Ch. 603; 34 L. T., N. S., 550; 24 Week. Rep. 501; *Charton v. Douglass*, Cox's Manual of Trade-mark Cases, 172; 1 Johns. 174; L. J. 28 Ch. 841; 5 Jur., N. S., 887; 33 L. T.

57; 7 Week. Rep. 365; *Ayer v. Hall*, 3 Brewst. 509; *Probasco v. Bouyon*, 1 Mo. App. 241; *Filkins v. Blackman*, 18 Blatchf. 440.

The case in hand falls directly within the doctrine of the cases cited. There is nothing, however, new in this doctrine. It is the old principle, that a title based on a sale for a valuable and adequate consideration, fairly entered into between parties *sui juris*, will be upheld, and enforced in equity as well as at law.

It will be seen, by looking at the contract in question, that Frazer, in the first place, sells and conveys, absolutely, all his right, title, and interest in and to the patent for making the rosin oil. He then proceeds to confer on the grantees, their "successors," etc., the right to use his name, "so far as it might be necessary to use it as a trade-mark, or as indicating the material or product which had theretofore been manufactured under said letters patent, and generally known and called 'Frazer's Axle Grease,'" etc. Had the agreement stopped here, there would, at least, have been a question whether this grant of the right to use Frazer's name for the purpose stated was intended to be exclusive. But as this right, unless exclusive, would have been of little or no value, it was a matter of great importance to the grantees that all doubt whatever on the subject should be removed; and for this purpose, it is then added that Frazer "confers the authority to use his name, as aforesaid, upon the parties of the second part, to their assigns, successors, etc., exclusively." He also expressly binds himself to confer such authority upon no other person or persons, corporation or association, whatsoever. Having thus covenanted not to confer the right to use his name upon any one else, he then stipulates as follows: "And the said party of the first part agrees and binds himself not to engage in the manufacture, directly or indirectly, of the product or material secured by said letters patent, and known as aforesaid." If this covenant stood alone, there might be some question as to what was meant by it. But when taken in connection with the provision preceding it, which gives the grantees the right to use Frazer's name as a trade-mark, or "as indicating the material or product" theretofore manufactured under the patent, "known and called Frazer's Axle Grease," etc., there is no room to doubt what was intended. The words "known as aforesaid" evidently have reference to the same thing which is qualified and de-

scribed by the words "known and called," in the preceding stipulation in question, — namely, "Fraser's Axle Grease."

It is very clear that Frazer intended, and did, so far as the law would permit, to absolutely bind himself, without limit or conditions of any kind whatever, to not again engage in the manufacture of the rosin oil or grease in question. Whether it was competent for him to do this, it is not important to inquire, since, for the purposes of the conclusion we have reached, it may be conceded it was not; for, however that may be, he clearly did have the power to sell the exclusive use of his name in conducting that particular business. That power, as we have already seen, he exercised, receiving therefor a valuable consideration, and justice and equity alike demand that he should be held to his agreement.

Finally, Frazer expressly covenants not to use, or otherwise authorize the use of, his name as a trade-mark, or otherwise, for the manufacture of said lubricator, axle grease, or grease, or any other product, under said letters patent. It will be observed that the grease or axle grease to which the contract relates is, throughout the instrument, characterized as a grease or product made under the patent. Yet it will be remembered the patent does not cover the process of making the grease. It only extends to the principal ingredient in it — namely, the rosin oil. The process of obtaining that alone is covered by the patent, and it was therefore clearly in this sense the grease is spoken of in the contract as being made under the patent. When, therefore, Frazer covenanted that he would not use his name himself, or permit it to be used by others, in the manufacture of grease, or any other product, "under said letters patent," he simply and obviously intended to bind himself not to use his own name, or suffer it to be used by others, in the manufacture of the rosin oil, or any grease or other product of which the rosin oil is a constituent part. This covenant, so far as the use of Fraser's name is concerned, we hold, as already stated, to be a valid and binding obligation, both at law and in equity. That it has been violated by Frazer, and those acting in concert with him, is equally clear.

The judgment will be affirmed.

TRADE-MARK. — One who has simulated another's trade-mark, or who, having a trade-mark otherwise valid, stamps upon his goods false representations intended to mislead the public, is in no condition to complain of a

third person for using or simulating the trade-mark used by complainant: *Parlett v. Guggenheimer*, 1 Am. St. Rep. 416. The law of trade-marks is discussed in note to *Partridge v. Menck*, 47 Am. Dec. 284-299.

TRADE NAME. — One has a right in good faith to use his own name on goods manufactured or sold by him, although it is the same name as that of another person previously selling or manufacturing like goods: *Rogers v. Rogers*, 55 Am. Rep. 78; *Meriden B. Co. v. Parker*, 12 Id. 401, and note 410-414; *Olin v. Bate*, 38 Id. 78, and note.

GOOD-WILL OF BUSINESS. — Person who sells good-will of business will be enjoined from again setting up business at such a place, and in such a manner, as to destroy or diminish the business of which he sold the good-will: *Myers v. Kalamazoo Buggy Co.*, 52 Am. Rep. 811; *Shaver v. Shaver*, 37 Id. 194; *Bergamini v. Bastian*, 48 Id. 216, and note 223-232; *Hoxie v. Chaney*, 58 Id. 149.

DELANO v. CASE.

[121 ILLINOIS, 267.]

DIRECTORS OF BANK ARE TRUSTEES FOR DEPOSITORS, as well as stockholders.

DIRECTORS OF BANK ARE ANSWERABLE TO ITS DEPOSITORS for failing to exercise ordinary care and diligence.

DEPOSITOR IN BANK MAY RECOVER FROM ITS DIRECTORS for damages resulting to him from negligence in permitting it to be held out to the public as solvent, when it was insolvent.

ACTION against Delano and others, directors of a bank. Judgment for plaintiff. Defendants appealed.

Palmers, Robinson, and Shutt, for the appellants.

Greene, Burnett, and Humphrey, for the appellee.

By Court, SCHOLFIELD, J. This was case, in the circuit court of Macoupin County, by a general depositor in a bank, against directors of the bank, for negligence in permitting it to be held out to the public as solvent, when in fact it was, at the time, insolvent. Judgment was rendered for the plaintiff in that court, and that judgment was affirmed, on appeal to the appellate court for the third district, and this appeal is from that judgment.

The appellate court, in its opinion filed on rendering that judgment, holds: 1. That the directors of a bank are trustees for depositors as well as for stockholders; 2. That they are bound to the observance of ordinary care and diligence, and are hence liable for injuries resulting from their non-observance; and 3. That the present appellants did not observe that degree of care and diligence, and in consequence thereof

appellee sustained the damages for which the judgment was rendered: *Delano v. Case*, 17 Ill. App. 531.

The last proposition we are relieved from inquiring into, since there was evidence tending, though it may be but slightly, to sustain it.

The propositions of law, as above stated, are, in our opinion, free of objection and sustained by authority: *Percy v. Millaudon*, 3 La. 568; *United Society of Shakers v. Underwood*, 9 Bush, 609; *Morse on Banks and Banking*, 2d ed., 133; *Thompson on Liability of Officers and Agents*, 395; *Shea v. Mabry*, 1 Lea, 319; *Hodges v. New England Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624; *Wharton on Negligence*, sec. 510.

The judgment is affirmed.

SHELDON, C. J., and CRAIG, J., dissented.

ACTION AGAINST DIRECTORS OF CORPORATION MAY BE MAINTAINED BY STOCKHOLDER for misconduct in office, when the corporation is unable to, or through fraud or collusion will not, sue: *Musina v. Goldkwaite*, 7 Am. Rep. 281. But a director is not answerable for mere errors of judgment, nor want of skill or knowledge: *Spring's Appeal*, 10 Id. 684; nor for representations, false in fact, but not known to him to be so, made in the published circulars of the corporation, on which his name appears in the list of directors: *Wakeman v. Dalley*, 10 Id. 551.

SUITS BY STOCKHOLDERS AGAINST DIRECTORS AND OFFICERS OF CORPORATIONS to call them to account for moneys improperly received or retained, and for other breaches of duty or of their trust: See *Hersey v. Veazie*, 41 Am. Dec. 364, and note 367-370; *Hodges v. New England Screw Co.*, 53 Id. 624, and note 637-651.

WABASH, ST. LOUIS, AND PACIFIC RAILWAY CO. v. HAWK.

. [121 ILLINOIS, 259.]

FELLOW-SERVANTS. — A foreman in charge of a wrecking-train is not a fellow-servant of the members of the crew who are under his orders and control.

LIABILITY OF MASTER TO ONE EMPLOYEE FOR NEGLIGENCE OF ANOTHER. —

If a railway company confers authority on one of its employees to take charge of a gang of men in carrying on some branch of its business, he, in governing and directing the movements of the men under his charge, is the direct representative of such company. They are bound to obey any order given by him, which is within the scope of his authority and not manifestly unreasonable, and although he may have an immediate superior standing between him and the company, yet his commands are the commands of the company, for which it is answerable. The company is therefore liable for the negligence of such employee when it results in the injury of another employee acting under his command.

ACTION by Hawk to recover for injuries sustained by him while in the service of the railroad company. He recovered judgment in the circuit court of Livingston County.

G. B. Burnett, for the appellant.

W. T. Ament and A. E. Harding, for the appellee.

By the COURT. This was an action to recover for an injury received by the plaintiff, while assisting in the removal of a wreck from the defendant's railroad track. The accident occurred near Forrest, in Livingston County, on the fourteenth day of April, 1882. At the time of the accident, the railroad company had a wrecking-crew at Forrest, consisting of four or five men, including the plaintiff. The crew was under the control of one Button, who was foreman. When a wreck occurred, it was the duty of Button and his men to remove the wreck and clear the track as speedily as possible, so that the running of trains might not be delayed. The railroad company had furnished Button with an engine and wrecking-car, supplied with ropes, chains, and block and tackle. At the time of the accident, a freight train had been thrown from the track, about one mile from Strawn. Button and his men went out to the wreck with the engine, wrecking-car, and other appliances, for the purpose of removing the wreck from the track. Chapman, defendant's road-master, with a number of section-men, was working at the south end of the wreck, while Button and his men worked at the north end. When the two came together they found the floor of a car lying across the track, and the men were ordered to lift it over, off the track, by hand. When the floor of the car had been lifted as high as the men could raise it, a prop was put under it, and the men ordered to rest it on the prop, which they did. The men were then ordered to stand back from the floor of the car, and they all did so, but before appellee could get away, the prop slipped, the car-floor fell, and caught plaintiff's leg, which was fractured at the ankle. All of the men engaged in the work, including Chapman and his crew, were under the control of Button.

In the amended declaration, it is averred that the defendant did not use, or order to be used, the necessary machinery and appliances for the safe lifting, holding, staying, and removing of said car, but carelessly, willfully, and negligently neglected, failed, and refused to use the same; but instead thereof carelessly and negligently ordered and directed the use of a prop

for the purpose of holding the said car at the point where lifted, which was then and there used by such order and direction, and that in consequence of said neglect and failure of the defendant to so use the said machinery and appliances, and in carelessly and negligently ordering and directing plaintiff and said other servants to lift and remove said car by their individual strength, and in the careless use of the prop, as aforesaid, the plaintiff then and there exercising all due care and caution on his part, the said car, without any warning whatever to plaintiff, fell back upon the ground, and upon the leg and foot of plaintiff, and broke and crushed the foot and ankle of plaintiff, etc.; that said agent giving the order to place the prop under the car then and there had the power and authority to give the said orders and directions for the performance of the work, and was then and there exercising such power and authority, and then and there had full control and superintendence of said work and the details thereof.

In the circuit court, plaintiff recovered a judgment against the railroad company, which was affirmed in the appellate court. The defendant brings the record here, and assigns as error the giving and refusing of instructions in the circuit court.

The facts in this case upon which the questions of law are raised are quite similar to the facts in *Chicago and Alton R. R. Co. v. May*, 108 Ill. 293, and the law as declared in that case settles the real questions of law presented by this record. If the plaintiff had occupied to Button the position of a fellow-servant in the same line of employment, he might not be entitled to recover for the injury received. But Button had the entire charge and control of the wrecking-crew; they were employed by him; they were under his command, and bound to obey his orders. Where such was the situation of the parties in the May case, it is said: "When a railway company confers authority upon one of its employees to take charge and control of a gang of men in carrying on some particular branch of its business, such employee, in governing and directing the movements of the men under his charge with respect to that branch of its business, is the direct representative of the company itself, and all commands given by him, within the scope of his authority, are in law the commands of the company; and the fact that he may have an immediate superior standing between him and the company makes no difference in this respect. . . . When he gives an order within the scope of his

authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations, and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences." The jury found that the plaintiff, while in the exercise of due and proper care, was injured through the negligence of the direct representative of the defendant. That finding, having been affirmed in the appellate court, is conclusive here.

The ruling of the court in the instructions conformed substantially to the law as declared in the May case, and we perceive no ground upon which the judgment can properly be reversed. Some of the instructions may not be technically accurate, but on the main question involved they conformed to the law as heretofore declared by this court, and the errors committed, if any, were not of such a magnitude as to authorize a reversal of the judgment.

The judgment of the appellate court will be affirmed.

SHELDON, C. J., dissented.

MASTER AND SERVANT. — The duty of a master to his servant in guarding him against danger, in providing him with safe machinery and other appliances, and the consequences of a neglect of these duties, where their performance is delegated to another servant, are considered in *Wormell v. Maine Central R. R.*, 1 Am. St. Rep. 321; *Smith v. Peninsular Car Works*, 1 Id. 542; *Fisk v. Central Pacific R. R.*, 1 Id. 22; *Bushby v. New York R. R. Co.*, 1 Id. 843; *St. Louis R. R. Co. v. Irwin*, 1 Id. 286; *Clapp v. Minnesota and St. Louis R. R.*, 1 Id. 269; and *Smith v. Wabash R. R.*, 1 Id. 729, and notes to these cases. The same cases and notes also discuss the question who are fellow-servants, within the meaning of the rule that a servant cannot recover for injuries suffered by him through the negligence of his fellow-servants.

McCord v. PIKE.

[121 ILLINOIS, 283.]

TAX-PAYER MAY SUSTAIN BILL TO ENJOIN the imposition of an unjust and illegal burden on the municipality, or to prevent its property from being wasted and squandered: *Chicago v. Building Association*, 102 Ill. 379, explained, and shown not to conflict with this rule.

INJUNCTION AT SUIT OF TAX-PAYER will issue to prevent the officers of a county from selling its lands for a less sum than was offered therefor by another bidder, especially if it appears that their action is collusive and for the purpose of defrauding the county.

RECONSIDERATION. — A board of commissioners, or other like body, acting in a ministerial capacity, cannot, by any system of rules of its own making,

preclude reconsideration and correction of its erroneous action, whether resulting from haste and want of consideration or from intentional wrong.

ACCEPTANCE OF BID BY COUNTY COMMISSIONERS CONFERS NO VESTED RIGHT on the bidder, and interposes no obstacle to a suit to enjoin them from conveying property pursuant to such bid, if proper grounds for such injunction are shown.

BILL in equity, by Pike and others, as tax-payers, against McCord and the county commissioners of Cook County, to enjoin such commissioners from executing a conveyance to McCord of certain real property. The prayer of the bill was granted. Thereupon McCord prosecuted a writ of error.

Barnum, Rubens, and Ames, for the plaintiff in error.

Wallace Heckman and Sidney Smith, for the defendants in error.

By Court, SCHOLFIELD, J. This was a bill in equity, exhibited in the superior court of Cook County, by Eugene S. Pike, John H. Dunham, and others, citizens and tax-payers of Cook County, on behalf of themselves and all other tax-payers of that county, against Ira McCord and the board of county commissioners of the county of Cook, praying that the execution and delivery of a certain deed be enjoined. Answers were filed to the bill, and McCord filed a cross-bill against the board of county commissioners and the complainants, praying that specific performance of a contract to purchase the property, the execution of the deed for which was sought to be enjoined by the original bill, be decreed. Answers were filed to the cross-bill, and replications were filed to the several answers. On hearing, the court decreed that McCord's cross-bill be dismissed, and that the board of county commissioners be perpetually enjoined from executing and delivering the deed described in the original bill. The present writ of error is prosecuted by McCord alone.

The first question to be considered is, Will a bill in equity, by tax-payers, lie in a case like the present? The contention of plaintiff in error is, that such a bill will lie only in the name of the attorney-general, or of the state's attorney of the county, as the representative of the public. In some states, and notably in New York, this is the rule: See *Roosevelt v. Draper*, 23 N. Y. 318. But the ruling in this state is different. It is here held that where an unjust and illegal burden is being imposed on the tax-payer by the municipality, or the

money or property of the municipality, to replace which taxation must be levied, is being wasted or squandered, the taxpayer has such a direct interest that a bill to enjoin the threatened burden will lie: *Colton v. Hanchett*, 13 Ill. 615; *Prettyman v. Supervisors of Tazewell Co.*, 19 Id. 406; 71 Am. Dec. 230; *Perry v. Kinnear*, 42 Ill. 160; *Drake v. Phillips*, 40 Id. 389; *Chestnutwood v. Hood*, 68 Id. 132; *Devine v. County Commissioners*, 84 Id. 590; *City of Springfield v. Edwards*, 84 Id. 626; *C. & N. R. Co. v. People*, 92 Id. 170; *Leitch v. Wentworth*, 71 Id. 147.

It seems to be supposed that something was said in *City of Chicago v. Union Building Ass'n*, 102 Ill. 379, contrary to this rule. It is very certain that was not intended, and we think, if the question there really under consideration be kept in view, and it be also kept in view that the language employed was with reference to that question only, it will appear that nothing there said can reasonably be held to have the effect of announcing a different rule from that sustained by the cases cited *supra*. The bill there was by a private property owner, to enjoin the vacating of a part of a street in a city. This property owner's property was remote from the part of the street proposed to be vacated. It was not shown that the revenues of the city would be impaired by the vacation, or that the vacation would necessitate the opening of streets elsewhere at the expense, in part, of this tax-payer, or that any pecuniary burden would in any way result to the tax-payers of the municipality in consequence of this vacation. The injury to the complainant was precisely that sustained by the entire public, in common with it, except in degree. In referring to the New York cases, and to other cases of like ruling, and in immediately afterwards quoting from Dillon on Municipal Corporations, the purpose was simply to show that we had, in *Colton v. Hanchett*, *supra*, and the other cases cited from this court, gone beyond many respectable courts, and to the extreme limit fixed by any court for allowing a bill to be filed by a tax-payer enjoining municipal action; and hence, that since that case did not fall within the doctrine of our previously decided cases, there was no ground upon which it could be rested.

The next question is, Does the evidence prove sufficient of the material allegations of the bill to sustain the decree? In our opinion it does. The property in controversy is known as block No. 2, of resubdivision of reform school property, and

belonged to the county of Cook. Section 7, of article 10, of the constitution, provides that "the county affairs of Cook County shall be managed by a board of commissioners of fifteen persons." Section 62, chapter 34, of the Revised Statutes of 1874, provides that the board of commissioners of Cook County shall exercise the same power as boards of supervisors in other counties. And section 16, of chapter 30, provides that "the county board may authorize any officer or member to execute and deliver all deeds, etc., necessary in selling real estate belonging to the county; and that such deeds, . . . if made without fraud or collusion, shall be obligatory upon the county."

It seems that one Warfield had made a proposition to the board to give fifty-two thousand dollars for this property, and this was referred to a committee called the "joint committee on finance and public service." Thereupon, on the 24th of August, 1885, Augustus French, a real estate broker, proposed to this committee to buy the property and pay fifty-five thousand dollars for it. On the same day the committee submitted the offer of French to the board, and reported, recommending that the committee be directed to offer the property for sale at the best figure attainable, not less than fifty-five thousand dollars, and this report was adopted. On the 19th of October, 1885, W. H. Colvin made an offer of fifty thousand dollars for the property, accompanying his offer with a check for fifty thousand dollars, and on the same day Ira McCord offered fifty-one thousand dollars for it, accompanying his offer with a check for ten thousand dollars. French, on the same day, made a written offer to the board of fifty-five thousand dollars for the property, accompanying his offer with no check.

The bill, among other things, contains allegations "that no bids were received by said joint committee or by said board, other than those above mentioned; that neither of said bids made by others than said French fell within the scope of the resolution and action of said board; that each of said bids was less than the fifty-five thousand dollars offered by French, and the lowest price at which the same could be sold in accordance with such action; that said board, although under obligations to Cook County to obtain the highest price it could for said property, accepted the bid of Ira McCord, although the same was four thousand dollars less than the bid of French for said property; that said board pretended to disregard the bid of French, for the reason that no check accompanied the

same, but it is alleged no check or draft was requested or required by said board; that when said board intimated a desire that checks or deposits should accompany bids for such property, French immediately produced and tendered to the board a check for ten thousand dollars, on account of said purchase, but said board proceeded to declare the property sold to Ira McCord. It is charged that the pretended sale to McCord is not *bona fide*, but is collusive, and for the purpose of defrauding the county of Cook out of the full value of the property; that such action, and the sale of the property for four thousand dollars less than the bid received therefor, as before stated, increases the burden of taxation upon the property of the complainants and other tax-payers of Cook County," etc.

We do not deem it necessary to recite the facts in evidence in full,—it is sufficient that we believe these allegations to be substantially proved. French, in fact, represented Eugene S. Pike. He was ready to pay fifty-five thousand dollars for the property. The board knew this, yet they professed to sell it to McCord for fifty-one thousand dollars. This was a breach of trust, and a fraud upon the tax-payers to the amount of four thousand dollars. It was not within the discretion of the board, for the board had no authority to give away property.

It is contended, with much plausibility and force, that French held back and did not promptly file his written offer, and that when he did file it he accompanied it with no check. All this is true; yet he did, before the bids were passed upon, present his bid in writing, and when thereafter notified that a check was required, and before the board had adjourned its session or meeting, he presented Pike's certified check for ten thousand dollars. This was not a sale pursuant to a previous advertisement requiring sealed proposals,—it was a mere informal sale, in which there were no specific conditions precedent required before considering propositions. There was no necessity for haste, and even if, technically, the check should have accompanied the offer, it was but justice to require that the *bona fides* of the offer be investigated. No reason is disclosed why the previous resolution of the board to sell the property at a price not less than fifty-five thousand dollars was disregarded. No individual desiring to sell his own property would have acted as this board did. Before the board adjourned the check was furnished, but counsel say it was then too late. But why too late? No contract was signed or deed executed. The board had but resolved (if honest) under a

misapprehension, and it was not too late to recall that resolution.

The following appears in evidence as a transcript of the proceedings of the board:—

After some business was transacted, irrelevant to the present question, "an offer of fifty-five thousand dollars for block two (2) of the reform school property was read, and, on motion of commissioner Van Pelt, action thereon was deferred until after the transaction of the routine business." Then the transcript goes on with the routine business, and when we get to the sixth page we find the joint committee on finance and education submitted the following:—

"The chairman suggested that, as there were several bids for the property, they be read, and directed the clerk so to do.

"Commissioner McClaughrey moved that the offer of Ira McCord, of fifty-one thousand dollars, cash, for the property, be accepted.

"Commissioner Senne protested against the consideration of propositions offering less than fifty-five thousand dollars, as the action of the board did not authorize the receipt of bids for a less amount.

"Commissioner Van Pelt moved that action be deferred for one week. The motion was lost by the following vote:—

"Yeas: Senne, Van Pelt, Wren, Ochs, — 4.

"Nays: Hannigan, Leach, Leyden, MacDonald, Patrick McCarthy, J. J. McCarthy, McClaughrey, Niesen, Wasserman, — 9.

"Commissioner Leach moved the previous question. Carried by the following vote:—

"Yeas: Hannigan, Leach, Leyden, MacDonald, Patrick McCarthy, J. J. McCarthy, McClaughrey, Niesen, Wasserman, — 9.

"Nays: Senne, Van Pelt, Ochs, — 3.

"After debate, the bid of Ira McCord, of fifty-one thousand dollars, was accepted by the following vote:—

"Yeas: Hannigan, Leach, Leyden, MacDonald, Patrick McCarthy, J. J. McCarthy, McClaughrey, Niesen, Van Pelt, Wasserman, — 10.

"Nays: Senne, Wren, Ochs, — 3.

"Commissioner Leyden moved a reconsideration of the vote just taken. The motion to reconsider was laid on the table.

"Commissioner Leyden moved that the county attorney be

instructed to draft a deed of the property to Ira McCord, in accordance with the terms of his proposal, and that the chairman of the board be authorized to sign the same, and that it be attested by the county clerk. Carried by the following vote:—

“Yeas: Hannigan, Leach, Leyden, MacDonald, Patrick McCarthy, J. J. McCarthy, McClaughrey, Niesen, Van Pelt, Wasserman, — 10.

“Nays: Senne, Ochs, Wren, — 3.”

And again: “Commissioner Senne offered a check for ten thousand dollars to guarantee the fulfillment of the proposal of Augustus French, for the purchase of the reform school property; but the chair decided that, as the property was sold by previous action of the board, the check could not be accepted.

“On motion, the board adjourned to Monday, October 26, 1885, at 2 o'clock, P. M.”

It was shown that, by a rule of the board, any member voting with the majority, or any member absent at the time a vote was taken, might move for a reconsideration at any time before the expiration of the next meeting of the board. But even if there had been no such rule, a body acting in respect to a purely ministerial matter, as this body was here acting, could not, by a system of rules of its own making, preclude reconsideration and correction of its erroneous action, whether resulting from haste and want of consideration, or from intentional wrong.

An excuse for the delay of French in closing the trade with the committee is found in the fact that the committee was endeavoring to get him to assume the payment of certain liens for special assessments, amounting to a considerable sum of money, and not within the contemplation of his offer. But it does not follow that the action of the board of commissioners was right, even if he was negligent and careless in what he ought to have done to entitle him to a conveyance. The question is not between French and the board; the question is, whether the board shall be allowed to sell, and McCord shall be allowed to buy, the property for four thousand dollars less than another party is, within the knowledge of the board at the time, willing to pay for it.

Warfield's bid, as well as that of French, seems to have been arbitrarily disregarded. Trust property cannot be arbitrarily or capriciously disposed of; it must be sold for the most that it will bring in market.

McCord has no vested right to have this property on his bid. He did nothing, and parted with nothing, on the faith of the claimed acceptance of his bid before the filing of the bill.

The decree is affirmed.

REMEDIES OF TAX-PAYERS FOR ILLEGAL CORPORATE ACTS, ETC. — The point involved in the principal case as to the right of the individual taxpayer to maintain a suit in equity to obtain relief, where money or property of the municipal body is being wasted, squandered, or misappropriated, is a question of no slight importance, and one which has been the subject of much discussion by the courts. It is argued, on the one hand, that, for such breach of the public trust, the remedy to the individual corporators or taxpayers is to change their rulers at the proper time, or to obtain the aid of the courts through the attorney-general or like public officer; it being said that a private person cannot bring such action when he merely sustains an injury common to all other resident tax-payers, and when he sustains no injury to his private rights, claims no special grievance peculiar to himself, or who does not ask to have such rights enforced, nor seeks the redress or prevention of a threatened wrong to him as a private citizen distinct from that to which all tax-payers are subjected, and that to permit such person to sue by himself would entitle every other person in like position to bring a like suit, and the result would be that the administration of municipal affairs would be impeded, and great injustice follow. On the other hand, it is contended that it is not doubted but the right to a remedy exists, the only question being as to who is the proper party to sue. This being conceded, it is argued that in case the attorney-general or like official refuses to act, or does not proceed with requisite vigor, the tax-payer has no remedy whatever, since there is often a necessity for prompt action to prevent irremediable injury; that the corporation holds its money and other property in trust for the corporators, and that any misappropriation or misuser thereof is an injury to the citizen and tax-payer which gives him a special interest in having the wrong righted. Otherwise he is irreparably injured, since he must contribute his proportion of taxation to replace the property so wrongfully and illegally taken. He has no remedy whatever against paying the tax required to replace such property; and if such action were not permitted, the tendency to abuse of public trusts would increase, and large sums of money be misappropriated, and justice impeded. As necessary to the proper consideration of this question, we will examine, — 1. The powers of municipal corporations; 2. The relation such corporations sustain to the corporators or tax-payers; 3. The purposes of taxation.

POWERS OF MUNICIPAL CORPORATIONS. — The right to a remedy presupposes that a necessity exists therefor by reason of some illegal act done or threatened by a municipal or *quasi* municipal corporation, or its officers, and this involves the question of what corporate acts are illegal, or rather what powers municipal corporations possess. It is a fundamental and well-settled principle underlying all corporate existence that corporations can exercise only such powers as are expressly granted, or which are incident thereto and necessary to enable them to carry those powers into effect, and that such powers will be most strictly construed, particularly upon the subject of appropriation of the public funds: *Davis v. Mayor etc. of New York*, 1 Duer,

451, 535, Bosworth, J.; *Halstead v. Mayor etc. of New York*, 5 Barb. 218; 3 N. Y. 433; Cooley on Constitutional Limitations, 5th ed., 234, 260; *Canon v. Martin*, 69 Am. Dec. 584; *City of St. Paul v. Lardler*, 72 Id. 89; *Law v. People*, 87 Ill. 387; *City of Springfield v. Edwards*, 84 Id. 627; *New London v. Brainard*, 22 Conn. 552; *Oliver v. Keighley*, 24 Ind. 514; *City of Eufaula v. McNab*, 67 Ala. 588; 42 Am. Rep. 118; *Selma v. McMullen*, 46 Ala. 411, 414; *Mayor v. Moay*, 53 Id. 561; *Henderson v. City of Covington*, 14 Bush, 312; *McCoy v. Briant*, 53 Cal. 247; *City of Leavenworth v. Morton*, 1 Kan. 432; *Sherman v. Carr*, 8 R. I. 433; *Blake v. Mayor etc. of Macon*, 53 Ga. 177; *Treadway v. Schmauber*, 1 Dak. 236, 248; *Trustees of First M. E. Church v. City of Atlanta*, 76 Ga. 181, 188. Should there be any appropriation of such funds or property by them not "authorized by charter or by positive law, whether it be done by resolution, ordinance, or under the form of legislation, their act is without authority, and void": *Davis v. Mayor etc. of New York*, 1 Duer, 451, 506. So equity will interfere to prevent a city council from incurring in any manner an indebtedness exceeding that which it may legally contract under its constitution and the laws: *City of Springfield v. Edwards*, 84 Ill. 627.

LEGISLATIVE OR DISCRETIONARY POWERS. — There is, however, a class of cases where the courts refuse to interfere, as where the act complained of is one involving the exercise of legislative or discretionary powers: *Sherlock v. Winnetka*, 59 Ill. 369, 398; *Brush v. City of Carbondale*, 78 Id. 74; *City of Valparaiso v. Gardner*, 97 Ind. 1; *Satterwaite v. Commissioners of Beaufort Co.*, 76 N. C. 153; *Wilson v. Board of Aldermen of Charlotte*, 74 N. C. 748; *Horton v. Mayor etc. of Nashville*, 4 Lea, 39; 40 Am. Rep. 1; *New Orleans, Mobile etc. R. R. Co. v. Dunn*, 51 Ala. 128, 134; *Mayor etc. of Athens v. Camak*, 75 Ga. 429; *Perry v. Worcester*, 66 Am. Dec. 431, and note. But if such discretion has been abused, or not exercised within the prescribed limit of power, or legislation is sought to be made effective by some ministerial act, equity will lend its aid: *City of Valparaiso v. Gardner*, 97 Ind. 1, 5, 6; *New Orleans, Mobile etc. R. R. Co. v. Dunn*, 51 Ala. 128, 134. In a recent case in Georgia, where a city had subscribed for shares in a certain railroad and issued bonds in payment thereof, to redeem which an annual tax was levied upon the city property, it was held, upon a petition in equity at the suit of resident tax-payers, that an injunction would not be decreed to prevent the city from making a new contract with the railroad company to extend its road, since the city authorities had merely exercised their discretionary power *bona fide*, and were not answerable, although such discretion may have been erroneously exercised, and may be injurious in its consequences to the property holders. The distinction was further made, however, that the city incurred no debt with which she was not already burdened, and that it did not appear that a resort to further taxation would be required; that in making the new contract she exchanged one consideration for another which she deemed more valuable, and that it was not the spirit or purpose of the constitution or the law to "deprive these municipalities of the power to save from wreck and ruin the property intrusted to their care": *Mayor etc. of Athens v. Camak*, 75 Ga. 429.

RELATION SUSTAINED BY MUNICIPAL CORPORATIONS TOWARDS TAX-PAYERS. — It was said by the court in *Winston v. Tennessee and Pacific R. R. Co.*, 1 Bart. 60, 75, that "the corporation, as such, so far as it uses the funds or means gathered from the tax-payer, is a trustee, to a certain extent at least, using these funds and collecting them for purposes authorized by law,

and having only authority to use or collect them for such use"; and it is unqualifiedly declared in *Joyce on the Law of Injunctions*, ed. 1877, 295, that "a city corporation is in the nature of a trustee of the money in its treasury for the corporators, for the purposes for which they were incorporated"; and this is almost identically the language used by the court in *New London v. Brainard*, 22 Conn. 552, 556; and it is held in the *Town of Aurora v. Chicago etc. R. R. Co.*, 119 Ill. 246, that money raised for a special purpose, and in the hands of the municipal authorities, is a trust fund, and cannot be appropriated for any other purposes than those intended. To the same effect are the cases of *Webster v. Town of Harwinton*, 32 Conn. 131; *Coulson v. City of Portland*, Deady, 494; *Willard v. Comstock*, 58 Wis. 571, 572; *Pullman v. Mayor etc. of New York*, 49 Barb. 61; *People v. Canal Board of New York*, 55 N. Y. 390, 393; *Milbau v. Sharp*, 15 Barb. 212. So, again, it was expressly declared in *Sherlock v. Village of Winnetka*, 59 Ill. 389, 398, that corporate property is held in trust for the benefit of the corporators and tax-payers, and that "the corporation is bound to administer such property faithfully, honestly, and justly, and if it is guilty of a breach of trust by disposing of its valuable property without any or for a nominal consideration, it will be regarded in the same light as if it were the representative of a private individual or of a private corporation," and that relief would be granted against it as well as against a natural person: See also *Milbau v. Sharp*, 15 Barb. 212. So it was also ruled in *Reynolds v. Mayor etc. of Albany*, 8 Id. 599, that the officials of a municipality are the agents of the corporators and tax-payers, in the disbursement of corporate funds. But, however, it was declared by Harris, J., in *Roosevelt v. Draper*, 7 Abb. Fr. 126, note, that the tax-payer "has no interest, legal or beneficial," in the property owned by a municipal corporation; that the "relation of *cestui que trust* and trustee does not exist between him and the corporation"; and he makes the further nice distinction that such property is simply held upon public trust.

PURPOSES OF TAXATION. — A tax is defined "as a sum of money assessed under the authority of the state on the person or property of an individual, for the use of the state": *Allen v. Inhabitants of Jay*, 60 Me. 124, 128; "for the support of government and all public needs": *Cooley on Taxation*, 2d ed., 1; "to raise money for public, as distinguished from private, purposes, or to accomplish some end or object public in its nature": *Dillon on Municipal Corporations*, 3d ed., sec. 736. It is not our purpose to consider here the limitations upon the legislative power to tax, or to go into the subject of taxation otherwise than, as it affects the remedy of tax-payers for illegal corporate acts, by showing what constitutes a legal exercise of the power of taxation; and in this connection we will assume that "it is a general rule that the legitimate object of raising money by taxation is for public purposes and the proper needs of government, general and local, state and municipal": *Weisner v. Village of Douglass*, 64 N. Y. 91, 99; and that in addition there can be no "legitimate taxation when the money to be raised does not go into the public treasury or is not destined for the use of the government or of some of the governmental divisions of the state": *Hanson v. Vernon*, 27 Iowa, 28; *Allen v. Inhabitants of Jay*, 60 Me. 124, 128; and that taxes may not be diverted for private objects or the special benefit of individuals or persons: *Allen v. Inhabitants of Jay*, 60 Id. 124, 128. It must be conceded, then, that this power of taxation has a limit, and when that limit is passed, and the power illegally exercised, then there must be a remedy to the tax-payer. A distinction is made between, — 1. The mere power of a court of equity to interfere to restrain the collection of taxes affecting only some particular

individuals in their rights; and 2. The right of tax-payers to prevent the collection of a tax illegally levied and affecting every tax-payer, or where, as in the principal case, the question arises of the right of a tax-payer to restrain or prevent illegal corporate acts whereby municipal property is being unlawfully sold, wasted, or squandered, and to replace which he must contribute his *pro rata* of taxes. On the first point, see *Holland v. Mayor etc. of Baltimore*, 60 Am. Dec. 195, note 196 et seq.; 74 Id. 123; 56 Id. 355, 368; *Pierce on Railroads*, ed. 1881, pp. 488 et seq.; 2 *Dillon on Municipal Corporations*, 3d ed., sec. 923; *Sage v. Town of Fifield*, 68 Wis. 546, 555; *Tallace v. Spigener*, 49 Ala. 262, 264; *Dodd v. City of Hartford*, 25 Conn. 232; *New York and Chicago Grain etc. Exchange v. Gleason*, 121 Ill. 502, 512; *Rosenberg v. Weeks*, 67 Tex. 578; *Alabama Gold Life Ins. Co. v. Lott*, 54 Ala. 499; *City Council v. Sayre*, 65 Id. 564; *Elyton Co. v. Ayres*, 62 Id. 413; Am. Law Reg., art. 20, p. 1-16; *Cooley on Taxation*, 2d ed., 760 et seq. As to the second point, we will consider that under the following heads: 1. The right to a remedy; 2. The proper parties complainants; 3. Special instances of suits; 4. New York cases, and states relying thereon; 5. Subscriptions to aid railroads; 6. Other cases; 7. Cases *contra*; 8. Laches; 9. Miscellaneous.

RIGHT TO REMEDY. — We have shown what powers municipal corporations possess, the relation they sustain to the tax-payers in the disposition, management, and control of the public funds or property, the taxing power, and how it should be exercised; and where these powers have been illegally or improperly exercised, and there has been a breach of the trust relation, whereby the burden of taxation will be unjustly increased, there is no doubt whatever, so far as the weight of authority determines the law, of the right of the tax-payer to a remedy in equity. "The chief difference is as to the proper party plaintiff in a bill of this character": *Dillon on Municipal Corporations*, 3d ed., sec. 921, pp. 914, 915; *Place v. City of Providence*, 12 R. I. 1, 5. So it was said in *Winston v. Tennessee and Pacific R. R. Co.*, 1 Bart. 60, 73, that a corporation ought not to be allowed to misapply the trust funds "to an unauthorized purpose, or to create an unauthorized liability upon the individual corporator, so to speak; and when such liability is sought to be created, if it is charged to be beyond the powers of the corporation, and if this charge can be made good by proof, then such attempted liability should, on sound principles, be annulled by a court of equity at the suit of the parties to be affected by it." To the same effect are the words of the court in *Coulson v. City of Portland*, Deady, 494, where it is declared that a court of equity "has jurisdiction over a municipal corporation in regard to its conduct concerning property and franchises held by it in trust for the inhabitants thereof, the same as in the case of a natural person; and that it will enjoin and prevent such corporation from disposing of its property or franchises fraudulently, or for a mere nominal consideration; and this, although the forms of legislation are used to give the transaction the appearance of an exercise of political power for public purposes. The privilege of exemption from judicial interference terminates where legislative action ends." And it is unanimously held by the courts that these municipal corporations are bound to use the corporate moneys and funds for the purposes intended, and in the mode indicated by their corporate charters, and for no other purpose whatever, or equity will give relief: *Kerr's Injunctions in Equity*, 2d ed., 506; *Willard v. Comstock*, 58 Wis. 571, 572. And again, in *People of New York v. Canal Board of New York*, 55 N. Y. 390, 393, the court expressly holds: "That public bodies and public officers may be restrained by injunction from pro-

ceeding in violation of law, to the prejudice of the public, or to the injury of individual rights, cannot be questioned. A usurpation of powers may by this process be prevented, in a proper case, and a waste, misapplication, or diversion of public property or trust funds be enjoined, and an alienation or renunciation of a public franchise be forbidden and restrained." Nor is it necessary to wait until the intended misappropriation or apprehended illegal act is consummated, or the unlawful tax levied, or about to be actually collected; but the court will, in a proper case, interfere to prevent the wrongful act or contemplated injury: *Joyce on the Law of Injunctions*, ed. 1877, p. 295; *Place v. City of Providence*, 12 R. I. 1, 5; but see *Pomeroy's Eq. Jur.*, sec. 266; *Cooley on Taxation*, 2d ed., 765 et seq. And where a legislative act authorized the levy and collection of a special tax, a bill in equity was maintained to prevent such levy: *Brodnax v. Groom*, 64 N. C. 244. So a bill in equity will lie to prevent the levy and collection of a tax to pay a debt made in excess of the constitutional limit: *Howell v. City of Peoria*, 90 Ill. 104. On the right to a remedy, see also subtitles herein, "Subscriptions to Railroads" and "Other Cases."

PROPER PARTIES COMPLAINANT. — The attorney-general, or like public law officer, has undoubtedly, by a great preponderance of authority, the right, in all cases of such illegal exercise of corporate privileges, whenever public money or property is being unlawfully used in such a manner as to affect the tax-payer's burden, to interfere by a bill in equity brought in his name or in the name of the state at the relation of persons interested, in all cases properly of equitable cognizance: *Cooley on Taxation*, 2d ed., 764; *Dillon on Municipal Corporations*, 3d ed., sec. 912, p. 904; 2 *High on Injunctions*, 2d ed., p. 857, sec. 1303; *State ex rel. Huston v. Commissioners of Perry County*, 5 Ohio St. 497. In England, where it is sought by suit to enforce a public trust against a municipal corporation, the attorney-general is the proper party, and an individual, though a member of such corporation, claiming to be entitled by reason of a personal benefit, cannot maintain such action at his own instance: *Joyce on the Law of Injunctions*, ed. 1877, 293. Although in *Smith v. Township of Raleigh*, 3 Ont. Ch. Div. 405, where the question was raised whether a rate-payer or the attorney-general should bring the suit, as against a township corporation for certain alleged irregularities in using money raised by tax for a special purpose, the court made the distinction that the case in question was one in which, not the public, but only a limited number of the public, was interested, and that therefore the attorney-general need not be made a party. In the case of *Attorney-General v. Wilmington*, 4 Del. Ch. 575, it was held that a suit could be maintained in chancery by the attorney-general to prevent the incurring of an indebtedness in excess of the corporate power, and to prevent the purchase by the municipality of lands for a park. So, also, at suit of such public officer, to prevent the diversion of money—raised by taxation for general and necessary expenses of the county—to the erection of county buildings: *State v. Commissioners of Marion County*, 21 Kan. 419, 432; and such suit was maintained to prevent the issue of certain school bonds: *Board of Education v. State*, 26 Id. 44. So *mandamus* may be had at the instance of the attorney-general, as plaintiff, to compel performance of a public duty by a municipality: *Attorney-General v. Boston*, 123 Mass. 460. The case of *State v. Saline County Court*, 51 Mo. 350, 363, 364, 11 Am. Rep. 454, was an action brought by the circuit attorney in the name of the people to obtain a decree that certain public officials be enjoined from issuing any bonds in payment of subscriptions to certain railroad stocks, and from levying or collecting taxes to pay the bonds. The court held that the action could

be maintained, and said: "To the argument that in this and similar cases the tax-payer has a complete and efficient remedy for the alleged violation of the law and the constitution, it is to be said that it is no argument against the right of the state to prevent public corporations from violating the law, that private individuals have the same right when their private interests are affected": *State v. Saline Co. Court*, 51 Mo. 368; and again: "It is possible, too, for the corporation, conscious that they are about to do an illegal act, to take such steps that when the act is done and the bonds issued they are beyond the jurisdiction of the court, so that it is very difficult, if not impossible, for the tax-payer to obtain redress. I cannot think that there is furnished any effectual protection to the tax-payer from being compelled to pay an illegal tax, or to the state for the violation of the constitution or the law": *Id.* 369. The cases of *Davis v. Mayor etc. of New York*, 2 Duer, 663, and *People v. Miner*, 2 Lans. 396, are cited, and the latter case criticised at length and disapproved.

RESIDENT TAX-PAYERS MAY SUE. — While there are numerous and well-considered opinions in New York (see cases below) prior to the statute (1872, chapter 161), and in other states which followed the New York cases and the line of reasoning adopted by them, to the effect that a private citizen and tax-payer cannot, in the absence of a special interest or injury to his individual rights not suffered by him in common with all other tax-payers, maintain an action in equity by himself, or with others, to prevent any threatened illegal act which might be oppressive in its results to the whole community by creating unjust or excessive taxation, yet the more recent cases determine, by a great preponderance of authority, that a single tax-payer, or a number of them, may have a remedy in equity upon his or their suit to prevent municipal, or quasi municipal, corporations and their officers from levying unauthorized taxes, or from doing any illegal act in relation to the corporate moneys or property whereby the burden of taxation would be unjustly increased; and this relief is granted, in many cases, upon the ground that such tax-payer would, if the threatened illegal act complained of were consummated, be specially injured as a tax-payer, and that such injury would be irreparable: *Burroughs on Taxation*, ed. 1877, 448; *New Orleans etc. R. R. Co. v. Dunn*, 51 Ala. 123, 134; *Davenport v. Kleinschmidt*, 6 Mont. 502, 521, 522; *Willard v. Comstock*, 53 Wis. 565; *Pomeroy's Remedies and Remedial Rights*, 2d ed., sec. 142; *Place v. City of Providence*, 12 R. I. 1, 5; *Cooley on Taxation*, 2d ed., 764; *Dillon on Municipal Corporations*, 3d ed., sec. 922, p. 947; 1 *Pomeroy's Eq. Jur.*, ed. 1881, sec. 260, p. 277; *Winston v. Tennessee etc. R. R. Co.*, 1 Baxt. 60, 73; *Fitzgerald v. Harms*, 92 Ill. 372; *City of Springfield v. Edwards*, 84 Id. 627; *Wheeler v. Philadelphia*, 77 Pa. St. 338, 347, 348; *Curtienius v. G. R. & Ind. R. R. Co.*, 37 Mich. 583; *Lynch v. Eastern La F. & M. R. R. Co.*, 57 Wis. 430, 435; *London v. City of Wilmington*, 78 N. C. 109, 111; *Smith v. Magourick*, 44 Ga. 163; *Sinclair v. Comm'rs of Winona County*, 23 Minn. 407; *Hodgman v. Chicago etc. R. R. Co.*, 20 Id. 48, 54; *Merrill v. Plainfield*, 45 N. H. 126, 134; *Barr v. Deniston*, 19 Id. 170, 180; *Allison v. Louisville etc. R. R. Co.*, 9 Bush, 247, 252; *Sherman v. Carr*, 8 R. I. 431; *Hoopes v. Wyatt*, 63 Iowa, 284; *City of Valparaiso v. Gardner*, 97 Ind. 1; *Rice v. Smith*, 9 Iowa, 570, 576; *Town of Jacksonport v. Watson*, 33 Ark. 704; *Wright v. Bishop*, 88 Ill. 302; *Chestnutwood v. Hood*, 68 Id. 132; *Colton v. Hanchet*, 13 Ill. 615; *Drake v. Phillips*, 40 Id. 392; *Beauchamp v. Board of Supervisors*, 45 Id. 274; 2 *High on Injunctions*, 2d ed., 853; *Newmeyer v. Missouri etc. R. R. Co.*, 52 Mo. 81; 14 *Am. Rep.* 394; *Mayor etc. of Baltimore v. Gill*, 31 Md. 375, 394; *Crampton v. Zabrickie*, 101 U. S. 609; *Normand v. Otse County*, 8 Neb. 18, 21. "The misappropriation of corporate funds," *de*
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declares the court in *Willard v. Comstock*, 58 Wis. 571, 572, "would not render the tax levied to repair the waste or supply the deficiency illegal. . . . The misappropriation of the public moneys forms good ground for such an injunction by the citizen and tax-payer. . . . When the amount thus misappropriated is subsequently needed for legitimate purposes, a citizen cannot resist the necessary tax to supply the deficiency. The same principle is applied to the misappropriation of corporate property": See also *Sage v. Town of Fifield*, 68 Wis. 552.

SPECIAL INSTANCES OF SUITS BY TAX-PAYERS. — At the instance of a taxpayer a court of equity will restrain a city from appropriating moneys for a celebration on Independence Day: *New London v. Brainard*, 22 Conn. 552, 556. So an injunction was granted, at the suit of a tax-payer, to restrain a city from paying money to transport the Liberty Bell from New Orleans to Philadelphia, notwithstanding that an ordinance was passed to defray such expenses, and also the expenses of a committee appointed to take charge of the same, the ordinance being declared illegal, null, and void: *Bayle v. City of New Orleans*, 23 Fed. Rep. 843. And a suit may be maintained to prevent proceedings to collect an illegal tax to pay for the site of a school-house: *Mann v. Board of Education*, 53 How. Pr. 289; or the erection of a school building: *Rothrock v. Carr*, 55 Ind. 334. So, also, to determine whether a law authorizing an assessment or expenditure is valid or not: *Wells v. Bain*, 75 Pa. St. 39; and to prevent annexation, under a city ordinance, of territory which would largely increase taxation: *Pittsburg's Appeal*, 79 Id. 317; or to prevent, on the ground of irreparable injury, the issue of state bonds, when the act authorizing them is unconstitutional: *Galloway v. Chatham R. Co.*, 63 N. C. 147; but see Id. 165. And a suit lies to prevent the unauthorized publication of a delinquent tax list by the county commissioners, and the payment therefor out of the public funds: *Sinclair v. Commissioners of Winona County*, 23 Minn. 404; and to restrain city officials from paying money to defray the expenses of parties sent to procure legislation to authorize building a bridge: *Henderson v. City of Covington*, 14 Bush, 312. So an action may be had in equity to prevent a municipal corporation from purchasing real estate, when the object was to control the same, and thereby compel a citizen, with whom it was in litigation, to settle or abandon the same: *Place v. City of Providence*, 12 R. I. 1, 5; see *Lewis v. City of Providence*, 10 Id. 97. And equity will enjoin the payment of warrants illegally drawn by supervisors on the county treasurer against the general fund: *Andrews v. Pratt*, 44 Cal. 309; or restrain county commissioners from unlawfully appropriating county funds to aid an agricultural society to pay its debts; and this, although the county auditor has issued the order for the payment of such appropriation: *Warren County Agricultural etc. Co. v. Barr*, 55 Ind. 30. So citizens and tax-payers have the right to enjoin the collection of taxes illegally laid to procure a new steam fire-engine in place of the old one: *Hudson v. Mayor etc. of Marietta*, 64 Ga. 286; or to prevent the payment of bounty illegally ordered by the town during the civil war: *Webster v. Harwinton*, 32 Conn. 131; *Terrett v. Town of Sharon*, 34 Id. 105; *Oliver v. Keightley*, 24 Ind. 514. And where the officers of a municipality, in excess of their power, purchased land, and erected academy buildings thereon, for private purposes and for private gain, and issued the corporate bonds therefor, a large proportion of which were taken by members of the common council, some of the members being also trustees of the academy, it was held to be such a breach of trust against the tax-payers as to bring the action within the equitable jurisdiction of the court, and that relief would

be granted, at the suit of such tax-payers, to prevent the levy and collection of a tax to pay the interest on the bonds: *Sherlock v. Winnetka*, 59 Ill. 389. Tax-payers may maintain such actions under the statute in Ohio: Rev. Stats., sec. 5848-5851; *Counterman v. Dublin Township*, 38 Ohio St. 515; and under the statute in Massachusetts such right exists upon the petition of not less than ten taxable inhabitants, but independently of the statute there is no such right: *Carlton v. Salem*, 103 Mass. 141, 143. For New York, see sub-title herein, "New York Cases."

NEW YORK CASES. — The case of *Mayor etc. of Brooklyn v. Mcserole*, 23 Wend. 132 (1841), although frequently cited as authority in those causes which hold *contra* to the doctrine above stated, is not in point, since the question there was not one of tax-payers seeking a remedy, either at their own instance or through the attorney-general, but was simply a case where certain real-estate owners sought the aid of chancery for relief against an alleged illegal assessment of their land for widening a highway; and the court held that it had no jurisdiction in the premises. Nor was *Moore v. Smedley*, 6 Johns. Ch. 28 (1822), — frequently relied on, — a case where the question of tax-payers as parties was raised. The cases of *Christopher v. Mayor etc. of New York*, 13 Barb. 567 (1852); *De Baun v. Mayor etc. of New York*, 16 Id. 392 (1853), — dissenting opinion, 2 Edmonds's Select Cases, 396; *Milhan v. Sharp*, 15 Barb. 193, 218 (1853); *Stuyvesant v. Pearsall*, 15 Id. 244 (1853), — were all cases in which the court decided that a suit in equity would lie at the petition of tax-payers to restrain misappropriation of money, or the sale of municipal property at a nominal valuation, the question being directly adjudicated in each case. In 1853, it was held, in the case of *Davis v. Mayor etc. of New York*, 2 Duer, 663, 14 N. Y. 506, 67 Am. Dec. 186, that where the alleged wrongful corporate act worked a special injury, a tax-payer might sue in his own name; but that the attorney-general was a necessary party where the alleged wrongful act affected the public at large. In 1866, it was declared by the court in *Shepard v. Wood*, 13 How. Pr. 48, 50, that "any tax-payer, on behalf of himself and other tax-payers, may ask the interposition of this court in a proper case, whenever his or their interests are likely to be injuriously affected by any person or corporation, or other body of persons, acting or pretending to act by lawful authority, when they assume power over property which the law does not give them, when they go beyond the line of their authority and infringe or violate the rights of others, or when they attempt or are about to exceed their powers by levying a tax, or by misapplying their funds, or their own credit, to an object beyond their authority, — whenever the purpose of such body, if carried out, would constitute a breach of the law or of their duty, — that the appropriate mode of relief in any such case is by injunction."

Though in *Gillespie v. Broas*, 23 Barb. 370 (1856), the court refused to interfere upon a suit in equity by certain tax-payers to prevent the alleged illegal appropriation of county funds towards the erection of a court-house and jail, it being claimed that there was no authority in the officials sought to be enjoined to act in the premises. And in *Wetmore v. Story*, 22 Id. 414, 484 (1856), the court declared that the remedy must be sought in the name of the people. But the case of *Wood v. Draper*, 4 Abb. Pr. 322, 24 Barb. 187, 195 (1857), maintained the right of a tax-payer to sue, in a proper case, for equitable cognizance.

The case of *Roosevelt v. Draper*, 7 Abb. Pr. 106 (1858), 23 N. Y. 318 (1861), decides that the tax-payer of a city may not maintain an action to obtain the cancellation of a deed of land owned by the city, the claim being that

such sale was illegally and improvidently made, and would increase the taxes of the plaintiff. The court said that to allow such claim "would produce incalculable mischief, and violate the well-established principle that one person cannot sustain a civil action for an injury of a public nature, when the damage he sustains is no greater than that sustained by every other member of the community. However, it was held in *Davis v. Mayor etc. of New York*, 14 N. Y. 506, 52, 67 Am. Dec. 188, 1 Duer, 451, 506, that there was no principle of equity which would prevent the bringing of such action by a tax-payer; and in *People v. Mayor etc. of New York*, 32 Barb. 102, 104, it was decided that a suit would lie at the instance of the people to prevent the execution of leases for ferry privileges extending through a term of years, and by which rights of property would be granted to the injury of the public, especially when the actual granting of such leases would be difficult to set aside. The case of *Rosevelt v. Draper*, *supra*, was then limited as to the general rule that equity will not interfere to restrain the assessment and collection of a tax, in *Mann v. Board of Education*, 53 How. Pr. 289, 297. In *Hills v. Peetskill Savings Bank*, 26 Hun, 161 (1882), the court granted relief at the suit of a tax-payer against the negotiation of bonds illegally issued, and the court in this case reviews the statutes passed in New York relating to tax-payers' rights to sue; and in *Osterhout v. Hyland*, 27 Id. 167, 98 N. Y. 222, *Latham v. Richards*, 15 Hun, 129, and *Metager v. Attica and Arcade R. R. Co.*, 79 N. Y. 171, relief was granted under the statute (1872, c. 161); and section 1925 of the code now provides that an action may be brought by a tax-payer. In *Tift v. City of Buffalo*, 65 Barb. 460 (1873), it was held that a tax-payer could not bring a suit for relief against illegal corporate acts. So does the case of *Phelps v. City of Watertown*, 61 Id. 121, 123 (1871). The case of *Kilbourne v. St. John*, 59 N. Y. 21, 17 Am. Rep. 291, holds that an individual tax-payer may not maintain a suit in equity after a tax has been collected and paid into the hands of the official custodians to restrain them from devoting such proceeds to the purposes for which they were collected, viz., that of paying the interest on certain bonds issued by the town to aid in the building of a railroad, it being claimed that such bonds were illegally issued, and, in consequence, void. The opinion was by a divided court, one judge not voting, and two dissenting. This case was based upon the cases of *Moore v. Smedley*, 6 Johns. Ch. 28, *Heywood v. City of Buffalo*, 14 N. Y. 534, and *Susquehanna Bank v. Board of Supervisors of Brown Co.*, 25 Id. 312, cases which do not consider the right of a tax-payer to sue in equity in that capacity, but which simply determine whether equity would entertain jurisdiction to prevent the collection of an illegal tax or assessment, the parties specially aggrieved being the petitioners in that case. It was even doubted in that state prior to the statute of 1872 whether the attorney-general could bring an action in the name of the people to enjoin a municipal corporation: *People v. Miner*, 2 Lans. 396 (1868), where the decision in *Davis v. Mayor etc. of New York*, 2 Duer, 663, was explained, and *dicta* disapproved as to the right of the attorney-general to sue in such cases. But in the case of *People v. Tweed*, 13 Abb. Pr., N. S., 25, 53 (1872), the case of *People v. Miner*, *supra*, was opposed so far as this point was concerned; see also *Supervisors of New York v. Tweed*, 13 Abb. Pr., N. S., 152; *Ketchum v. City of Buffalo and Austin*, 14 N. Y. 370; *People v. Mayor etc. of New York*, 32 Barb. 35 (1859); *People v. Lowler*, 7 Abb. Pr. 158 (1858). The gross abuses which grew out of this construction of the law are set forth in *Ayres v. Lawrence*, 59 N. Y. 192.

OTHER STATES FOLLOWING NEW YORK. — The doctrine laid down in the later New York cases prior to 1872, that such a suit could not be maintained in

equity by a tax-payer, is followed in *Wood v. Bangs*, 1 Dak. 179, 192, which was a case brought by citizens and tax-payers to prevent the issue and collection of certain warrants issued to aid in erecting a court-house. So the cases of *Craft v. Jackson Co.*, 5 Kan. 518, *Bridge Co. v. Comm'rs of Wyandotte Co.*, 10 Id. 326, 331, follow the New York decisions in this respect; and in *State v. McLaughlin*, 15 Id. 228, 22 Am. Rep. 264, it was held that an action could not be maintained by the attorney-general to restrain the collection of a tax levied to pay bonds which had been illegally issued by a school district, and were therefore void. That case, however, seems to turn upon the point that the tax-payers, either individually or collectively, had in themselves an adequate and complete remedy, and that therefore the state would not interfere to protect them from the illegal acts of a public officer, or to restrain by injunction apprehended wrong on the part of a public corporation. The cases of *Davis v. Mayor of New York*, 2 Duer, 663, and *Attorney General v. Miner*, 2 Lans. 393, are relied on. It was held, however, that a person who sends his children to school has a right to the interposition of a court of equity to prevent the school-house being used for any other purpose than that of keeping school therein, upon showing that his children's books were injured by the school being let to societies, etc., for religious and political meetings, and the court, in considering the question, determined that this was sufficient to entitle him to maintain the action, although his interest as a tax-payer was declared insufficient: *Spencer v. School District No. 6*, 15 Kan. 259. *Dawson v. Insurance Co.*, 15 Minn. 136, follows the New York cases; but the law there, as adopted in *Hodgman v. Chicago etc. R. R. Co.*, 20 Id. 48, is *contra*, and in line with the doctrine that such suit may be had by a tax-payer. In Louisiana a creditor and tax-payer was held to have no right to interfere in the administration of municipal affairs, and that equity could take no cognizance of his suit in that capacity: *Louisiana National Bank v. City of New Orleans*, 27 La. Ann. 446. The court said: "The plaintiff has no more right to the writ which it seeks than any other creditor and tax-payer, and we apprehend the law could not be administered if every person occupying the same position could rush into court for an injunction by which he could exercise a supervisory control over the administration of government in the city."

SUBSCRIPTIONS TO AID RAILROADS. — The cases of most frequent occurrence are those relating to subscriptions made by municipalities and like corporate bodies in aid of railroads, and it has been held that a court of equity will enjoin, at the suit of tax-payers, the issue of bonds in aid of a railroad company, when the proceedings prerequisite to a valid issue of such bonds are not properly conducted: *Reidl v. Supervisors of Henry County*, 31 Gratt. 685; *Counterman v. Dublin Township*, 38 Ohio St. 515; *Lynch v. Eastern La F. & M. R. R. Co.*, 57 Wis. 430, 435; *Lauson v. Schnellen*, 33 Id. 288; *Lane v. Schromp*, 20 N. J. Eq. 82; *Campbell v. P. & D. R. R. Co.*, 71 Ill. 614; *Curtenius v. G. R. & Ind. R. R. Co.*, 37 Mich. 583; *Stokes v. Scott County*, 10 Iowa, 166; *Metzger v. Attica and Arcade R. R. Co.*, 79 N. Y. 171; *New Orleans, Mobile etc. R. R. Co. v. Dunn*, 51 Ala. 128; *Board of Commissioners of Delaware County v. McClintock*, 51 Ind. 325; *City of Lafayette v. Cox*, 5 Id. 38; *Treadway v. Schnauder*, 1 Dak. 236; *Hodgman v. Chicago and St. Paul R. R. Co.*, 20 Minn. 48, 54; *Winston v. Tennessee and Pacific R. R. Co.*, 1 Baxt. 60. And this, although a remedy was provided by a special act: *Reidl v. Supervisors of Henry County*, 31 Gratt. 685. And the action may also be maintained to prevent the negotiation of such bonds, when unlawfully issued: *Allison v. Louisville, H., U. & W. R. R. Co.*, 9 Bush, 247, 252; *Metzger v. Attica and Arcade R. R. Co.*, 79 N. Y. 171; *Marshall v. Silliman*, 61 Ill. 218. And to have such bonds sur-

rendered and canceled: *Bound v. Wisconsin Central R. R. Co.*, 45 Wis. 543; *Marshall v. Sullivan*, 61 Ill. 218. And it is a good ground that the company does not fulfill the conditions under which the town made its subscription: *Wagner v. Meety*, 69 Mo. 150. So a suit in equity may be maintained by a tax-payer to prevent the hypothecation of shares of stock of a certain railroad company owned by the city, and the investment of funds so raised in aid of another railroad company; and at such suit an ordinance of the city authorizing such act was declared unconstitutional and void: *Mayor etc. of Baltimore v. Gill*, 31 Md. 375, 393. And such suit lies to prevent subscription to railroads, or other private corporations, etc.: *Wright v. Bishop*, 88 Ill. 302; *Winston v. Tennessee and Pacific R. R. Co.*, 1 Baxt. 60; *Newmeyer v. Missouri and Mississippi R. R. Co.*, 52 Mo. 81; 14 Am. Dec. 394. And to restrain the levy and collection of taxes to pay interest on bonds illegally issued: *Marshall v. Sullivan*, 61 Ill. 218; *Ruis v. Calhoun*, 100 Id. 392; *Coulson v. City of Portland, Deady*, 481. So also to enjoin a municipality from indorsing the bonds of a railroad corporation, although it was specially authorized by law to "subscribe to stock in railroads": *Blake v. Mayor etc. of Macon*, 53 Ga. 172. And an injunction will be granted to prevent the diversion of a fund, raised by taxation, from the purpose for which it was collected; as in a case where taxes were raised to pay bonds issued in aid of a railroad corporation, it was held that they could not be applied to any other purpose: *Town of Aurora v. C., B., & Q. R. R. Co.*, 119 Ill. 246. Nor is a tax-payer precluded from maintaining such actions by the fact that he knew that the railroad in question was being constructed, and that his property as well as the township itself was benefited: *Counterman v. Dublin Township*, 38 Ohio St. 515. It is held, however, that where a tax had already been collected under a void ordinance, yet being in the city treasury, it became thereby municipal property or funds, and that no individual could maintain any proceeding to control the disposition of the same, though, in case it should appear that there was an attempted or threatened illegal appropriation thereof, it might be restrained upon the complaint of some proper party, representing the whole public, whose property it was: *Coulson v. City of Portland, Deady*, 481, 501, 502.

OTHER CASES. — There are numerous cases other than those of railroad-aid subscriptions and bonds where courts of equity have granted relief to tax-payers upon their own suit. It was held in *Allen v. Inhabitants of Jay*, 60 Me. 124, at the suit of ten taxable inhabitants (under a statute), that the court would enjoin a town from issuing bonds, or from loaning its credit to aid a manufacturing company, and that any legislative act authorizing such loan was unconstitutional and of no validity. Such suit lies to prevent payment of moneys voted to the selectmen of a town as an indemnity for damages and costs incurred by them in certain lawsuits brought against them for alleged misconduct in managing certain check-lists during their official term: *Merrill v. Plainfield*, 45 N. H. 126, 132. And equity will enjoin the collection of a judgment obtained by a school-teacher for compensation for his services, it appearing that he had not complied with the provisions of law prerequisite to obtaining such compensation: *Barr v. Deniston*, 19 Id. 170. So equity will interfere to prevent the unlawful appropriation of the municipal funds for the purpose of maintaining a free ferry outside the corporate limits: *Town of Jacksonport v. Watson*, 33 Ark. 704. And a board of supervisors of a city may be enjoined from passing an ordinance which is not within the scope of its corporate powers, and which, if passed, would work irreparable injury, and this although the ordinance would be void if passed: *Spring Valley Water Works v. Bartlett*, 16 Fed. Rep. 615. So also chancery

will enjoin the refunding of taxes erroneously and illegally collected: *Hosper v. Wyatt*, 63 Iowa, 264. So it may enjoin a public official from illegally issuing and negotiating county bonds, although such act be recommended by the grand jury of the county: *Dent v. Cook*, 45 Ga. 323. And such suit in chancery lies to restrain illegal expenditures of county moneys in building a court-house: *Rice v. Smith County Judge*, 9 Iowa, 570, 576; especially when the "letting to receive" bids was done at a time and in a manner different from that provided by the act authorizing such building: *Board of Comm'rs of Benton Co. v. Templeton*, 51 Ind. 266. It is said to be a proper case for chancery, and that that court will, at the suit of the tax-payers of a county, enjoin the collection of a tax levied without legal authority, and void: *Vance v. Davis*, 27 Ga. 354. Where a special act provided for the organization of a permanent board of education, and gave to the mayor and common council power to raise funds by taxation, or by issuing bonds, or otherwise pledging the city's credit for the "establishment and maintenance of such public schools as may be established by said board of education, and as may be required of them for said purpose"; and said section was impliedly repealed by a later act vesting the power to raise such funds solely in the mayor and common council, and giving the power to apply the same at their discretion. It was held, at the suit of certain citizens and tax-payers, that equity would interfere to restrain the board of education from requiring the mayor and council from levying or collecting any tax for such school purposes, or from issuing or negotiating bonds, or otherwise pledging the city's credit therefor. But the court said that "if such tax be collected, it may be used by the mayor and council at their discretion": *Board of Education v. Barlow*, 49 Ga. 232, 242.

CASES CONTRA. — In the following cases relief has been refused, not on account of the fact that the suit was improperly brought as to the parties, but for other reasons. Where it was sought to restrain certain county officials from levying taxes to pay the interest on railroad bonds issued in behalf of the township, the relief was refused, on the ground that it did not appear that the defendants had ever threatened or attempted to levy the taxes, and also on the ground that the act under which the bonds were issued, having been declared unconstitutional and void, and the levying of taxes in like cases, except upon order of court, having been made a statutory offense, it could not be presumed without proof that the acts complained of were done in violation of the constitution and of the law: *State v. Hager*, 92 Mo. 511, 515. And chancery will not interfere to restrain the collection of a tax levied to pay bonds issued for sanitary improvements in a municipality; and where such bonds are in the hands of third parties who are *bona fide* holders for value, the court will not inquire into claimed irregularities in giving notice of the election by virtue of which the bonds were issued: *Gresley v. City of Jacksonville*, 17 Fla. 174. Nor will it lend its aid at the instance of a taxpayer to restrain the appropriation by a municipal corporation of moneys to settle a disputed claim arising out of a contract not *ultra vires*: *Warren v. St. Paul*, 4 Law & Eq. Rep. 556. So where gas-works are the property of a city, equity will not interfere to prevent its borrowing money to pay debts contracted therefor: *Wheeler v. Philadelphia*, 77 Pa. St. 339. And upon a bill in equity setting out that certain ordinances had been passed and contracts made in relation to the supply and distribution of water, which would necessitate illegal taxation, and further alleging that the municipality intended to impose such illegal tax, and pledge its credit, and asking for relief, the court, upon demurrer, held that the action could not be maintained: *Carlton v.*

Salem, 103 Mass. 141, 143. So the court, as a court of chancery, refused its aid to prevent the city treasurer from carrying into effect certain votes of the city council authorizing a subscription to railroad stock, or to prevent it from negotiating loans therefor: *Johanna v. Thorndike*, 56 Me. 32. Nor can an equitable suit be maintained to restrain a city from paying a water company a certain annual sum to supply the city with water, such act not being unconstitutional, as incurring an indebtedness in excess of its powers: *Grant v. City of Davenport*, 36 Iowa, 396. But *contra*, where such contract would create an indebtedness in excess of the constitutional limit, or encroach upon other corporate funds not intended to be applied to such purpose: *City of Valparaiso v. Gardner*, 97 Ind., 1. Nor will such suit lie by a tax-payer to enjoin the circulation of bonds void in the hands of innocent holders, since such tax-payer could not be injured by bonds which were uncollectible against the city: *McCoy v. Bryant*, 53 Cal. 247; see *Linden v. Case*, 46 Id. 171. In California a court of equity will not interfere at the suit of a tax-payer to prevent a board of supervisors from auditing or ordering paid alleged illegal claims against the county: *Merriam v. Board of Supervisors*, 72 Cal. 517; although the court says: "In other states it is true such suits have been maintained, although the rulings do not seem to be uniform upon the subject": 72 Id. 518.

LACHES. — The remedy should be promptly sought, or otherwise the rights of third parties may have accrued so as to render it more inequitable to grant relief to the complainant than to refuse it; as in a case where a statute authorized the issue of certain railroad bonds by a city, provided its qualified electors should vote to carry into effect the provisions of the act, and an election was had, and the result being favorable, the bonds were duly issued in accordance with the statute, and passed into the hands of third persons who were *bona fide* holders. Upon a bill in equity, at the suit of individual citizens and tax-payers, setting forth certain claimed irregularities in the election, and assailing the validity of the tax sought to be enjoined, and asking for an injunction to prevent the collection of the tax, and also that the bonds be declared void, it was held that if the alleged irregularities had been shown at the proper time they would have furnished a sufficient reason for granting the relief sought, and that if the city authorities, who were authorized to act in the premises, "were taking any steps in violation or disregard of the provisions of the statute, then the tax-payers of the city, at any time before the bonds passed into the hands of *bona fide* holders, could have intervened, and by injunction arrested such illegal act before its consummation": *State v. City Council of Montgomery*, 74 Ala. 226. So where an injunction was asked to restrain the payment of moneys appropriated by a town to celebrate certain anniversaries, and it appeared that the petitioners — tax-payers — had been cognizant of the vote making such appropriation, and had stood by and permitted third parties to make contracts and incur liabilities in good faith, it was held that the petitioners had been guilty of laches and unreasonable delay, and were not entitled to relief: *Tush v. Adams*, 10 Cush. 252. But where a town illegally appropriated money to pay for uniforms of a military company, it was held that equity would interfere on the petition of tax-payers (under the statute) to prevent the payment of the money for the purpose for which voted, although the uniforms had been purchased and placed in the armory as town property: *Claylin v. Inhabitants of Hopkinton*, 4 Gray, 502. It is held in *Willard v. Comstock*, 58 Wis. 565, 576, that a tax-payer has been guilty of no laches where the fraud claimed did not come to his knowledge until just before the action was brought, and the fraud had not

been consummated nor the scheme fully carried out. But equity will not take cognizance to prevent the payment of a balance of money raised by taxation and authorized by vote to be paid over by the treasurer of a town for the purposes of a public park, the land having been purchased by virtue of said vote, and part of the money raised therefor having been expended for that purpose, and it was held that it made no difference whether the vote was legal or the levy unlawful. The suit was brought by the attorney-general: *Attorney-General v. Burrell*, 31 Mich. 25; see Cooley on Taxation, 2d ed., 768.

MISCELLANEOUS. — It is error to admit directors of a railroad company as defendants in a suit to prevent the collection of a tax to aid a subscription to such company: *Jager v. Doherty*, 61 Ind. 528; and in a suit by a tax-payer against municipal officers the state need not be made a party: *Neumeyer v. Missouri and Mississippi R. R. Co.*, 52 Mo. 81; 14 Am. Rep. 394. Where a suit is pending against the corporation a tax-payer has no right to come in and defend: *Cornell College v. Iowa County*, 32 Iowa, 520. The case of *Willard v. Comstock*, 58 Wis. 565, 577, goes to the extent of deciding that the tax-payers are "the only proper parties plaintiff," and that the state has no interest in such a suit, and that the attorney-general is not a party.

CARTWRIGHT v. MCGOWN.

[121 ILLINOIS, 383.]

MARRIAGE IS VOID, AND NO DECREE IS REQUIRED TO AVOID IT, if either of the contracting parties has a husband or wife then living and undivorced.

VOID MARRIAGE IS GOOD FOR NO LEGAL PURPOSE. Its invalidity may be proved at any time, in any court, and by any person.

MARRIAGE OF ZERELDAY CACEY IS PROVED BY CERTIFICATE of the marriage in which the woman's name is spelled "Serelda," and a license in which it is written "Seralda," accompanied by evidence showing the assumption of marital rights and obligations by the parties, although the marriage, if celebrated at the time named in the certificate, must be held void because the husband had a prior wife then living and undivorced.

FROM CELEBRATION OF MARRIAGE, LAW PRESUMES CONTRACT OF MARRIAGE, the capacity of the parties, and everything essential to a valid marriage. This presumption is overcome by proof that one of the parties had no capacity to contract marriage, because he had living and undivorced a wife by a prior marriage.

MARRIAGE. — SEXUAL INTERCOURSE, which the parties know to be contrary to law, forms no element of marriage.

MARRIAGE IS NOT VOID BECAUSE FORMALITIES PRESCRIBED BY STATUTE HAVE NOT BEEN OBSERVED; nor because solemnized without a license, when such solemnization is forbidden.

MARRIAGE IS CIVIL CONTRACT, MADE IN DUE FORM, by which a man and woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge towards each other the duties imposed by law upon such relation. No solemnization or other formality, apart from the agreement itself, is necessary; nor need there be any witnesses.

MARRIAGE. — AGREEMENT FOR PRESENT COHABITATION, and for a marriage to be celebrated at some future time, is not marriage.

MARRIAGE IS PRESUMED WHERE PARTIES HAVE AGREED TO MARRY AT SOME FUTURE TIME, and then have had *copula*, which is lawful only in the married state. In such cases the copulation is presumed to have been allowed on the faith of the marriage promise, and to have been coincident with the acceptance by the parties of each other as husband and wife. This presumption is not indulged when a previous illicit intercourse is shown.

MARRIAGE. — COHABITATION AND REPUTE OF BEING MARRIED, having their inception in a solemnization of marriage which was void for want of capacity of one of the parties to contract marriage at the time, known only by him, will, though continued after such incapacity was removed, be referred to the previous void marriage, and hence will not create a presumption that the parties contracted another and valid marriage, after they both had capacity so to do, when it is not shown that either ever knew of the removal of the incapacity, or that the woman ever knew of its existence.

MARRIAGE. — COHABITATION ILLICIT IN ITS INCEPTION IS PRESUMED to so continue.

IF MARRIAGE IS SOLEMNIZED IN HONEST THOUGH MISTAKEN BELIEF BY BOTH PARTIES that both were capable at the time of contracting marriage, and they continue, after the impediment to their marriage is removed, to cohabit as husband and wife, the law will presume that they have contracted a common law marriage, in the absence of evidence to the contrary.

PRESUMPTION IN FAVOR OF INNOCENCE will not give rise to a presumption of marriage, if it will involve one of the parties in guilt.

PRESUMPTION OF DEATH OF OR DIVORCE FROM PRIOR HUSBAND OR WIFE may be indulged to sustain a second marriage. There is, however, no room for such presumption when the first spouse is shown to be living, and the time between deserting her and contracting the second marriage is only three years, and the records of the only courts in which a divorce could have been lawfully procured are accessible and easily examined.

LACHES. — One who commences an action within the time allowed by the statute of limitations cannot be denied relief on the ground of laches.

SUIT for partition. Both parties claimed under Braxton B. Lewis. The claim of the plaintiffs depended on the invalidity of the marriage of Lewis with Zerelday Cacey. The complainants' bill was dismissed, and they thereupon prosecuted a writ of error.

A. N. Kingsbury, and Lane and Cooper, for the plaintiffs in error.

James M. Truitt, for the defendant in error.

By Court, SHOPE, J. The right to have partition of the lands described in the bill depends upon the fact whether Braxton B. Lewis, at his death, left any lawful issue capable

of taking from him by inheritance. He left one child, Mary A., his other children having died while mere infants. It is not denied by the plaintiffs in error that he was formally married to one Zerelday Cacey, mother of this child, December 8, 1843, in Montgomery County, in this state, under a license issued out of the office of the clerk of the county court of that county, nor that he afterwards lived and cohabited with her, as man and wife, up to his death, and recognized the issue of such cohabitation as his children; but it is claimed that this marriage was absolutely null and void, for the reason that Lewis had, at the time of its solemnization, a lawful wife then living in Caldwell County, in the state of Kentucky, from whom there was no divorce.

The marriage of a man and woman, where one of them has a husband or wife by a prior marriage, who is then living and undivorced, is void, and not merely voidable. Being a nullity, no decree is necessary to avoid the same: *Reeves v. Reeves*, 54 Ill. 332; *Drummond v. Irish*, 52 Iowa, 41; *Blossom v. Barrett*, 37 N. Y. 434; 97 Am. Dec. 747; *Janes v. Janes*, 5 Blackf. 141; *Tefft v. Tefft*, 35 Ind. 44; *Glass v. Glass*, 114 Mass. 563; *Martin v. Martin*, 22 Ala. 86.

A void marriage is good for no legal purpose, and its invalidity may be shown in any court, between any parties, either in the lifetime of the parties thereto, or after their death. There can be no doubt of the fact of the prior marriage of Lewis to Sarah James, in Caldwell County, Kentucky, and that he abandoned her in less than a year after their marriage, and came, shortly after, to Montgomery County, in this state, and that such prior wife obtained a divorce from him in the circuit court of Caldwell County, Kentucky, in December, 1846, some three years after his second marriage. The first marriage is satisfactorily shown by the record evidence thereof, and the testimony of many witnesses who were present at its celebration, and knew the parties.

Defendant in error contends that the evidence does not sufficiently show that the marriage with Zerelday was in 1843, or at any time prior to the divorce in Kentucky, but that the facts and circumstances are such as to afford presumptive evidence of a common-law marriage after the divorce. The marriage certificate on file in the proper office shows that this marriage was celebrated on December 8, 1843, by one J. W. Woods, a minister of the Gospel. The proof also shows that Woods was a minister of the Gospel, and that Lewis cohabited

with this woman, as his wife, up to his death, and that she was always reputed to be his wife. No importance is attached to the fact that the woman's name in the marriage license was written "Seralda," and in the minister's return thereon "Serelda." The evidence shows, beyond dispute, that Zerelday Cacey was the person named in the certificate of marriage and the license. If this was the only marriage of Lewis, there could be no doubt of the sufficiency of the evidence to establish the same. It could not be invalidated by any mistake in the spelling of a name. Every reasonable and fair presumption will be indulged for the purpose of upholding a marriage, and establishing the legitimacy of the offspring. When the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and in fact everything necessary to the validity of the marriage, in the absence of proof to the contrary, will be presumed: *Caujolle v. Ferrie*, 28 Barb. 177; *Fleming v. People*, 27 N. Y. 329; *Strode v. Magowan*, 2 Bush, 627; 1 Bishop on Marriage and Divorce, sec. 457; Lawson on Presumptive Evidence, 104-107; *People v. Calder*, 30 Mich. 85; *State v. Kean*, 10 N. H. 347; 34 Am. Dec. 162.

The presumption of the capacity of Lewis to enter into the marriage contract with Zerelday Cacey, December 8, 1843, is overcome by proof of his prior marriage in Kentucky, and that his wife by that marriage was still living and undivorced at that time. This proof established the fact that the second marriage in 1843 was a nullity, conferring no marital rights whatever. A simple marriage ceremony will not make a man and woman husband and wife. Capacity and consent are absolutely essential, but celebration only contingently so: *Thompson v. Thompson*, 114 Mass. 566; *Merriam v. Wolcott*, 61 How. Pr. 377; *Rundle v. Pegram*, 49 Miss. 751. Nor can sexual intercourse, which the parties know to be contrary to law, form even an element of marriage: *Peck v. Peck*, 12 R. I. 485; 34 Am. Rep. 702; *Port v. Port*, 70 Ill. 484.

This formal marriage being void, do the facts and circumstances proved create a presumption of a lawful marriage of Lewis and Zerelday after the divorce in 1846? No record of any subsequent marriage has been produced, nor has any witness testified directly as to any such marriage; but it is strenuously insisted that the evidence will justify the court in presuming a common-law marriage of the parties after the impediment to their legal union was removed.

While our statute prescribes certain formalities to be observed in marriages, and certain steps to be taken to preserve the evidence of their celebration, it does not declare a marriage void which is legal at the common law, merely because not entered into in accordance with its provisions: *Port v. Port*, 70 Ill. 484. A marriage is a civil contract, made in due form, by which a man and woman agree to take each other for husband and wife, during their joint lives, unless it is annulled by law, and to discharge towards each other the duties imposed by law upon such relation. Each must be capable of assenting, and must in fact consent, to form this new relation. If a statute forbids the solemnization of marriage without a license, still, in the absence of a clause of nullity, the marriage will be good though no license was had: 1 Bishop on Marriage and Divorce, sec. 284. The proof here fails to show any license for the marriage of Lewis after the divorce, but on the contrary, the clerk of the county court, the keeper of the public records relating to marriages, testified that he had carefully examined those records, and failed to find any other marriage license than that issued in 1843, nor is there any direct evidence of any marriage of the parties after the divorce, *per verba de præsenti*, or *per verba de futuro cum copula*; but the court is asked to infer such a marriage from the long-continued cohabitation of the parties, and their reputation of being married at some time. When the consent to marry is manifested by words *de præsenti*, a present assumption of the marriage status is necessary. As said in *Van Tuyl v. Van Tuyl*, 57 Barb. 237: "As the law stands, a valid marriage to all intents and purposes is established by proof of an actual contract, *per verba de præsenti*, between persons of opposite sexes, capable of contracting, to take each other for husband and wife, especially where the contract is followed by cohabitation. No solemnization or other formality, apart from the agreement itself, is necessary. Nor is it essential to the validity of the contract that it should be made before witnesses"; citing *Clayton v. Wardell*, 4 N. Y. 230; *Cheney v. Arnold*, 15 Id. 345; 69 Am. Dec. 609; *Tummally v. Tummally*, 3 Bradf. 372; Hubback on Succession, c. 4, sec. 1. On the other hand, it is not sufficient to agree to present cohabitation and a future regular marriage when more convenient, or when a wife dies, or when a ceremony can be performed: *Robertson v. State*, 42 Ala. 509; *Duncan v. Duncan*, 10 Ohio St. 182; *Estate of Beverson*, 47 Cal. 621; *Fryer v. Fryer*, Rich. Eq.

Cas. 85; *Van Tuyl v. Van Tuyl*, 57 Barb. 235; 1 Bishop on Marriage and Divorce, sec. 262. To constitute marriage, the consent must not be attended by an agreement that some intervening thing shall be done before the marriage takes effect, as that it be publicly solemnized: 1 Bishop on Marriage and Divorce, sec. 249.

In *Hantz v. Sealy*, 6 Binn. 405, the plaintiff and defendant had long lived in adulterous intercourse, although they considered themselves as lawfully married. In fact, they had entered into a marriage contract, which was void, because the defendant had a former wife living, from whom he had been separated by consent, but not legally. After a legal divorce was procured, they were advised by their lawyer to celebrate a new marriage. The defendant said: "I take you [the plaintiff] for my wife"; and the plaintiff, being told if she would say the same thing, the marriage would be complete, answered, "To be sure, he is my husband,—good enough." The court held that these words of the woman did not constitute a present contract, but alluded to the past contract, which she always asserted to be a legal marriage.

Where parties competent to contract have agreed to marry at some future time, if they have *copula*, which is lawful only in the married state, in the absence of any evidence to the contrary, they will be presumed to have become actually married by taking each other for husband and wife, and to have changed their future promise to marry to one of present marriage. In such a case, the *copula* will be presumed to have been allowed on the faith of the marriage promise, and that the parties, at the time of such *copula*, accepted each other as man and wife: *Port v. Port*, 70 Ill. 484; *Hebblethwaite v. Hepworth*, 98 Id. 126. This kind of a marriage must be distinguished from cases of seduction, or sexual intercourse followed by a promise of marriage, and cases where the intercourse, in its inception, is illicit, and is known to be such: *Cheney v. Arnold*, 15 N. Y. 345; 69 Am. Dec. 609; *Duncan v. Duncan*, 10 Ohio St. 181; 1 Bishop on Marriage and Divorce, sec. 261.

The evidence in the record is amply sufficient to show that Lewis and Zerelday lived and cohabited together as husband and wife for a period of about twenty-five years, and that during all this time he treated her as a man would a wife, and her children as his own, and that they were reputed as husband and wife. But it must be borne in mind that co-

habitation and repute do not constitute a marriage, but are only evidence tending to raise a presumption of marriage, of more or less strength, according to the circumstances of the case, and that the cohabitation must not be meretricious, but matrimonial, in order to give rise to this presumption: 1 Bishop on Marriage and Divorce, sec. 266. Where a marriage in fact is shown by direct evidence, as in this case, there is no necessity for presuming its existence. Presumption must yield to the superior force of direct and positive proof. In this case, there was an actual marriage ceremony performed in 1843, by which Lewis and Zerelday were apparently and ostensibly married. Their cohabitation thereafter, and reputation as to being married, might very naturally and properly be referred to the fact of this apparent marriage, there being nothing to indicate to their acquaintances and neighbors that it was void. If no actual marriage ceremony had been shown, then the cohabitation and repute proved might be referred to some supposed informal, common-law marriage.

This cohabitation and repute is not shown as evidence of the ceremonial marriage in 1843, but of some other kind of marriage, entered into some time after the divorce in December, 1846. Is such cohabitation and repute based upon a supposed common-law marriage, any more than upon the formal marriage, shown by the records to have been entered into in 1843? The habit and repute shown in this case might just as well, and more naturally, arise from the marriage in 1843. If this evidence could, by any known rule, be so limited as to show a cohabitation and repute from some day after the divorce, when no impediment existed, it might afford evidence of a common-law marriage of the parties by their own acts. If the cohabitation and repute were the result of the assumed marriage, in 1843, which was void, it was illicit, and not matrimonial, and no marriage can be presumed from illicit sexual intercourse.

Their cohabitation being meretricious in its inception, at least so far as Lewis is concerned, was it changed by the divorce in Kentucky, and rendered thereafter matrimonial? This would seem to depend upon the intention of the parties, and the fact whether they had knowledge of the divorce removing the only impediment there was to their marriage. There is no proof in the record that either Lewis or Zerelday had ever been informed of the divorce, or that she ever knew

that he had a former wife. Without knowledge of the removal of the impediment they could not have intended a second marriage, or have attempted to enter into another marriage. Courts cannot marry parties by mere presumption, without their consent. In the absence of consent, the status of marriage is never created by any government. The law compels no one to assume the matrimonial status. Without assent, no statute or constitution can create this relation: *Dickerson v. Brown*, 49 Miss. 373. In *Turpin v. Public Administrator*, 2 Bradf. 424, the surrogate said: "When parties are living in a meretricious state, a promise to marry on some future condition does not effect a marriage by a mere continuance of that connection."

What evidence is there that Lewis ever consented to, or even desired to, change his connection with Zerelday from an illicit to a matrimonial one? He took no steps to remove the impediment to his marriage with her. The divorce was not sought by him, but was obtained by his former wife in 1846. If he had no knowledge of this divorce, it cannot be presumed that he would have married the same woman. If he had notice of the divorce, and desired to change his connection with Zerelday into that of marriage, it was an easy matter for him to have had solemnized a legal marriage, or for the parties in some public manner to have indicated an intention to enter into that relation; but this was never attempted.

It may be said that the holding of Zerelday out to the world as his wife shewed a desire to change his connection with her to that of marriage. But little importance can be attached to this circumstance, when considered in connection with the other facts of the case. A concubine is often held out to the world as a wife, to conceal an illicit cohabitation and prevent a criminal prosecution. And in addition to this, if he desired to change his former connection, there was an easy way open to him. The holding of her out as his wife before the divorce was a fraud and a deception, and if Lewis would attempt to deceive the public by creating false appearances prior to December, 1846, why may not his subsequent acts also have been equally deceptive and fallacious?

As said before, there is no evidence in the record showing that Zerelday ever knew that Lewis had a wife living at the time she supposed she married him. She was deceived and imposed upon by Lewis, in his falsely assuming to have capa-

city to marry her, and in concealing the fact of his prior marriage to a then living and undivorced wife. Not knowing of the former marriage, she could have had no reason for desiring a second marriage. If she regarded herself as the lawful wife of Lewis, it would be a violent presumption to hold that she assented to a second informal marriage. If she knew of the prior marriage, then her cohabitation with Lewis was meretricious in its inception, and could only be changed after the disability of Lewis was removed, and then only by the mutual consent of both. If she had notice of the illegality of her marriage after the divorce, and cohabited with Lewis after that without a new marriage, it was criminal. If she desired to make her subsequent connection with him lawful, she no doubt would have insisted upon a public or statutory marriage, so as to preserve the evidence of the same. Marriage may be shown by circumstantial as well as by direct evidence. It may, in a proper case, be inferred from continuous cohabitation and repute, when nothing appears to prevent the raising of the presumption created by the proof of these facts. If the cohabitation was in its inception illicit, the presumption of the innocence and morality of the parties is at once rebutted and overcome; and without proof of a change in their relation to each other, it will be presumed that the continuance of the connection of the parties is of the same character: *Floyd v. Calvert*, 53 Miss. 37.

Bishop, in his work on marriage and divorce (sec. 506), says: "If parties come together, intending and choosing an illicit commerce, there being no impediment to marriage, it cannot be presumed, without reasons, whatever the law under which they live, that they have altered their choice, for a condition of things once shown is presumed to continue; and it can make no difference in this, that an impediment to marriage, existing when the cohabitation began, was afterwards removed."

In the state of Mississippi the constitution provided that all persons who have not been married, but are now living together, cohabiting as husband and wife, shall be taken and held, for all purposes in law, as married, etc. The supreme court of that state held that where a person claims to be married thereby, there must be some formal and explicit agreement between the parties that they will and do accept the new organic law as establishing thenceforth between them a new relationship, or there must be such open and visible change

in the conduct and declarations of the parties that an agreement to accept the new law might fairly be inferred: *Floyd v. Calvert*, 53 Miss. 37; *Dickerson v. Brown*, 49 Id. 357.

Where both parties are married in the honest belief, founded on an apparently good reason, that they are capable of entering into the marriage contract, when in fact one of them is not, if they continue to cohabit as man and wife after the removal of the impediment to their lawful union, the law will presume a common-law marriage by the acts of the parties, in the absence of any evidence to prevent such presumption. In such a case, there are many strong and cogent reasons for presuming a new marriage after the removal of the impediment, even though the parties may not have known of its removal. There the cohabitation, in ignorance of facts rendering it illegal, is not to be regarded as meretricious or criminal until the parties have knowledge of such facts. Their purpose in such a union is honorable marriage, which the law favors, and not mere illicit intercourse. The fact that Mrs. Lewis had no knowledge of the invalidity of the marriage, and therefore the cohabitation on her part was not criminal, cannot validate the assumed marriage, even as to her. If valid as to her, it must be equally so as to him. A contract not mutually binding is void for want of mutuality. The most that can be said is, that Mrs. Lewis was not liable to criminal punishment for living with a man she supposed, in good faith, was her husband.

In *Randlett v. Rice*, 141 Mass. 385, one Alexander, in 1836, was married to A, in the state of Vermont, where he resided with her up to 1863, when he left her and went to Canada with another woman, after whose death, in the same year, he came to Portsmouth, New Hampshire, where he married B, in December, 1864. On September 11, 1867, he married C. A died in May, 1866. Neither Alexander nor A ever procured a divorce. It was contended that the cohabitation of Alexander with B, after the death of his first wife, A, in May, 1866, and before his marriage to C, in 1867, was evidence of a marriage between him and B, and therefore his marriage with C, in 1867, was void. The court say: "The cohabitation was the only evidence of a marriage, and in this case the cohabitation points only to the illegal contract of marriage under which it commenced. The parties had no thought of any other marriage. The testimony of the supposed wife shows this, and the fact that she did not know of the exist-

ence of the legal wife, and that Alexander did not know of her death, forbids any presumption that they made a new contract in consequence."

In *Harbeck v. Harbeck*, 102 N. Y. 714, which was a bill for a divorce, the issue was, whether the parties were married, no ceremony having been performed. The plaintiff was formerly the wife of Montgomery, who abandoned her. She lived with the defendant until 1879, passing as his wife, both believing that Montgomery was dead, which was not true. The court said: "That the union between the parties was at first illegal is conceded. If a change occurred, it was followed by no formal celebration. Nor is there evidence of any present agreement to take each other for husband and wife. And that they ever passed, by contract or by mutual consent, from the state of concubinage to that of marriage, is doubtful, by the admissions of the plaintiff, proven by the testimony of her sister, and by the defendant's father, and by other witnesses. If that testimony is true, it is difficult to find that she herself regarded the connection as matrimonial, or that its continuance depended upon anything more binding than the inclination or will of the defendant. It is true that he assumed the character of husband, and she that of wife, and reported themselves in that relation to their associates and others," etc.

In *Appeal of Reading Fire Ins. Co.*, 113 Pa. 204, 57 Am. Rep. 448, the supreme court of Pennsylvania say: "Undoubtedly they lived together for a long time, under circumstances to prove intimate sexual relations; but cohabitation and reputation alone are not marriage,—they are merely circumstances from which a marriage may sometimes be presumed. It is a presumption, however, that may be rebutted by other facts and circumstances: *Hunt's Appeal*, 86 Pa. St. 294. When the relation between a man and a woman living together is illicit in its commencement, it is presumed to so continue until a changed relation is proved. Without proof of subsequent actual marriage, it will not be presumed from continued cohabitation and reputation of a relation between them which was of illicit origin. Here the evidence establishes with sufficient certainty that in its inception the relation between the appellee and Riegel was illicit, and there is no sufficient evidence to create a legal presumption of any subsequent marriage."

It is said that the presumption in favor of innocence, and against immorality and guilt, is so strong as to give rise to the

presumption of a marriage. This is so in many cases, but such presumption of marriage will not arise if it will involve one of the parties in guilt,—as where a man is cohabiting with two women, or where one of the parties is proved to be married to some one else: *Williams v. State*, 44 Ala. 44; *Case v. Case*, 17 Cal. 598; *Harrison v. Lincoln*, 48 Me. 205; *Jones v. Jones*, 45 Md. 144; *Emerson v. Shaw*, 56 N. H. 418; *Senser v. Bower*, 1 Penr. & W. 450; *Weinberg v. State*, 25 Wis. 370. The courts, in favor of a second marriage, will often presume the death of a prior husband or wife, when not heard from for a much less period than seven years: *Commonwealth v. Boyer*, 7 Allen, 306; *Rex v. Inhabitants of Tynning*, 2 Barn. & A. 386; *Greensborough v. Underhill*, 12 Vt. 604; *Harris v. Harris*, 8 Bradw. 57; *Dixon v. People*, 18 Mich. 84; *Yates v. Houston*, 3 Tex. 449; *Senser v. Bower*, 1 Penr. & W. 450; *Johnson v. Johnson*, 114 Ill. 611; 55 Am. Rep. 883. So they will often presume a previous divorce in order to sustain the second marriage: *Blanchard v. Lambert*, 43 Iowa, 228; 22 Am. Rep. 245; *Hull v. Rawls*, 27 Miss. 471; *McCarty v. McCarty*, 2 Strob. 6; 47 Am. Dec. 585; *Carroll v. Carroll*, 20 Tex. 731; *In re Edwards*, 58 Iowa, 431.

In the present case the evidence excludes any presumption of the death of the first wife of Lewis, she being alive after his death, and there can be no presumption that she obtained a divorce before his marriage in 1843, as the evidence shows her divorce was not granted until December, 1846, and the established facts will not justify the court in presuming that he procured a divorce from his prior wife. He was married to Sarah James, April 29, 1841, and lived with her about a year, when he left her and came to this state, where he was ostensibly married to Zerelday Cacey, December 8, 1843, only about a year and seven months after his abandonment of his first wife. If he procured any lawful divorce, it must have been in Caldwell County, Kentucky, or in Montgomery County, Illinois. If he procured such a divorce, it was a very easy matter to have shown it. Under the circumstances of this case, and taking into consideration the shortness of the time intervening from his desertion of his first wife and his second marriage, it cannot be presumed, in favor of the innocence of the parties and the legality of the second marriage, that Lewis obtained a legal decree releasing him from his prior marriage.

The point is made, that the plaintiffs in error are barred by

laches in asserting their rights. The bill was filed March 2, 1885, about seventeen years after the death of Lewis, so that the suit is not barred by the twenty-years' limitation law. The defendant in error, having no color of title, is not in a position to invoke the seven-years' limitation law. To establish a bar under the limitation law of 1839, the possession and payment of taxes for seven successive years must be under color of title: *Stoltz v. Doering*, 112 Ill. 234; *Heacock v. Lubuke*, 107 Id. 396. As a general rule, courts of equity follow the law in applying the statute of limitations. The plaintiffs in error, not being barred at law of the right to assert an interest in the lands, are not precluded by laches from maintaining this bill.

The decree of the circuit court will be reversed, and the cause remanded.

VOID MARRIAGE. — An action for damages may be sustained by the innocent party to a void marriage: *Blossom v. Barrett*, 97 Am. Dec. 747. But this seems to be the only redress. The marriage as between the parties is not valid for any purpose: *Cathings v. Williams*, 44 Id. 49, note 54-57. Where the marriage is valid by the laws of the state wherein it was contracted, a reasonable doubt may exist with respect to its validity in a state to which the parties remove, and in which their marriage is prohibited by law. In Virginia, the courts refuse to recognize a marriage void under the laws of that state, though valid where contracted: *Greenlow v. James's Ex'r*, 56 Am. Rep. 603. But generally a marriage valid where made is respected elsewhere: *Van Voorhis v. Briatnall*, 40 Id. 535. The innocent party to a void marriage is entitled to alimony: *Strode v. Strode*, 96 Am. Dec. 211. For a discussion of the question whether a party to a void marriage, or his representatives, may be estopped from denying its validity, see note 214, 215.

PRESUMPTION OF MARRIAGE, AND EVIDENCE SUFFICIENT TO ESTABLISH: *Stute v. Kean*, 34 Am. Dec. 162, and note to *Taylor v. Swett*, 22 Id. 157-163; note to *Appeal of Reading F. I. & T. Co.*, 57 Am. Rep. 451-463.

PRESUMPTIONS IN SUPPORT OF SECOND MARRIAGE MAY BE INDULGED. — Thus though a woman contracted marriage in less than seven years after her husband deserted her, the court presumed that he had died prior to such marriage: *Johnson v. Johnson*, 55 Am. Rep. 883. So a divorce may be presumed, though there is no direct evidence thereof: *Blanchard v. Lambert*, 22 Id. 245.

PARTIES TO VOID MARRIAGE MAY CONTINUE LIVING TOGETHER as husband and wife, after the removal of the impediment to a valid marriage. Undoubtedly this removal has no effect upon their legal relations toward each other, except that it enables them to contract a valid marriage, if they seem so disposed. Whether they did in fact contract such marriage is in England a question of fact to be determined by the jury, and not of law for the decision of the court: *Lapsley v. Grierson*, 1 H. L. Cas. 498; *Doe d. Breakey v. Breakey*, 2 U. C. Q. B. 349; *Campbell v. Campbell*, L. R. 1 H. L. S. 182; and there is no doubt that the jury may presume a valid marriage to have taken place after the removal of the previous impediment: *Fenton v. Reed*, 4 Am.

Dec. 244; *Rose v. Clark*, 8 Paigo, 574; *Donnelly v. Donnelly*, 8 B. Mon. 113; *Hynes v. McDermott*, 43 Am. Rep. 677.

PROMISE TO MARRY IN FUTURE, FOLLOWED BY COHABITATION, is generally, but not universally, regarded as constituting a valid marriage: See note to *Cheney v. Arnold*, 69 Am. Dec. 615-619.

HAMILTON v. HARVEY.

[121 ILLINOIS, 469.]

SPECIFIC CONTRACT WILL BE DECREED ONLY WHEN CONTRACT IS IN WRITING, and is certain and fair in all its parts, and for an adequate consideration. The description of the subject-matter must be so certain that it may be known therefrom what the purchaser was contracting for and the vendor was selling.

DESCRIPTION OF LAND as "a one-third interest in five acres near said works" is too uncertain to sustain a decree for specific performance. The following descriptions have also been held fatally defective: "A tract of land lying on the north side of the Watery Branch, containing 150 acres"; "a lot of land joining a small tract now occupied by Michael Micue"; "the houses on Smithfield Street"; "two lots of land situate in Hackensack township, in the county of Bergen"; "one house and lot in the town of Hillsborough, purchased of me"; "the 120 acres of land in Shannon County, Missouri"; and "from twenty-six thousand to twenty-eight thousand feet of land situate on Walden and Vassal Lane, in Cambridge, when the bounds are fixed and the street laid out, the street to be forty feet wide and two hundred feet long."

BILL by I. R. Harvey to compel the specific performance of an instrument set out in the opinion of the court. The bill was dismissed.

John S. Miller and B. F. Chase, for the appellant.

James Frake, for the appellee.

By Court, MAGRUDER, J. This is a bill filed in the superior court of Cook County, January 22, 1886, by the appellant against the appellee for the specific performance of the following instrument: —

"CHICAGO, ILLINOIS, November 17, 1885.

"MR. W. R. HAMILTON.

"*Dear Sir*, — I hereby agree to lease my bldg. at Pacific Junction, known as the Foster Rotary Plow Factory Co., at \$100 per month for first year, or the privilege hereafter of buying, if they choose, at \$10,000; or if building should not be suitable, will donate 200 ft. square ft. along the R. R. for company to build on. Will allow you, as commission for said location, $\frac{1}{3}$ interest in five acres located near said works.

"I. R. HARVEY."

Answer was filed to the bill, and replication to the answer. The cause was heard upon the pleadings, and upon proofs taken by the complainant. The defendant introduced no testimony. The court below dismissed the bill for want of equity.

The circumstances surrounding the execution of this instrument were briefly as follows: —

Appellee owned some land at Pacific Junction, in Cook County, and also held the equitable title to the lots upon which stood a building known as the Foster Rotary Plow Company Factory. Appellee and other property owners were desirous of having a factory located in the vicinity, which would employ a large number of men, and thus give value to their property. Appellant, a real-estate agent in Chicago, undertook to accomplish what was desired. Through his efforts, a lease, dated December 18, 1885, was made by W. C. Grant, trustee, to L. C. Maxwell, C. R. Johnson, and C. H. Jackson, representing the Maxwell Patent White Lead Works, leasing the premises occupied by said building from January 1, 1886, to December 31, 1887, at one thousand dollars for the first year, and twelve hundred dollars for the second year.

We think that the bill was properly dismissed. The instrument here recited is too uncertain and indefinite to justify a court of equity in decreeing its specific performance.

An application for the specific performance of a contract is addressed to the sound legal discretion of the court. Courts of equity will decree a specific performance where the contract is in writing, and is certain, and is fair in all its parts, and is for an adequate consideration, and is capable of being performed, but not otherwise: *Bowman v. Cunningham*, 78 Ill. 48. It must be reasonably certain as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made: 3 Pomeroy's Eq. Jur., sec. 1405. It is essential that the description of the subject-matter should be so definite that it may be known with certainty what the purchaser imagined himself to be contracting for, and that the court may be able to ascertain what it is: *Fry on Specific Performance*, 3d ed., sec. 327.

The description of the land to be conveyed is indefinite and uncertain. The words are: "Will allow you, as commission, . . . one third interest in five acres located near said works." The five acres are not described. It is not stated that they are owned by Harvey, the vendor. Their direction from the "works," whether north, south, east, or west, is not indicated.

In *Capps v. Holt*, 5 Jones Eq. 153, the description was "a tract of land lying on the north side of the Watery Branch, in the county of — and state of —, containing 150 acres." The court said: "The position thus given is not definite enough, and no decree for conveyance could be based upon it. . . . The writing of itself clearly is too vague and uncertain, in the description of the land bargained for, to warrant us in declaring where it is, by what termini included, and decreeing a conveyance of it."

In *Jordan v. Fay*, 40 Me. 130, the description in the memorandum was: "A lot of land joining a small tract now occupied by Michael Micue." The court held: "There is in the writing no reference by which the land can be determined with any greater certainty than by the memorandum. The location, size, and shape of the lot are entirely wanting in the description; and without a resort to parol evidence, it would be impossible to ascertain what land was intended to be the subject of the agreement; and it forms no ground for a specific performance."

In *Hammer v. McEldowney*, 46 Pa. St. 334, the description was "the houses on Smithfield Street," in the city of Pittsburgh. After speaking of the alleged contract as being "without any designation of the houses, where situate on the street mentioned, of what size, dimensions, or material, or the area of ground to be embraced, and without in fact disclosing to whom they belonged," etc., the court say: "It is a settled rule in equity that the specific performance of a contract will not be decreed unless its terms are clear, and capable of ascertainment from the instrument itself. . . . So courts of equity will not ordinarily entertain bills for the specific execution of contracts with variations or additions or new terms to be made and introduced into them by parol. . . . It requires no argument or illustration to bring this imperfect or indefinite contract within these rules."

In *Carr v. Passaic Land Improvement and Building Co.*, 19 N. J. Eq. 424, and 22 Id. 85, the resolution of the company was "that two acres be sold." It was held to be, upon its face, vague and uncertain. The court there say: "The vagueness and uncertainty is patent, and no parol proof can be admitted to explain it."

In *King v. Ruckman*, 20 N. J. Eq. 316, Ruckman, by a written contract, agreed to sell King certain tracts of land in Bergen and Rockland counties, New York, "describing them as all

the lands he owned and held contracts for in the township of Harrington," etc., "and also two lots of land situate in Hackensack township, in the county of Bergen." The court say: "As to the parts in Harrington township and the county of Rockland, the description is sufficiently certain. It is all the land owned by Ruckman, or for which he held contracts within certain boundaries. The maxim is, *Id certum est quod certum reddi potest*. It can be shown with certainty what lands he owned or held contracts for in these boundaries. But the last clause seems uncertain. . . . It does not describe them as two lots owned by him, for then, if he owned only two lots there, it might be rendered certain. This contract would be complied with by his conveying two lots of ten feet square, or two lots containing a thousand acres. Nor can this part be rejected as immaterial, and performance be ordered of the residue upon compensation." Although this case was overruled in *King v. Ruckman*, 21 N. J. Eq. 599, yet it was solely on the ground that the uncertainty was remedied by the allegations in the bill and answer. The terms, in which the opinion of the court upon the point stated in the foregoing extract was announced, affirm the doctrine of *King v. Ruckman*, 20 Id. 316, as will be seen by reference to *Nichols v. Williams*, 22 Id. 63.

In *Murdock v. Anderson*, 4 Jones Eq. 77, a decree for conveyance was refused, where the receipt described "one house and lot in the town of Hillsborough, purchased of me," etc. It is there aptly said: "Where a sufficient description is given, parol evidence must be resorted to, in order to fit the description to the thing; but where an insufficient description is given, or where there is no description (as in our case), such evidence is inadmissible": See also *Allen v. Chambers*, 4 Ired. Eq. 125.

In *Miller v. Campbell*, 52 Ind. 125, the contract described certain land as "the one hundred and twenty acres of land in Shannon County, Missouri," etc. It was claimed that this description was void for uncertainty, and could not be enforced. The court say: "This position, in our opinion, is well taken, and the objection is fatal to the complaint. It is a well-settled principle, under the statute of frauds, that contracts for the sale of land must so far describe the land as that it may be identified without resort to parol evidence. . . . Doubtless the parties may have had in view a particular tract of land containing one hundred and twenty acres, and the plaintiff may have been able to show by extrinsic evidence what par-

ticular tract was intended; but this would be to subvert and overthrow the statute."

In *Lynes v. Hayden*, 119 Mass. 482, Somerby agreed "to deed to Lynes from twenty-six thousand to twenty-eight thousand feet of land situate on Walden Street and Vassal Lane, in Cambridge, when the bounds are fixed and the street laid out, the street to be forty feet wide and two hundred feet long," etc. Chief Justice Gray said: "The agreement signed by the intestate describes the boundaries of the land by the adjoining streets on the northeast and northwest only, and looks to the fixing of the bounds and the laying out of another street before the conveyance. The report finds that the bounds were not fixed, nor the location of the proposed street determined, in his lifetime. The agreement is too indefinite to be specifically enforced."

Appellant claims that he had the right, under the contract, to select the five acres in the first place, but that, if he was not first entitled to the right of selection, such right afterwards devolved upon him, because appellee refused to select five acres, and not only so, but repudiated the contract entirely. The contract does not in express terms confer upon appellant the right of selecting the five acres: *Vide Carr v. Passaic Land Improvement and Building Co., supra*. We do not, however, deem it necessary to pass upon the question whether the right of selection devolved upon either party under the contract.

It is sufficient to say that, even if the appellant was entitled to make a selection of the five acres, his designation of the part selected by him is as uncertain and indefinite, under the facts of this case, as the description in the agreement. He says in his testimony: "I have done nothing but make the selection in my own mind. I have a present selection of the five acres. . . . It is all of block 9 and so much of block 10 as is necessary with block 9 to make five acres." There is nothing in the record to show how many acres are contained in block 9 or in block 10, or how much of block 10, when added to block 9, will make five acres.

Nor is there anything to show that appellee owns block 9. The bill avers that appellee owns about twenty-seven acres in section 2, town 39, range 13, which were subdivided into certain blocks and lots, but block 9 is not mentioned among such blocks and lots. The abstract refers to a deed conveying to appellee the premises described in the bill, but we can find no such deed in the record.

There is another respect in which either the contract is uncertain, or in which its enforcement might be unfair. It is not altogether clear whether the location of the works at Pacific Junction, for which the commission was to be allowed, was to be a permanent location, or a location during the lease. The Maxwell company did not buy the building for ten thousand dollars, nor have they built on two hundred feet square of ground donated to them by appellee. They did nothing but take a lease for two years. Appellant says the lease entitles him to his commission, while appellee claims, in his answer, that the agreement contemplated a permanent location of the works, and that they are not permanently located. The testimony of Maxwell shows that the manufacture of white lead at Pacific Junction is as yet an experiment, and that the question of a permanent location will not be decided until the lease ends. Appellee's construction would seem to be the correct one, as the object of the location was to give value to the land, which could not be effected by a mere temporary lease. If the commission was to be allowed for a permanent location, then, inasmuch as appellant's own evidence proves that a permanent location there has not yet been accomplished, it would be unfair to enforce the contract: *Race v. Weston*, 86 Ill. 91; *Tamm v. Lavalle*, 92 Id. 263.

The decree of the superior court is affirmed.

SPECIFIC PERFORMANCE WILL NOT BE COMPELLED where it appears that a portion of the property has been destroyed, as where the ocean has washed it away: *Huguenin v. Courtney*, 53 Am. Rep. 688. The subject of specific performance of contracts is treated in note to *Anderson v. Green*, 22 Am. Dec. 423-431.

DESCRIPTIONS OF REAL PROPERTY, rules for construing and determining sufficiency of: See note to *Heaton v. Hodges*, 30 Am. Dec. 735-742; *Hurley v. Brown*, 96 Id. 671, and note.

CHICAGO GAS LIGHT COMPANY v. PEOPLE'S GAS LIGHT COMPANY.

[121 ILLINOIS, 580.]

MANUFACTURE AND DISTRIBUTION OF ILLUMINATING GAS, under legislative authority, in the streets of a town or city, is the exercise of a franchise belonging to the state. This franchise is conferred for the benefit of the public as well as of the company.

CORPORATION OWING DUTY TO PUBLIC cannot make a valid contract not to discharge such duty.

TRANSFERS OF POWERS OF ONE CORPORATION TO ANOTHER, without the authority of the legislature, are against public policy, and the courts will do nothing to promote the transfer.

GAS COMPANY HAVING EXCLUSIVE RIGHT TO MANUFACTURE AND SELL ILLUMINATING GAS in a city may make a valid contract to permit another company to compete with it in such manufacture and sale.

CONTRACT TO ABANDON PUBLIC DUTY, as where a gas company authorized by the legislature to manufacture and sell illuminating gas in a city agrees not to manufacture or sell such gas in a designated part of the city, will not be aided nor enforced in equity.

CONTRACT AGAINST PUBLIC POLICY WILL NOT BE ENFORCED, nor specific performance thereof decreed in equity.

CONTRACT IS AGAINST PUBLIC POLICY which, being entered into between two gas companies, stipulates that one of them shall discontinue for a hundred years the manufacture and sale of illuminating gas in a city in which it had been granted by the legislature the right to manufacture and sell such gas.

RULE THAT CONTRACTS IN PARTIAL RESTRAINT OF TRADE are valid does not apply to a contract by a corporation to abandon a part of its duty to the public.

THOUGH RESTRAINT OF TRADE IMPOSED BY CONTRACT IS BUT PARTIAL, it will not be enforced if it is unreasonably injurious and oppressive to the public.

CORPORATIONS HAVE SUCH POWERS ONLY as the act creating them confer, and are confined to the exercise of the powers expressly granted, and such incidental powers as are necessary to carry into effect those specifically conferred.

ULTRA VIRES. — Contract by a corporation authorized to manufacture and sell illuminating gas in a city, by which it agrees to discontinue such manufacture and sale, is *ultra vires*, and therefore void.

BILL filed by the People's Gas Light and Coke Company to enjoin the Chicago Gas Light and Coke Company from violating a certain contract entered into between them, the effect of which was that each had surrendered the right to manufacture and sell gas in certain designated parts of Chicago. The bill was dismissed by the superior court of Cook County, whose decree was reversed by the appellate court. From the latter decree an appeal was taken to the supreme court.

John N. Jewett and Melville W. Fuller, for the appellant.

Francis Adams and C. Beckwith, for the appellee.

By Court, MAGRUDER, J. This is a bill for the specific performance of a contract, the nature of which will be explained hereafter. Upon final hearing in the superior court of Cook County, the preliminary injunction which had been granted was dissolved and the bill dismissed. The bill was filed in that court by appellee against appellant. The cause was heard upon the pleadings and exhibits thereto, and upon certain affidavits filed with the answer. The appellate court, to which an appeal was taken, reversed the decree of the superior court, and remanded the case, with directions to "enter a decree enjoining and restraining the said Chicago Gas Light and Coke Company from laying gas mains or pipes in the said West Division, or entering into contracts for supplying the city or the inhabitants in said West Division with gas, and from in any manner violating said contract." The case is brought before us by appeal from the appellate court.

The Chicago Gas Light and Coke Company was incorporated by an act of the legislature, approved February 12, 1849, the second section of which is as follows:—

"The corporation hereby created shall have full power and authority to manufacture and sell gas to be made from any and all of the substances, or a combination thereof, from which inflammable gas is usually obtained, and to be used for lighting the city of Chicago, or the streets thereof, and any buildings, manufactories, public places, or houses therein contained, and erect all necessary works and apparatus, and to lay pipes for the conducting of the gas in any of the streets or avenues of said city; provided that no permanent injury or damage shall be done to any street, lane, or highway in said city. The real estate which the corporation is entitled to hold shall not exceed in value fifty thousand dollars."

Section 3 provides, among other things, that the capital stock of the corporation shall not exceed three hundred thousand dollars, and that "said company shall have the exclusive privilege of supplying the city of Chicago and its inhabitants with gas, for the purpose of affording light, for ten years."

An amendment, approved January 17, 1855, authorized an increase of one million dollars to the capital stock of the company, and also authorized the company to borrow money for

constructing, carrying on, and completing its works under the direction of its board of directors, and to issue bonds and mortgage its property. The company was also authorized to acquire and hold real estate necessary for its business.

The second and only other amendment to the original charter was approved March 12, 1869, and simply authorized an increase of the capital stock of the company "to an amount not to exceed five million dollars."

The People's Gas Light and Coke Company (the appellee) was organized under a special charter approved February 12, 1855. The bill states the substance of the powers conferred and rights granted, as follows: "With power and authority to erect the necessary works for the manufacture of gas and coke within the city of Chicago, and, on and after the twelfth day of February, 1859, to manufacture and sell gas to be made from any and all substances, or a combination thereof, from which illuminating gas is usually obtained, and to be used for the purpose of lighting the city of Chicago, or the streets thereof, and any buildings, manufactories, public places, or houses therein contained, and to erect all necessary works and apparatus for that purpose. And on and after the twelfth day of February, 1859, or sooner, and by and with the consent of the Chicago Gas Light and Coke Company, to lay pipes for the purpose of conducting the gas, in any of the streets or avenues of said city, with the consent of the city council."

The bill also states that by an amendment to the said act of February 12, 1855, approved February 7, 1865, the People's company "was granted full power and authority forthwith to proceed to the erection and maintenance of the necessary works for the manufacture of gas and coke within the said city of Chicago, and to manufacture, supply, and sell gas, to be made from any and all substances, or a combination thereof, from which illuminating gas is usually obtained, and to be used for the purpose of lighting the city of Chicago, any streets, buildings, manufactories, public places, or houses therein contained, and to erect and use all necessary works and apparatus for such purposes aforesaid, and, with the consent of the common council of said city, to lay down and use all necessary pipes for the conducting of gas in and along any of the streets, alleys, avenues, or public squares of said city."

In 1858, an ordinance was passed by the common council of Chicago, authorizing the People's company "to lay its gas-mains, pipes, feeders, and service-pipes in any of the streets,

alleys, avenues, highways, public parks, and squares through said city, subject to then existing rights, and at all times to the resolutions and ordinances of the common council of said city."

On April 21, 1862, a contract was made between appellant of the first part, appellee of the second part, and Cornelius K. Garrison of the third part, the material portions of which are as follows:—

"3. For and in consideration of the sale and conveyance of the said improvements, by the said party of the first part to the said party of the third part, as aforesaid, and of the covenants and agreements herein contained, to be kept and performed by the said parties of the first part, the said parties of the second and third parts, separately, each for themselves, hereby covenant and agree to and with the said party of the first part, that they, the said parties of the second and third parts, or either of them, will not, during the period of one hundred years from this date, either jointly or separately, in their own names or in the names of any other party or parties, lay, or cause to be laid, any gas-mains or gas-pipes, of any kind, in the North and South divisions of the said city of Chicago, or in such parts of said city as now lie, or may hereafter lie, east of the north and south branches of the Chicago River, nor furnish nor sell illuminating gas to any person or persons, for consumption or use, within the said last-mentioned portions of the said city of Chicago; nor, during the period aforesaid, interfere with or molest, in any way whatever, the business of the party of the first part of manufacturing and selling illuminating gas, and its incidents, in the said last-mentioned parts of said city of Chicago.

"4. For and in consideration of the purchase and payment so made as aforesaid, by the said party of the third part, and of the covenants and agreements of the said parties of the second and third parts herein contained, the said party of the first part hereby covenants and agrees to and with the said parties of the second and third parts, severally, that the said party of the first part will not, during a like period of one hundred years from the date hereof, either directly or indirectly, in its own name or in the name of any other party or parties, lay, or cause to be laid, any gas-mains or gas-pipes, of any kind, in the said West Division of the city of Chicago, or in such part or parts of said city as now lie, or may hereafter lie, west of the north and south branches of the Chicago

River; nor furnish nor sell illuminating gas to any persons, for consumption or use, within the said last-mentioned portions of said city of Chicago, nor, during the period aforesaid, interfere with nor molest, in any way whatever, the business of the said parties of the second and third parts, or either of them, of manufacturing and selling illuminating gas, and its incidents, in the said last-mentioned part or division of said city."

This contract appears to have been observed by both parties until May or June, 1886, when appellant obtained permission from the city council to construct a tunnel under the south branch of the Chicago River, in which to lay gas-mains to be connected with mains and service-pipes in the streets of the West Division. The bill charges that appellant threatens to lay its mains and service-pipes in the West Division for the purpose of supplying gas there, in violation of its contract. The object of the bill is to enforce the fourth clause of the contract, as above quoted, and prevent its violation.

Under its charter, appellant had the right to make and sell gas to be used for lighting all the divisions of the city of Chicago, and all of the streets and buildings therein. It had as much power and authority to lay pipes in the streets of the West Division as in those of the North and South divisions. By the contract, it agreed to lay no mains or pipes in the West Division, nor to furnish or sell any gas to persons living there, for a period of one hundred years. It thereby bound itself to avoid the performance of a duty which it owed to the public.

The manufacture and distribution of illuminating gas by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character; it is the exercise of a franchise belonging to the state; the services rendered and to be rendered for such grant are of a public nature. Where the right to make and sell gas to the city and its inhabitants, under the conditions here named, is conferred upon a company, it is so conferred as well for the benefit of the public as of the company.

In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, the supreme court of the United States say:—

"The manufacture of gas, and its distribution for public and private use, by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise

belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever and upon what terms it pleases. It is a business of a public nature, and meets a public necessity, for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety."

In *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, the same court say:—

"Such a business is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas-lights. The former articles may be supplied by individual effort, and with their supply the government has no such concern that it can grant an exclusive right to engage in their manufacture and sale. But as the distribution of gas in thickly populated districts is, for the reasons stated in the other case, a matter of which the public may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as, under the constitution of Kentucky, authorized the legislature to grant to the defendant the exclusive privileges in question."

To the same effect are *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539; *City of St. Louis v. St. Louis Gas Light Co.*, 70 Mo. 69; 2 Morawetz on Private Corporations, sec. 1129; 2 Dillon on Municipal Corporations, 3d ed., sec. 691.

It is to be noted that the appellant company was organized under a private charter granted before the adoption of the present constitution of the state, and that the power and authority therein conferred are not made subject, by the terms of the charter, to the consent of the city council.

Inasmuch, therefore, as by the terms of its charter the appellant owed a duty to the public, it could not avoid the performance of that duty by a contract with another corporation.

In *Peoria etc. R. R. Co. v. Coal Valley Mining Co.*, 68 Ill. 489, it was held that the duties which railroad corporations owe to the public, and which are the considerations upon which their privileges are conferred, cannot be avoided by neglect, refusal, or by agreement with other persons or corporations. Therefore any contract to prevent the faithful discharge of any such duties will be against public policy, and void.

In *Hays v. Ottawa etc. R. R. Co.*, 61 Ill. 422, this court says: "But a sale and transfer of the powers of one company to another, without the authority of the legislature, are against public policy, and the courts will do nothing which will promote the transfer, as it is in utter disregard of the duties and obligations of the company."

In *Thomas v. Railway Co.*, 101 U. S. 83, it is said "that where a corporation, like a railroad company, has granted to it by charter a franchise intended, in large measure, to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void, as against public policy."

In *City of St. Louis v. St. Louis Gas Light Co.*, *supra*, the charter of the gas company gave it the "exclusive" right to manufacture and sell gas in the city of St. Louis. The company made a contract by which it surrendered and abandoned its "exclusive" right to have gas-works, lay pipes, or furnish gas in a particular district of the city north of a certain line. It simply parted with the right, given it under its charter, to exclude all other companies from that district; but did not bind itself not to do a gas business there in common with other companies, if it saw fit to do so. The supreme court of Missouri there say:—

"This right to exclude competition was not a right vested in the company for the benefit of the public, because, in its very nature, it was injurious to the public; but it was a right vested in the company for its own benefit, which it might therefore surrender with the consent of its stockholders. The right to make and vend gas to the city and its inhabitants was a right conferred upon the company for the benefit both of the company and the public, and not for the sole benefit of others, but the right to exclude competition was solely for the benefit of the company. If, in the provision of the contract above quoted, the company surrendered and abandoned a right to make and vend gas in that portion of the city described therein, then the position taken by counsel—that it abandoned a public duty—is maintainable. We do not think that said provision is susceptible of that construction; but on

the contrary, it is expressly declared that both of said companies, or any other company or individual, shall be permitted to exist and do business in the aforesaid district or portion of said city without hindrance. We think it clear that the St. Louis Gas Light Company did nothing more than surrender its right to exclude all competition in that part of the city lying north of Washington Avenue, reserving to itself the right to meet any demand which might lawfully be made upon it by the public. There is no abandonment or surrender, on the part of the St. Louis Gas Light Company, of its right, or surrender or abandonment of its duty, to make and vend gas north of the south line of Washington Avenue."

The appellant herein — the Chicago Gas Light and Coke Company — had the exclusive privilege, under its charter, of supplying the city of Chicago with gas for ten years, from February 12, 1849, to February 12, 1859. So far as its privilege was exclusive, such privilege was for its own benefit, and not for the benefit of the public. If, therefore, at any time before February 12, 1859, appellant had made an agreement with the appellee or any other company, foregoing its exclusive right to make and sell gas in the West Division, such an agreement would have been valid as parting only with a privilege conferred for the benefit of the company. But the appellant binds itself, by the contract now under consideration, to surrender and abandon altogether, for one hundred years, all the right conferred upon it by its charter to manufacture and vend gas in the West Division. By so doing, "it abandoned a public duty," and a court of equity will not aid either party in the enforcement of such a contract: 2 Morawetz on Private Corporations, sec. 656; *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 617; 46 Am. Rep. 527; *State v. Hartford etc. R. R. Co.*, 29 Conn. 538; *Hartford etc. R. R. Co. v. New York etc. R. R. Co.*, 3 Rob. 411; *St. Louis etc. R. R. Co. v. Mathers*, 71 Ill. 592; 22 Am. Rep. 122.

There may be cases where a corporation may abandon a public work for reasonable cause; but this is a very different thing from disabling itself, by contract, from the performance of a duty to the public. Nor is the question here as to the extent to which duties imposed upon a corporation will be enforced by *mandamus*; the question is, whether a court of equity will enforce the specific performance of such a disabling contract as is above indicated. In *Marsh v. Fairbury Co.*, 64 Ill. 414, 16 Am. Rep. 564, a bill in chancery was filed

by Marsh for the specific performance of a contract which a railroad company had made with him "to locate passenger and freight depots of said road in Marsh's addition to Fairbury, and at no other point in said town"; and we there held that equity would not enforce the contract, because its enforcement was regarded as against public policy. This court said in that case: "The specific execution of a contract in equity is a matter, not of absolute right in the party, but of sound discretion in the court; and in deciding whether specific performance should be enforced against a railway company, the court must have regard to the interests of the public."

Other provisions of the contract, in the case at bar, besides the third and fourth clauses above quoted, show that appellant and appellee had already entered upon the discharge of their duties to the public, when the contract of April 21, 1862, was made between them. Appellee had laid mains and pipes east of the river, and appellant had laid such mains and pipes west of the river. The contract provides for an exchange of these properties, and the proofs show that forty thousand dollars were paid by appellee to appellant for the excess in value of the latter's interests on the West Side over the value of appellee's interests east of the river.

Moreover, the agreement of April 21, 1862, shows on its face that at that date appellant had a contract with the city for lighting the street-lamps, etc., on the West Side as well as in the other divisions of the city, and appellant thereby sold and assigned so much of such contract as applied to the West Side to the appellee, both parties covenanting each with the other "to use such reasonable and proper influence as they respectively may have with the authorities of the city of Chicago to procure a division of said contract; and a new and independent contract between said city and the said party of the second part for furnishing gas in the West Division."

In view of the provisions thus referred to, it is not necessary to discuss the question whether appellant's charter was permissive or compulsory, or whether it was or was not bound by the mere acceptance of its charter to enter upon the business of making and supplying gas. Inasmuch as it did actually enter upon such business in the West Division, and commence supplying gas in that section to the city and the inhabitants there, a court of equity will not enforce the performance of a contract by which it agreed to abandon the

discharge of its duties to the public, and not to resume the discharge of those duties for one hundred years.

The contract between these corporations tends to create and perpetuate a monopoly in the furnishing of gas to the city, and is, therefore, against public policy. They were organized under special charters at a time when the granting of such charters was not forbidden by the constitution of this state. Appellant, under its charter, had a monopoly of the business of supplying gas up to February 12, 1859. Four years before the latter date, to wit, on February 12, 1855, the legislature granted to appellee its charter, and therein clearly recognized appellant's monopoly and indorsed its continuance for the balance of the ten years, but distinctly provided that, at the expiration of the ten years, appellee should have the same right to make and sell gas anywhere in the city as appellant had theretofore exclusively enjoyed, subject only to the consent of the common council.

We think it was clearly the intent of the legislature to put an end, after February 12, 1859, to the monopoly which appellant had had prior to that time, and to give the gas business to two competing companies. The contract in question sought to continue the monopoly in spite of legislative action. It invested the appellee with the exclusive right to furnish gas in the West Division, and the appellant with such exclusive right in the North and South divisions.

The ordinary rule, that contracts in partial restraint of trade are not invalid, does not apply to corporations like appellant and appellee, because they were engaged in a public business, and in furnishing that which was a matter of public concern to all the inhabitants of the city. In *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, *supra*, it was said: "If there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest."

In the *West Virginia* case it was held that "whenever the legislature by statute law has authorized any person or corporation to condemn the lands of others in order to carry on its

business, the courts will regard this as a legislative declaration that this character of business is such as that the public has so great and direct an interest in that the courts must hold it as contrary to public policy to permit any restriction of it by private contract." If clothing a corporation with the power of eminent domain—that is, with the right to take an individual's property by paying him for it—so stamps the business of such corporation with a public character that that business may not be restricted by contract, we see no reason why the same public character should not attach to a corporation which is vested with the right and power to tear up and use the streets of a great city. The fee of such streets is vested in the city for the benefit of the public. Any business which requires their use requires the use of property which belongs to the public: *Western Union Telegraph Co. v. American Union Telegraph Co.*, 65 Ga. 160; 38 Am. Rep. 781.

It is claimed that the restraint imposed on each of these companies by the contract is only partial, because confined to a particular division of the city. In *Craft v. McConoughy*, 79 Ill. 346, 12 Am. Rep. 171, we held that, even if the restraint imposed by the contract was but partial, yet if it was unreasonably oppressive and injurious to the public, it would not be sanctioned in a court of equity. It was there said: "Whatever is injurious to the interest of the public is void, on the ground of public policy."

Neither appellant nor appellee had any power to make the contract now under discussion. By the amendment of February 7, 1865, appellee was authorized "to borrow money and to mortgage or lease any of its property or franchises." But in April, 1862, neither the charter of appellant nor that of appellee conferred any authority to sell, transfer, assign, or make over to any other company any of the powers or franchises therein granted. By this contract appellant virtually assigns, surrenders, and transfers all its right under its charter to make and sell gas in the West Division to the appellee, and the appellee so disposes of all its rights in the South and North divisions to appellant. The authority to assign and transfer the privilege of making and selling gas is not incident to nor necessarily implied from the power of making and selling gas.

"The powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes that what is

fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others": *Thomas v. Railroad Co.*, 101 U. S. 71. "Corporations have such powers, and such only, as the act creating them confers, and are confined to the exercise of those expressly granted, and such incidental powers as are necessary to carry into effect those specifically conferred": *Franklin Bank v. Commercial Bank*, 36 Ohio St. 355; 38 Am. Rep. 594; *Balsley v. St. Louis etc. R. R. Co.*, 119 Ill. 68; 59 Am. Rep. 784. Hence the contract here sought to be enforced was *ultra vires* of both appellant and appellee.

For the reasons here stated, the judgment of the appellate court is reversed.

CONTRACTS IN PARTIAL RESTRAINT OF TRADE ARE GENERALLY VALID; but this is not so if the restraint is injurious to the public, as where it necessarily tends to the creation of a monopoly. Hence a contract is invalid if it grants to an oil transportation company the exclusive right of laying and maintaining tubing through a large tract of land for the transportation of oil: *W. V. T. Co. v. Ohio R. P. L. Co.*, 46 Am. Rep. 527; or grants to a telegraph company the exclusive use of the right of way of a railroad corporation for telegraph purposes: *W. U. Tel. Co. v. Am. U. T. Co.*, 38 Id. 781; *W. U. T. Co. v. C. & P. R. R. Co.*, 29 Id. 31; or stipulates that a railway company shall not build stations within three miles of a certain place: *St. L. J. & C. Ry. Co. v. Mathers*, 22 Id. 122; *Marsh v. F. & N. W. Ry. Co.*, 16 Id. 564. The validity of contracts in restraint of trade is discussed at length in note to *Angier v. Webber*, 92 Am. Dec. 751-765.

GAS COMPANY AUTHORIZED TO MANUFACTURE AND SELL GAS in a city, and to use its streets in which to lay pipes for conducting gas, owes a duty to the public, and must not discriminate between different citizens who desire to be supplied with illuminating gas: *Shepard v. Milwaukee G. L. Co.*, 70 Am. Dec. 479, and note 485-489; *contra: McCune v. Norwich City G. Co.*, 79 Id. 278; *Paterson G. L. Co. v. Brady*, 72 Id. 300.

LACKEY v. STEERE.

[121 ILLINOIS, 506.]

JUDGMENT AGAINST BANKRUPT PENDING PROCEEDINGS IN BANKRUPTCY, or after his discharge, based on a debt existing before his petition was filed, is not a nullity. Discharge in bankruptcy does not release or affect any person liable for the same debt with the bankrupt, either as partner, joint contractor, surety, or otherwise.

JUDGMENT AGAINST BANKRUPT DURING PENDENCY OF BANKRUPTCY PROCEEDINGS, but before the entry of a discharge, will be stayed on the application of the judgment debtor upon his producing such discharge; but unless so stayed, an execution sale thereunder is valid, and to the

extent of the bid satisfies the debt, and therefore releases other persons who were jointly liable with the bankrupt therefor. The satisfaction thereby produced will not be vacated on motion.

SCIRE FACIAS to revive judgment against Ira Lackey, and motion to vacate an apparent satisfaction of such judgment. The judgment in question was entered against Lackey and John M. Major October 10, 1877. In the previous month, Major had filed his petition in bankruptcy in the United States district court. In December, 1877, plaintiff, E. B. Steere, proved his judgment as a claim in bankruptcy against the estate of the bankrupt. In August, 1879, Major received his discharge. In the year 1882, execution was issued on the judgment, and levied on property belonging to Major. This property was sold for the full amount of the judgment. This sale was set aside by a suit in chancery, to which Lackey was not a party. Steere then sought by the present proceeding and motion to set aside the satisfaction apparently resulting from the sale, and to revive the judgment against Lackey. He was granted the relief sought in the circuit court, whose orders were affirmed by the appellate court.

John E. Pollock, for the plaintiff in error.

Kerrick, Lucas, and Spencer, for the defendant in error.

By Court, SCOTT, J. The record in this case shows two distinct proceedings in the circuit court. One is a motion to vacate the satisfaction of a judgment as to Ira Lackey that had previously been rendered against him and one John M. Major, and the other is a *scire facias* to revive the same judgment as to Lackey. The circuit court vacated the satisfaction of the judgment, as it was asked to do by the motion, and revived it as to Lackey on the *scire facias*. The errors assigned call in question the correctness of both decisions, and as one is dependent upon the other, they will be considered together as presenting a single question. If it shall be ascertained the order vacating the satisfaction of the judgment was improper as against Lackey, it follows, as a matter of course, it was error to revive it as to him:

As respects the facts, there exists no controversy. Pending a suit by Elisha B. Steere against John M. Major and Ira Lackey, on his own petition Major was adjudged a bankrupt in the United States district court. Major did not ask for a stay of proceedings against himself, as he might have done

under the bankrupt act. The suit still progressed, and shortly after the filing of Major's petition in bankruptcy plaintiff obtained a judgment against both defendants. Subsequently the judgment creditor proved his claim against the estate of the bankrupt, but never received any dividend or money whatever upon it. Later on, in August, 1879, Major was granted a discharge in bankruptcy. On the fourteenth day of December, 1882, execution was issued on the judgment against Major and Lackey, and real estate acquired by Major after his discharge in bankruptcy was levied upon and sold to the plaintiff in the execution, in full satisfaction of the judgment, interest, and costs. Afterwards, Major filed a bill in chancery to set aside the sale of the property under the judgment, as a cloud upon his title, and a decree was rendered accordingly; but the satisfaction of the judgment as to Lackey still remained until it was set aside in this proceeding.

It is said the judgment against Major, at the time the execution was issued, was an absolute nullity, on account of his previous discharge in bankruptcy, and that the sale on the execution was void for that reason; and being void as to Major, it is void as to Lackey also, and might be set aside on motion, as was done. This raises the direct question whether the judgment against Major, after his discharge, was a nullity. If so, the subsequent sale of his property under it would be void also.

There can be no pretense the judgment was void as to Lackey; for the bankrupt law provides, in express terms, "no discharge shall release, discharge, or affect any person liable for the same debt, or with the bankrupt, either as partner, joint contractor, surety, or otherwise": U. S. R. S. 1878, sec. 5118. But was the judgment a nullity as to Major after his discharge in bankruptcy? If it was not, it is plain the sale of his property thereunder was a satisfaction of the judgment, both as to him and Lackey. It must not be forgotten, in the brief discussion that is to follow, that Lackey was not a party to the bill filed by Major to set aside the sale of his property under the execution issued on the judgment against them, and is in no wise affected by the decree rendered. His rights are precisely the same as if the bill had never been filed by Major, and no decree rendered in favor of Major.

That the judgment against Major, jointly with Lackey, notwithstanding his subsequent discharge in bankruptcy, was valid as to him as well as Lackey, not the slightest doubt is

entertained. The court had jurisdiction of the subject-matter, and of the persons of defendants, by service of process, and the judgment was valid and would remain in force, and might be executed unless stayed or satisfied in some way known to the law, by judgment or otherwise. Whether a judgment rendered by a state court is valid, under its laws, is not a federal question; but whether its further execution might be stayed, after discharge in bankruptcy, by force and operation of the bankrupt law, may be, and no doubt is, a federal question. What the supreme court of the United States has decided as to the effect to be given to the discharge in bankruptcy after the judgment must therefore be regarded as controlling.

It will be seen the supreme court, in *Dimock v. Revere Copper Co.*, 117 U. S. 559, has held, in conformity with the state courts of Massachusetts, that a judgment rendered against the bankrupt, after his discharge, where he failed to plead such discharge, was conclusive on the question of his indebtedness, and hence the judgment was valid. In *Boyn-ton v. Ball*, 121 Id. 457, recently decided in the supreme court of the United States, it was said the principle on which Dimock's case was decided was, that while the discharge in bankruptcy would have been a valid defense to the suit, if pleaded at or before the time judgment was rendered in the Massachusetts court, it had, in that respect, no more sanctity or effect in relieving defendant of his debt to plaintiff than a payment or receipt or release, of which he could only avail by plea, or otherwise bringing it to the attention of the court; but failing to do so, and showing no good reason why he did not, it was held the judgment was conclusive, and for that reason plaintiff was permitted to revive the judgment against defendant, notwithstanding his previous discharge in bankruptcy.

It will be seen the Dimock case is not sufficiently analogous in its facts with the one being considered to be conclusive, one way or the other, upon the question whether the satisfaction of the judgment in this case can be set aside as to Lackey, and the judgment revived as to him. It does, however, support the view taken by the court, that the judgment against Major, notwithstanding his discharge in bankruptcy, was not a nullity, and the sequel will show that is an important point in the further consideration of the case. Neither is the case of *Boyn-ton v. Ball*, *supra*, sufficiently analogous in its facts to be controlling authority on the principal question in the case being considered. In that case the judgment was

rendered against Boynton prior to his discharge in bankruptcy, and hence he never had an opportunity to plead such discharge as a defense to the action against him. The fact he failed to ask for a stay of the proceedings against him, as he might have done under the bankrupt law, was regarded as a matter of no consequence. As he pleaded his discharge at the first opportunity, and asked for a stay of execution against him, it was held he was entitled to relief. But that is not this case. Here, Major did not ask for a stay of execution on the judgment against him, as he might have done under the rule declared in *Boynton v. Ball*, *supra*, but suffered execution to be issued, and his property to be sold in full satisfaction of the judgment, and costs against him and his co-debtor, Lackey.

As has been seen, the judgment as to Major was valid, and it follows, as a matter of course, the execution and sale thereunder were valid, and operated as a full and complete satisfaction of the judgment, both as to Major and Lackey. It is apprehended it is too late, after the judgment against the bankrupt has been executed and his subsequently acquired property sold in satisfaction of the judgment, to ask for relief against such sale. He should have asked for a stay of execution of the judgment before the sale of his property, and failing to do that, and showing no good reason why he did not, the subsequent sale of his property must be regarded as regular and valid. The case of *Dimock v. Revere Copper Co.*, *supra*, is a strong authority in support of this view of the law.

It would seem, therefore, to follow, as a matter of course, the satisfaction of the judgment, by the sale of Major's property, was a satisfaction of the judgment as to Lackey; and there is no reason, in law or in equity, why the satisfaction should be set aside and the judgment revived as to him. Whether the sale of Major's property was properly set aside on his bill, as to him, is a question not involved in the present discussion. As before remarked, Lackey was not a party to that suit, and had no opportunity to assert anything against the decree rendered in favor of Major, and is therefore not bound in any way by the decree. It is plain the sale of Major's property, as was done, was in satisfaction of the judgment against Lackey, and that is a full defense to the present proceedings against him.

The judgments of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court.

EFFECT OF JUDGMENT AGAINST BANKRUPT pending proceedings for his discharge has always been a subject of controversy and conflicting decisions, ever since there have been statutes in this country purporting to grant a bankrupt a release from his debts. On the one hand, it has been insisted that such judgment is a new debt, created subsequently to the filing of the bankrupt's petition, and therefore in no wise affected by his discharge: *Bradford v. Rix*, 3 Am. Rep. 483; *Freeman on Judgments*, sec. 245; and on the other hand, that it is not a new debt, but merely an old debt in a new form, and therefore released by the discharge: *Id.* The result of the latest adjudications, as shown by the principal case and the cases therein cited, is, that if the judgment is entered pending the proceedings in bankruptcy, and before the discharge, then it will be the duty of the court in which it was entered to grant a perpetual stay of execution, on being presented with such discharge. But if the discharge was granted before the judgment was entered, so that the defendant might have pleaded it by a supplemental answer, then his failure to do so precludes him from subsequently availing himself of such discharge: *Boydston v. Ball*, 121 U. S. 467; *Dinwoth v. Beaver Copper Co.*, 117 Id. 559.

MCINTYRE v. SHOLTY.

[121 ILLINOIS, 600.]

LUNATIC IS LIABLE IN CIVIL ACTION FOR ANY TORT HE MAY COMMIT.

PROPER MEASURE OF DAMAGES IN ACTION AGAINST LUNATIC for a tort committed by him is mere compensation for the injury sustained. It cannot include punitive damages.

INSTRUCTIONS TO COURT.—Party wishing to obtain the opinion of a trial court upon a question of law, for the purpose of having it reviewed in the appellate court, should submit to the trial court the proposition which he claims to embody the law applicable to his case, and ask for a ruling thereon.

TRESPASS by Levi Sholty to recover for damages for the death of Hannah Sholty. Judgment for plaintiff.

Blades and Neville, for the plaintiff in error.

Kerrick, Lucas, and Spencer, and Tipton and Beaver, for the defendant in error.

By Court, **MAGRUDER, J.** This is an action of trespass brought by defendant in error against plaintiff in error in the circuit court of McLean County, under the "Act requiring compensation for causing death by wrongful act, neglect, or default," being chapter 70 of the Revised Statutes, entitled "Injuries": *Hurd's Rev. Stats.* 1885, p. 695. Jury was waived by agreement, and the case was tried without a jury before the judge of the circuit court, who gave judgment for the plaintiff for two thousand five hundred dollars. This judg-

ment has been affirmed by the appellate court, and is brought before us for review by writ of error to the latter court.

Hannah Sholty was the wife of Levi Sholty, a farmer living in McLean County, near Bloomington. About February 17, 1886, a workingman upon Levi Sholty's farm discovered a man in the barn, who, to all appearances, had been concealing himself there for some time. The person so concealed is proven to have been defendant's intestate, Benjamin D. Sholty, a brother of Levi Sholty. Some effort seems to have been made, on February 17th or 18th, to get the officers of the law in Bloomington to go out to the farm and arrest Benjamin D. Sholty, called by the witnesses David Sholty. This effort, however, failed. Accordingly, Levi Sholty and his hired man and a number of his neighbors gathered at his house on the afternoon of February 18, 1886, for the purpose of watching for the intruder and getting him out of his hiding-place. The barn was forty or fifty feet wide and from eighty to one hundred feet long. It was situated about 150 or 200 feet northwest from the house. The granary was in the western end of the barn, and hence in the end that was farthest from the house.

About six o'clock in the evening, David Sholty was discovered in the granary by his brother Levi and one McCoy, who were on watch just outside of the granary door. He shot at them twice with a pistol while they were trying to prevent his escape and to capture him. Others, who were waiting in the house, came to their assistance. A rope was obtained with the intention of tying him, if captured. Presently there was a cry of "fire," and flames were seen to be breaking out at the eastern end of the barn, being the end nearest towards the house. At this time Mrs. Hannah Sholty, plaintiff's intestate, went from the house towards the barn, and had advanced about half of the distance between the two, when David Sholty appeared in the door at the eastern end of the barn with a shot-gun. He was plainly visible in the light made by the fire that had broken out. He called upon Mrs. Sholty and her daughter, Mary, who was with her, to stop. They stopped, turned, and had advanced a few feet on their way back towards the house, when David Sholty fired at them with the gun in his hand. Both were shot. The daughter was wounded in the wrist, and the mother was killed. This action is brought by her husband, as administrator of her estate, to recover damages for her death, against the administrator of the estate

of David Sholty, who is said to have perished in the flames of the burning barn.

The defendant introduced no testimony, except that the examination of one witness was begun and abandoned after a few preliminary questions, on account of the ruling of the court, as hereafter stated.

The defense proposed to show, by the witness on the stand and by others there present in court, that defendant's intestate, Benjamin D. Sholty, was insane at the time Mrs. Sholty was killed. The court refused to receive evidence of his insanity, and exception was taken to the ruling. The question presented relates to the liability of an insane person for injuries committed by him.

It is well settled that, though a lunatic is not punishable criminally, he is liable in a civil action for any tort he may commit. However justly this doctrine may have been originally subject to criticism on the grounds of reason and principle, it is now too firmly supported by the weight of authority to be disturbed. It is the outcome of the principle that, in trespass, the intent is not conclusive. Mr. Sedgwick, in his work on damages (marg. page 456), says that, on principle, a lunatic should not be held liable for his tortious acts. Opposed to his view, however, is a majority of the decisions and text-writers.

There certainly can be nothing wrong or unjust in a verdict which merely gives compensation for the actual loss resulting from an injury inflicted by a lunatic. He has properly no will. His acts lack the element of intent or intention. Hence it would seem to follow that the only proper measure of damages in an action against him for a wrong is the mere compensation of the party injured. Punishment is not the object of the law when persons unsound in mind are the wrong-doers.

There is, to be sure, an appearance of hardship in compelling one to respond for that which he is unable to avoid for want of the control of reason. But the question of liability in these cases is one of public policy. If an insane person is not held liable for his torts, those interested in his estate, as relatives or otherwise, might not have a sufficient motive to so take care of him as to deprive him of opportunities for inflicting injuries upon others. There is more injustice in denying to the injured party the recovery of damages for the wrong suffered by him than there is in calling upon the relatives or friends of the lunatic to pay the expense of his confinement, if he has an estate ample enough for that purpose. The

liability of lunatics for their torts tends to secure a more efficient custody and guardianship of their persons. Again, if parties can escape the consequences of their injurious acts upon the plea of lunacy, there will be a strong temptation to simulate insanity with a view of masking the malice and revenge of an evil heart. The views here expressed are sustained by the following authorities: Cooley on Torts, 99-103; 2 Saunders's Pleading and Evidence, 318; Shearman and Redfield on Negligence, sec. 57; *Weaver v. Ward*, Hob. 134; *Morse v. Crawford*, 17 Vt. 499; 44 Am. Dec. 349; *Behrens v. McKenzie*, 23 Iowa, 333; 92 Am. Dec. 428; *Krom v. Schoonmaker*, 3 Barb. 647; also cases in note to said case in Ewell's Leading Cases, 642. In the light of the principles thus announced, we find no error in the ruling of the circuit court upon this subject.

Plaintiff in error also contends that there should have been no recovery in this case, because of alleged contributory negligence on the part of Mrs. Sholty. It is claimed that she knew of her brother-in-law's madness, and that he was armed when she started to go from the house towards the stable, and that by doing so, under the circumstances, she was guilty of a want of proper care and prudence. We forbear to express any opinion as to whether or not there could be any such thing as contributory negligence in a case of this kind, and under such circumstances as are herein disclosed. It is sufficient to say that there is a considerable amount of evidence in the case bearing upon this question. If it could be properly raised, the facts necessary to do so were fully developed in the testimony presented to the court by the plaintiff below. Therefore, plaintiff in error should have submitted to the trial court a proposition, to be held as law, embodying his theory of contributory negligence as applicable to the facts of the case, in accordance with section 41 of the Practice Act: Hurd's Rev. Stats. 1885, p. 904. He did not do so, and hence the question is not properly before us for our consideration.

The judgment of the appellate court is affirmed.

LUNATIC IS ANSWERABLE FOR TRESPASSES AND TORTS in all cases where liability to the action is not dependent on the intent with which the wrongful act was done: *Furr v. John*, 92 Am. Dec. 428; *Morse v. Crawford*, 44 Id. 349; *Lancaster Bank v. Moore*, 78 Pa. St. 407. But in actions for slander the rule is otherwise, because the intent with which the slanderous words were spoken is of the *gravesamen* of the charge, and proof of insanity may always be received in mitigation of damages: *Dickinson v. Barber*, 6 Am. Dec. 53; *Yeates v. Reed*, 32 Id. 43; *Hornor v. Marshall*, 5 Munf. 466; *Bryant v. Jackson*, 6 Humph. 199.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

CINCINNATI ETC. RAILROAD COMPANY v. CARPER.

[112 INDIANA, 26.]

HOLDER OF TICKET OVER RAILROAD, WHO BY MISTAKE TAKES PASSAGE ON WRONG TRAIN, IS PASSENGER so far as to entitle him to protection against the negligence of the railroad company.

OBEEDIENCE BY PASSENGER TO DIRECTIONS OF CONDUCTOR OF TRAIN, GIVEN WITHIN SCOPE OF HIS AUTHORITY, WHERE SUCH OBEEDIENCE WILL NOT EXPOSE the passenger to known or apparent danger which a prudent man would not incur, is not contributory negligence, although it may result in bringing injury upon him.

WHERE PASSENGER ENTERS WRONG TRAIN THROUGH HIS OWN MISTAKE, AUTHORITY OF CONDUCTOR, AS REPRESENTATIVE OF CARRIER, TERMINATES when a safe alighting-place is provided, and the passenger has voluntarily left the train in safety. The company is not bound by the general directions of the conductor, in the nature of advice and information, as to what course the passenger shall pursue after he has left the train, and is not liable for an injury received by the passenger while acting upon such directions.

R. D. Marshall and W. C. Forrey, for the appellant.

B. F. Claypool, J. H. Claypool, J. S. Duncan, C. W. Smith, and J. R. Wilson, for the appellee.

By Court, ELLIOTT, J. The complaint of the appellee alleges that his intestate bought a ticket at Connersville, entitling him to a passage on the defendant's trains to Cincinnati, Ohio; that his intestate was a stranger in Connersville, unacquainted with the points of the compass at that city; that, on the day he purchased his ticket, he went to the appellant's depot, intending to take passage on its east-bound train, which,

according to schedule time, passed Connersville at 8:47 P. M.; that the east and west bound trains usually passed at that hour at Connersville; that the night on which the appellee's intestate intended to take passage was dark; that at a short distance to the west of appellant's station the track passed over a highway and a canal, upon an elevated trestle-work several hundred feet in length; that at a short distance west of the trestle-work there was a switch known as Salter's switch; that on the night on which the intestate intended to take passage for the east, the train from the west was behind time, and was ordered to wait at Salter's switch for the train from the east; that the latter train was ordered to move forward and pass at that point; that the conductor of that train had notice of these orders; that on the arrival of the train from the east the intestate, supposing it to be the east-bound train, entered it, and immediately thereafter it departed; that shortly after the departure of the train the conductor informed him that he was on the wrong train, and stopped the train a short distance west of the trestle-work which spanned the canal and highway; that "he carelessly and negligently directed the deceased to get off, and at once to walk back over the railroad track to Connersville, informing him that if he, the deceased, did so" he would reach the station in time to take passage on the east-bound train; that at the time the conductor gave these directions he knew of the existence of the trestle-work, and that the east-bound train would, in a very few minutes, pass over that part of the track lying between the place where the deceased was directed to leave the train and the station at Connersville; that there was no highway or foot-passage between those points by which the deceased could return to the station except by passing along the railroad track; that the deceased was ignorant of the existence of the trestle-work, and of the fact that the east-bound train would soon pass over the trestle-work; that the deceased undertook to obey the directions of the conductor, and, without fault or negligence on his part, was struck and killed while walking along the track built upon the trestle-work, on his way to the station at Connersville.

Where a person has bought a ticket over a railroad, and by mistake takes passage on the wrong train, he is a passenger so far as to entitle him to protection against the negligence of the company: *Columbus etc. R'y Co. v. Powell*, 40 Ind. 37; *Railway Accident Law*, 215; *International etc. R. R. v. Gil-*

bert, 22 Am. & Eng. R. R. Cas. 405; 64 Tex. 536; 2 Wood's Railway Law, 1047.

The deceased was therefore entitled to be treated as a passenger while on the train, and a high degree of practicable care to protect him from injury was due to him from the carrier.

Where the directions of the conductor are within the scope of his authority, and obedience to them will not expose a passenger to known or to apparent danger which a prudent man would not incur, obedience by the passenger is not contributory negligence, although it may result in bringing injury upon him.

In *Pool v. Chicago etc. R'y Co.*, 53 Wis. 657, and 56 Id. 227, the doctrine was stated somewhat more broadly, and it was said, in speaking of the passenger: "He relied—and we think he had the right to rely—on the judgment of the person in charge of the car, presuming that by following his directions in the matter he would not expose himself to any unnecessary or unusual peril."

It was held in *Hanson v. Mansfield etc. R'y & Trans. Co.*, 38 La. Ann. 111, 58 Am. Rep. 162, that one who rides on the locomotive, under the direction of the "engineer or conductor," is not guilty of contributory negligence, and the court said: "It has also been frequently held that taking an unusual place on a train, which ordinarily might be considered contributory negligence, cannot be so regarded where the place is occupied by the direction or permission of the conductor."

We cannot concur in this extreme view of the law. Our conclusion is, that a passenger may safely rely on the judgment of those placed in charge of the train, where it is not plainly open to his observation that reliance will expose him to danger that a prudent man would not incur, but that he cannot rely on their judgment where it would expose him to a risk that a reasonably prudent man would not assume. An American author says: "If the danger is obvious, and such as a reasonable man would not have incurred, the passenger must not assume the risk": 2 Wood's Railway Law, 1121. It was said by this court in *Louisville etc. R. R. Co. v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149, that "our own cases hold that passengers are warranted in obeying the directions of the agents and servants of the carrier, unless such obedience leads to known danger which a prudent man would not encounter." This doctrine is supported by our own cases, and by the great

weight of authority: *Jeffersonville R. R. Co. v. Swift*, 26 Ind. 459; *Pennsylvania Co. v. Hoagland*, 78 Id. 203; *Lake Erie etc. Ry Co. v. Fix*, 88 Id. 381; 45 Am. Rep. 464; *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 346; 49 Am. Rep. 168; *Filer v. New York etc. R. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Filer v. New York etc. R. R. Co.*, 59 N. Y. 351; *St. Louis etc. R. R. Co. v. Cantrell*, 37 Ark. 519; 40 Am. Rep. 105; *Fowler v. Baltimore etc. R. R. Co.*, 18 W. Va. 579; *Hickey v. Boston etc. R. R. Co.*, 14 Allen, 429; *Railroad Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323; *Philadelphia etc. R. R. Co. v. Boyer*, 97 Pa. St. 91; *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291; *St. Louis, I. M. & S. Ry Co. v. Person*, 49 Ark. 182; Beach on Contributory Negligence, 72; 2 Wood's Railway Law, 1121; Hutchinson on Carriers, sec. 535.

Under the rule we have stated, the deceased cannot be considered guilty of contributory negligence upon the case made by the complaint; for it is averred that he was ignorant of the danger to which the directions of the conductor exposed him, and was free from fault and negligence. As he was free from fault and ignorant of danger, and as the danger was not open to his observation, he cannot be regarded as having done what a reasonably prudent man would not have done in relying upon the directions of the appellant's conductor, if the directions were given by the conductor while acting within the line of his duty.

We come now to a question of much more difficulty, and that is, Were the directions of the conductor given while acting within the scope of his authority? It is an elementary rule that a principal is not bound by the acts of his agent, unless they are performed within the scope of the authority actually or ostensibly conferred upon him. This rule applies, of course, to railroad corporations as well as to natural persons: Railway Accident Law, 99.

The conductor of a passenger train is undoubtedly clothed with extensive authority. In discussing the subject, Chief Justice Ryan said: "Indeed, as that fictitious entity, the corporation, can act only through natural persons, its officers and servants, and as it of necessity commits its trains absolutely to the charge of officers of its own appointment, and passengers of necessity commit to them their safety and comfort *in transitu*, under conditions of such peril and subordination, we are disposed to hold that the whole power and authority of the corporation, *pro hac vice*, is vested in these

officers; and that, as to passengers on board, they are to be considered as the corporation itself": *Bass v. Chicago etc. R'y Co.*, 42 Wis. 654; 24 Am. Rep. 374. Speaking for the court, Campbell, J., said of the conductor and the company: "He represents them in the whole management of his train." It was also said: "He occupies the same position as the master of a ship": *Great Western R'y Co. v. Miller*, 19 Mich. 305.

In *Chicago etc. R'y Co. v. Ross*, 112 U. S. 377, the court declared that the conductor represents the corporation, and said: "If such a conductor does not represent the company, then the train is operated without any representative of its owner."

Discussing the general subject, the supreme court of Pennsylvania said: "And where there are no prescript rules, the usage or common law of railroads makes the conductor the responsible agent in the conduct of the train. It is of the last importance to all interests, both public and private, that the law should define with precision to whom the custody and responsibility of a train of cars attaches. We hold that, from the beginning to the end of the trip, whatever the motive power employed, the conductor, and nobody else, is the responsible party in possession of the train": *Rauch v. Lloyd*, 31 Pa. St. 358; 72 Am. Dec. 747.

There are many authorities which assert doctrines substantially the same as those declared in the cases from which we have quoted: *Columbus etc. R'y Co. v. Powell*, *supra*; *Terre Haute etc. R. R. Co. v. McMurray*, 98 Ind. 358; 49 Am. Rep. 752; 1 Wood's Railway Law, 449, and cases cited; Thompson on Carriers, 369.

But broad as the authority of the conductor is, it is by no means unlimited; on the contrary, it is limited to the management and control of the train committed to his care. He has authority to control the train in its movements, and it is his duty to take measures to preserve passengers from injury while getting on the train, while they are on it, and while they are alighting. In the discharge of this duty, he must, as the representative of the company, exercise a high degree of care and diligence; but when the relation of carrier and passenger terminates, the authority of the conductor, as the representative of the carrier, is at end. His authority ceases when the passenger has safely alighted from the train.

The company does not vest him with either apparent or actual authority beyond such as is necessary for the proper

care of the persons and property placed in his charge and control. When the person who enters as a passenger has finally left the train, the conductor no longer stands to him as the representative of the carrier. His representative character does not extend to acts done after the relation of passenger and carrier has been severed. It is his duty to afford the passenger whom he directs to leave his train a safe alighting-place; but he is not bound, as the representative of the company, to look after the passenger after he has left the train. It may be that, where a passenger leaves a train, and in making his way from the station, is injured by the negligence of other servants, the company is liable: *Imhoff v. Chicago etc. R. R. Co.*, 22 Wis. 649; *Gaynor v. Old Colony etc. R'y Co.*, 100 Mass. 208; *Indiana Central R'y Co. v. Hudelson*, 13 Ind. 325; 74 Am. Dec. 254. But even in such a case, it is doubtful whether the liability is that of a carrier to a passenger. If, however, it were conceded that the liability is of that character, still the concession would not avail the appellee, for the question here is not what other agents of the company did; the question is, What was done by the conductor? and was it within the scope of his authority? If the conductor had authority to give the deceased directions as to the course he should pursue after he left the train, then, upon the facts alleged in the complaint, the appellant may, perhaps, be liable; but if the conductor had no authority to give such directions, then there can be no liability on the part of the appellant. It is not for the negligence of any other of the appellant's servants that a recovery is sought; for the negligence of the conductor is stated as the sole cause of action, and for that negligence the appellant is not liable, unless he was at the time acting as its agent, and within the line of his duty.

Our judgment upon this point is, that where a passenger enters a wrong train, through a mistake of his own, the authority of the conductor, as the representative of the carrier, terminates when a safe alighting-place is provided, and the passenger has left the train in safety, and that it does not extend so far as to authorize the conductor to direct the passenger what course he shall pursue after leaving the train. If the conductor had directed the deceased to walk ten or twenty miles, it would hardly be contended that the corporation was responsible for such a direction, and we cannot perceive that the principle is different whether the distance be long or short. A passenger has no right to assume that the carrier has in-

vested the conductor with authority to direct him to travel back to a station, where he entered a train by mistake; for the conductor is neither actually nor ostensibly clothed with any such authority. If the conductor had directed the deceased to go to a hotel, or had directed him to walk back upon a wagon-road, he certainly would not have been acting in the line of his duty, and we cannot discern any difference between such cases and the one under examination, for the direction to go back upon the track cannot change the legal features of the case. If the conductor had refused to carry the deceased to a regular station, or had compelled him to leave the train, an essentially different question would have faced us; but here the passenger left the train without compulsion, and undertook to rectify his mistake by making his way back to the station, so that the case turns upon the question whether the instructions given by the conductor as to the course the deceased should pursue after leaving the train were within the line of his duty. It is not the theory of the complaint that the conductor put the deceased off the train at an improper place; the case is not, therefore, controlled by the authorities upon that general subject. Nor is it the theory of the complaint that the conductor was guilty of negligence in directing the deceased to alight at an unsafe place, so that the case is entirely unlike that of a conductor directing a passenger to step from one train to another, or to alight upon a defective or unsafe platform. The classes of cases mentioned, and their kindred, are therefore excluded from our consideration and decision.

Counsel for the appellee dispose of the question whether the direction to the intestate to walk back to the station was within the line of the conductor's duty, by asserting that it is not an open question in Indiana, and refer us to the cases of *Carter v. Louisville etc. R'y Co.*, 98 Ind. 552; 49 Am. Rep. 780; *Evansville etc. R. R. Co. v. McKee*, 99 Ind. 519; 50 Am. Rep. 102; *Terre Haute etc. R. R. Co. v. Graham*, 46 Ind. 239; *Terre Haute etc. R. R. Co. v. Fitzgerald*, 47 Id. 79; *Indianapolis etc. R'y Co. v. Anthony*, 43 Id. 183; *Jeffersonville R. R. Co. v. Rogers*, 38 Id. 116; 10 Am. Rep. 103; *Pennsylvania Co. v. Hoagland*, 78 Ind. 203; *Columbus etc. R'y Co. v. Powell*, 40 Id. 37; *Great Western R'y Co. v. Miller*, 19 Mich. 305; *Bass v. Chicago etc. R'y Co.*, 36 Wis. 450; 17 Am. Rep. 495.

But these cases do not meet the question which controls here; for they do no more than assert that for a wrong of an

agent, whether willful or negligent, committed within the line of his duty, the corporation is responsible, and that, in managing the train, the conductor is the agent of the railroad company. If it were granted that the act of directing a passenger what course to pursue after leaving a train is within the line of the conductor's duty, then the path of the appellee would be a smooth one, traversing solid ground; but the path is rugged and uncertain, because the assumption which is taken for granted — that is, that the act of the conductor was within the line of his employment — is the proposition which must be proved to make progress to a recovery possible. If it can be assumed that a railroad company actually or ostensibly invests its conductor with authority to direct passengers who by mistake enter the wrong train what route they shall take back to a station where they can rectify their mistake, then these authorities might justly be regarded as of controlling force; but until the assumption which lies at the foundation of appellee's theory is established, these authorities are irrelevant and inapplicable.

One great reason why a passenger is justified in obeying the directions of a conductor is, because the conductor is entitled to exact obedience. His directions are in the nature of commands or requirements; he may, indeed, put them in that form; it is therefore most reasonable that a passenger should have a right to rely on them when they are of that nature. The directions given by the conductor in this case are not of that nature; for it is perfectly obvious that he could not have required or commanded the deceased to take any particular route back to the station. It is not to be assumed that conductors have authority to bind the company by general directions, which are more in the nature of advice and information than of requirements or commands, as to what a passenger shall do after he leaves the train. There is an essential difference between a direction in the nature of a requirement and a direction in the nature of advice or information, as is strikingly illustrated by the cases of *Vimont v. Chicago etc. R. R. Co.*, 28 Am. & Eng. R. R. Cas. 210, 71 Iowa, 58, and *Jeffersonville R. R. Co. v. Swift*, 26 Ind. 459. It is clear to our minds, that, upon principle, a railroad company is not responsible for directions in the nature of information or advice given to a passenger who, through his own mistake, has entered the wrong train, as to what course he shall pursue after leaving the train. This is so because the company does

not, either actually or ostensibly, confer upon the conductor authority to give directions of that character to passengers who have entered its trains by mistake not caused by any negligence on its part.

Appellant's counsel dispose of the question by saying: "It was not an opinion given or an act done within the scope of his employment or authority, but a friendly act on the part of the conductor toward the person who had taken the wrong train without any fault or negligence on the part of the conductor." The only authorities cited are the cases of *Louisville etc. R'y Co. v. Boland*, 53 Ind. 398; *Cincinnati etc. R. R. Co. v. Eaton*, 53 Id. 307; and *Evansville etc. R. R. Co. v. Dexter*, 24 Id. 411. But, as counsel for the appellee justly say, "not one of these cases bears even remotely upon the point to which it is cited."

Authorities upon the general question are very abundant; but upon the precise phase of the question here presented it is far otherwise. The case of *International etc. R. R. Co. v. Gilbert*, 64 Tex. 536, 22 Am. & Eng. R. R. Cas. 405, in some of its features resembles the present case; but in that case the direction given by the conductor was clearly within the line of his duty, because it was made to the passenger while on the train, and was a direction to her to remain on it. The difference between the two cases is obvious, for here the direction was as to what the passenger should do after he had left the train.

In *Chance v. St. Louis etc. R'y Co.*, 10 Mo. App. 351, it was held that a brakeman, charged with the duty of directing passengers where to leave the cars, had authority to bind the company by directing the passenger to take a prescribed way from the train; and in support of this doctrine the cases of *McDonald v. Chicago etc. R. R. Co.*, 26 Iowa, 124, 145, 95 Am. Dec. 114, and *Allender v. Chicago etc. R. R. Co.*, 43 Iowa, 276, were cited. That case, however, stands upon the rule that carriers are bound to provide safe alighting-places, and are bound by the directions of their employees respecting such places. That case is, therefore, far from holding that directions, as to the course to be taken after the passenger has safely alighted, are within the line of a conductor's duty. There is some resemblance between this case and that of *Hulbert v. New York Central R. R. Co.*, 40 N. Y. 145; but the court, in its opinion, attached no importance to the directions of the conductor, and held the company liable on the ground of a negligent

breach of duty in failing to make safe the place where passengers entered and left its trains. We do not deem it necessary to comment upon the cases which hold the acts of an agent not to be within his duty, but content ourselves with referring to a few of them, and to the text-books, where others may be found: *Gilliam v. South and North Alabama R. R. Co.*, 70 Ala. 268; *Nunn v. Georgia R. R.*, 71 Ga. 710; 51 Am. Rep. 284; *Sevier v. Vicksburg etc. R. R. Co.*, 61 Miss. 8; 48 Am. Rep. 74; 2 Wood's Railway Law, 1213.

The complaint cannot be upheld unless it be adjudged that the conductor was not only in the service of the company, but that his instructions or directions were given while he was acting for the company within the line of his duty. If he was not acting for the company and within the line of his duty, the company would not be liable even though he was in its service and had committed a willful tort; but it is not the theory of the complaint that he committed such a tort, for there is no averment that the deceased was compelled or required to leave the train. We cannot presume that a wrong was done by the conductor; on the contrary, facts must be alleged which warrant the conclusion of tortious conduct, for the presumption is with the defendant, and not the plaintiff: *Chicago etc. R. R. Co. v. Bills*, 104 Ind. 13; *Beauchamp v. International etc. R. R. Co.*, 56 Tex. 239; 9 Am. & Eng. R. R. Cas. 307.

We must conclude that the deceased willingly left the train, for it is not otherwise averred; and so, too, we must conclude that there was no fault on the part of the conductor, except that of negligently instructing the deceased where and how to go in order to take the east-bound train. The utmost that can be claimed for the complaint, with trace or tinge of justice, is, that it shows that the conductor negligently gave instructions to the deceased as to what he should do and where he should go after alighting from the train.

The deceased left the train, we must assume, of his own free will, influenced, it may be, by the instructions of the conductor, but not constrained by them. Thus he severed the relation of passenger and conductor, and thus he passed from the conductor's supervision and control. We cannot think that the latter's authority went with the deceased from the train, controlling and protecting him on his way to the station. If the conductor had instructed the deceased to take a carriage and pass over a turnpike, the company would not, it seems to us,

have been liable, even though the conductor may have known that there was a broken bridge or a pitfall on the road which the deceased could not avoid. Neither would there have been liability if the conductor had assumed to direct the deceased to take a foot-path which he knew no man could traverse in safety. The principle which rules the real case against the appellee is the same as that which governs the supposed cases, and that principle is, that the conductor, as the representative of the company, had neither actual nor ostensible authority to instruct one who had voluntarily left his train what path or road he should walk to reach a distant station.

Judgment reversed.

LIABILITY OF RAILROAD COMPANY TO PERSONS INJURED BY WRONGFUL OR NEGLIGENT ACTS OF CONDUCTOR while acting within the scope of his authority: *Kline v. Central Pac. R. R. Co.*, 99 Am. Dec. 232, and cases collected in note 239; *Higgins v. Waterlot Turnp. Co.*, 7 Am. Rep. 293; *McClure v. Philadelphia etc. R. R. Co.*, 6 Id. 345; *English v. Delaware etc. Canal Co.*, 23 Id. 69; *Louisville etc. R. R. Co. v. Sullivan*, 50 Id. 186; *Murlock v. Boston etc. R. R. Co.*, 50 Id. 307.

WHO ARE TO BE REGARDED AS PASSENGERS ON RAILWAY TRAIN: *Commonwealth v. Vermont etc. R. R. Co.*, 11 Am. Rep. 301, and note 304; *Union Pacific Ry Co. v. Nichols*, 11 Id. 475; *Hammond v. North Eastern R. R. Co.*, 24 Id. 467; *Lucas v. Milwaukee etc. R. R. Co.*, 14 Id. 735; *Eaton v. Delaware etc. R. R. Co.*, 15 Id. 513; every one riding in a railway car is presumed to be there lawfully as a passenger: *Pennsylvania R. R. Co. v. Books*, 98 Am. Dec. 229.

WHEN PASSENGER ON RAILWAY TRAIN CEASES TO BE SUCH: *Commonwealth v. Boston etc. R. R. Co.*, 37 Am. Rep. 382.

CONDUCTOR TAKING FARE BEYOND AUTHORITY — LIABILITY OF COMPANY: *Haggerty v. Flint etc. R. R. Co.*, 60 Am. Rep. 301, and note 307.

DUTY OF RAILWAY COMPANY TOWARD PASSENGERS ALIGHTING AT FREIGHT-DEPOT: *Stewart v. International etc. R. R. Co.*, 37 Am. Rep. 753.

CONDUCTOR OF TRAIN, IN EXERCISE OF GENERAL AUTHORITY TO ADMINISTER RULES OF COMPANY, is allowed a discretion, and may apply or relax these rules, within reasonable bounds, according to circumstances: *O'Donnell v. Allegheny Valley R. R. Co.*, 98 Am. Dec. 336.

UPON QUESTION WHETHER PLAINTIFF WAS NEGLIGENT, JURY MAY, in connection with the facts and circumstances, take into consideration the general and known disposition of men to take care of themselves, and keep out of the way of danger: *North Central R. R. Co. v. State*, 96 Am. Dec. 545, and note 553.

WHERE RAILROAD TRAIN OVERSHOOTS STATION, AND IS STOPPED AT DANGEROUS PLACE IN DARK NIGHT, IT IS NOT NECESSARILY NEGLIGENT for passenger to alight: *Terre Haute etc. R. R. Co. v. Burk*, 49 Am. Rep. 168; *Baltimore etc. Ry Co. v. Kemp*, 48 Id. 134.

THE PRINCIPAL CASE IS CITED to the point that a carrier of passengers by railway clearly violates a legal duty in not stopping the train a sufficient

length of time to permit a passenger to alight in safety, in *Louisville etc. R. R. Co. v. Wood*, 113 Ind. 546; and is cited to the point that the conductor of a passenger train represents the company in his whole management of his train, in *Id.* 571.

LOUISVILLE, NEW ALBANY, AND CHICAGO RAILWAY COMPANY v. PHILLIPS.

[112 INDIANA, 59.]

RAILWAY COMPANY MUST MAINTAIN STREET OR HIGHWAY CROSSINGS in a reasonably safe condition when it has changed or altered them for its own purpose or convenience.

IF EMPLOYEES OF RAILWAY SEE PERSON FASTENED ON TRACK, they must use reasonable efforts to stop the train in time to prevent his injury; but if he is fastened upon a portion of the track upon which the public has no rights, the company is not answerable for the failure of its employees to stop the train, unless it appears that they saw him and knew his helpless condition.

TRESPASSER HAS NO RIGHT TO EXACT CARE OF RAILROAD COMPANY.

ONE WHO ENTERS UPON TRACK OF RAILROAD LAID UPON STREETS OF CITY is not a trespasser, nor is negligence to be imputed to him from the fact of his being upon such track. He has the right to enter upon the track, though his right to its use is subordinate to that of the railroad company.

ONE WHO WALKS UPON RAILWAY TRACK IN PUBLIC STREET OR HIGHWAY must use reasonable care to discover and avoid danger.

RAILWAY COMPANY IS ANSWERABLE TO ONE WHO BECOMES FASTENED UPON ITS TRACK in the streets of a city, because of negligence in the construction of such track, and who while so fastened is injured by an approaching train, though the employees of the company did not see him nor know of his helpless condition.

IMMATERIAL VARIANCE BETWEEN ALLEGATION AND PROOF does not require the reversal of a judgment.

G. W. Friedley and W. H. Martin, for the appellant.

J. R. and W. H. East, and G. W. Cooper, for the appellee.

By Court, ELLIOTT, J. The appellee alleges, in the first paragraph of his complaint, that the track of the appellant is laid upon Railroad Street in the city of Bloomington for the distance of one half of a mile; that it crosses several streets, among others Fourth and Fifth streets; that in constructing the track, a space of three or four inches was left between the guard-rail and the rails of the track; that, on the twenty-seventh day of December, 1882, the appellee, without any fault or negligence on his part, was crossing the track and caught his foot in the space between the guard-rail and the rails of the track; that the appellant negligently and carelessly

ran one of its trains upon the appellee while his foot was fastened between the rails, and greatly injured him.

The second paragraph of the complaint contains substantially the same allegations as to the appellant's negligence in running a train upon the appellee while his foot was fastened between the rails, as to his own care, and as to the occupancy of Railroad Street by the appellant's track; but it also alleges that for the use of persons traveling upon the street the appellant had constructed and maintained a walk or platform, and that it was guilty of negligence in constructing and maintaining the walk, thereby endangering the life and limbs of those who traveled over it.

There was no demurrer addressed to the complaint, nor is there any attack upon it that we can properly notice, although counsel have assigned as error rulings upon demurrers to each paragraph of the complaint. We do not, therefore, pass upon the sufficiency of the complaint, but confine our decision to such questions as are properly presented.

The material facts which are established by the evidence are these: In 1853 the track of the appellant was constructed upon and along Railroad Street in the city of Bloomington, and has since been maintained and used. Between the tracks of the company, and on each side, the ground is covered by planks. On the twenty-seventh day of December, 1882, the appellee, a lad about eight years of age, was sent on an errand, and passed down Fifth Street until he reached Railroad Street, and there entered upon the track laid in that street; from this point he walked toward Fourth Street, and when opposite the appellant's depot, and within twenty feet of Fourth Street, his foot was caught between the rail of the track and the plank on the inside of the track. His foot was so firmly fastened that he could not extricate it, and while he was thus fastened a train of cars was run upon him, and he was very severely maimed and injured. The employees of the appellant were guilty of negligence in the management of the train, but there was no intentional or willful wrong on their part. The track was negligently constructed and maintained, and was in such a condition, through the fault of the company, as to endanger the lives and limbs of those walking along the track laid in the street.

It is important to keep in mind the fact that the injury to the appellee did not occur at a street-crossing, but at a point on the track laid along a street twenty feet north of the cross-

ing. If the injury had been caused solely by the negligence of the appellant in constructing or maintaining the crossing, there would be no doubt as to the appellee's right of recovery, for it is the duty of a railroad company to maintain street or highway crossings, changed by it for its own purpose and convenience, in a reasonably safe condition for passage: *Delzell v. Indianapolis etc. R. R. Co.*, 32 Ind. 45; *Indianapolis etc. R. R. Co. v. Stout*, 53 Id. 143; *Louisville etc. R'y Co. v. Smith*, 91 Id. 119; *South etc. R. R. Co. v. McLendon*, 63 Ala. 266; *Kelly v. Southern etc. R. R. Co.*, 28 Minn. 98; *Oliver v. Northeastern R'y Co.*, 9 Eng. Rep. (Moak) 350; 2 Wood's Railway Law, 1382.

But the appellee was not injured at a crossing, so that the rule we have stated cannot directly apply, although the principle which it asserts may exert an important influence in the decision of the case; for if the place where the injury was inflicted was still a street, the principle the rule embodies does exert a potent influence: 2 Wood's Railway Law, 958.

If the place where the accident occurred was exclusively the track of the railroad company, in which the public had no rights, then there can be no recovery on the sole ground that the employees of the appellant were negligent in the management of the train which ran upon the appellee; for it does not appear, either by positive evidence or by inference, that they knew that the lad was fastened to the track. Had they known of his unfortunate situation, it would have been their duty, even had he been on a track in which the company's right was exclusive, to have used reasonable effort to bring the train to a stop. If the employees see a man bound to the rails in time to check the train, they must use reasonable measures to check it, and not suffer it to run upon the helpless man; but if they do not see him in time to check the train, the company cannot be held liable; nor could it, even in such a case, be held liable unless the employees knew of the helpless condition of the person on the track: *Indianapolis etc. R'y Co. v. Pitzer*, 109 Ind. 179; 58 Am. Rep. 387; *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318; *Lake Shore etc. R. R. Co. v. Miller*, 25 Mich. 274.

On the hypothesis that the place where the appellee received his injury was exclusively the roadway of the company, something must be superadded to the negligence of those in charge of the train in order to justify a recovery. On that hypothesis much more must be shown.

If the place where the lad caught his foot between the rail and the plank was the roadway of the company to the exclusion of the rights of the public, then there can be no recovery, even though the way was so unsafe that no citizen could walk along it without injury coming upon him. If the way was the exclusive roadway of the company, in which the public had no right of passage, then the company would not be liable to one who walked along it, unless the injury inflicted upon him was the result of willful or intentional misconduct. But if it was a street which the public had a right to use, then, although it may have been occupied by the track of the company, the person who walks upon it is not a trespasser. It is true that circumstances may make him guilty of contributory negligence that will defeat a recovery, but the mere fact that he walks upon the highway does not make him a trespasser, although the railroad company has its track laid in the highway. A trespasser has no right to exact care from a railroad company; but one who is not a trespasser has a right to exact a reasonable degree of care, if he is not himself in fault.

It is not necessarily inferable, because both the railroad company and the public have rights in a street or highway, that one who enters on the track in the street is a trespasser; nor, indeed, can it be inferred from that fact alone that he is guilty of negligence. If the way retained its character as a public one, it was not a wrong on the part of the citizen to carefully pass over it, even though it be conceded that so far as respects the running of trains, the right of the company is paramount. Although this right of the company is paramount, still a right of action may exist in favor of one who is injured by the negligence of the company's servants. It may be true, and probably is true, that the railroad company has the superior right: *Cincinnati etc. R. R. Co. v. Butler*, 103 Ind. 31. It cannot, however, be inferred from this that the citizen has no right to use the track for passage; he does have that right, but it is, perhaps, subordinate to the right of the company.

The cases relied upon by appellant's counsel certainly do not sustain the doctrine that the paramount right of the company absolves it from duty to those who walk along the way upon which its tracks are laid.

The first case cited is *Barker v. Hudson River R. R. Co.*, 4 Daly, 274. All that is decided in that case is, that a cartman is bound to get off the track when he sees a train approaching,

and that the ordinary rules of the road do not apply. But it is tacitly conceded, if, indeed, not directly affirmed, that where a track is laid in a street, the public may still use it, subject only to the right of the railroad company to move its trains over the track.

The second of the cases cited, and the one chiefly relied on, is that of *Zimmerman v. Hannibal etc. R. R. Co.*, 71 Mo. 476. In that case it was conceded that as to crossings the rights of the citizen are paramount, but that where the track is laid along a street it is otherwise. We agree to the doctrine that the rights of the railroad are paramount so far as the running of trains is concerned, but we think that it is so also as to crossings, for citizens must concede the superior right of passage to the trains of the company, wherever the trains are rightfully run. But the court did not hold the injured person to be a wrong-doer because he undertook to walk on the track, but he was held guilty of contributory negligence in carelessly going on the track in front of an approaching train. It is obvious that the case we are commenting on does not decide that the paramount right of the railroad company excludes all persons from traveling along the street occupied by the track; for what it decides is, that one who does travel along it must not be guilty of contributory negligence, thus fully conceding that one who does exercise care may rightfully travel along it.

The case of *Lake Shore etc. R. R. Co. v. Hart*, 87 Ill. 529, is not in point, for several reasons; but it is enough to say that the injured man was at the time of his injury, as the court declares, "walking laterally upon the track where it was exclusively the private right of way of the railroad company."

The case of *Wilbrand v. Eighth Avenue R. R. Co.*, 3 Bosw. 314, is against the appellant, for it was there said: "The public have a right, undoubtedly, to drive upon and across the track, but not so as to interfere with the proper business of the company."

The case of *Jersey etc. R. R. Co. v. Jersey City etc. R. R. Co.*, 20 N. J. Eq. 61, cannot be regarded as in point upon this branch of the case.

The decision in *Adolph v. Central Park etc. R. R. Co.*, 65 N. Y. 554, is very strongly against the appellant, for it was there held that "one traveling upon a city street has a right to drive his wagon upon or across the track of a street railroad, and this right is not confined to occasions where the other

portions of the street are crowded or obstructed. The only limitation of the right is, that he must not unnecessarily interfere with the passage of the cars; these have the preference in the use of the track." *Chicago etc. R'y Co. v. Bert*, 69 Ill. 388, was a street-railroad case, and simply decides that wagons must give way to the cars.

We have now examined all of the cases cited by counsel on this particular question, and we have found those that are in point are decisively hostile to the counsel who place them before us. It is, indeed, quite plain that the position taken cannot be maintained, for the bare assertion that the right is paramount necessarily implies that there are other rights, although inferior ones, and if this be true, it must also be true that one who carefully exercises the inferior right is not a wrong-doer to whom the company owes no duty.

The case of *Smedis v. Brooklyn etc. R. R. Co.*, 88 N. Y. 13, is directly in point. In that case the track was laid along a public street, and the plaintiff was injured on that street, but not at a crossing, and the company was held liable. The court, in the course of its opinion, said: "But assuming that the deceased was not attempting to cross at the crossing on Liberty Avenue, but was on Van Sinderin Avenue when struck, it does not follow as a matter of law that this action cannot be maintained. Sufficient evidence was given on the trial to warrant the jury in finding that this avenue was a public street. The defendant did not show, or offer to show, that it had any right upon this street except to lay down a railroad track therein and run cars thereon. The intestate, therefore, had a lawful right to go upon the defendant's track, . . . and if while there he was killed by the negligent act of the defendant, and without any want of care on his part, this action can be maintained."

In *Frick v. St. Louis etc. R. R. Co.*, 75 Mo. 595, the plaintiff was struck "midway between Grand Avenue and Theresa Street," in the city of St. Louis, and the court, pushing the general doctrine much further than we are required to do here, held the defendant liable. There are other cases in the same court which go still further,—much further, indeed, than we should be inclined to do: *Harlan v. St. Louis etc. R'y Co.*, 65 Id. 22; *Stillson v. Hannibal etc. R. R. Co.*, 67 Id. 671; *Bell v. Hannibal etc. R. R. Co.*, 72 Id. 50.

In one of our works on railroads it is said: "But although railroad trains and travelers . . . have equal rights to public

crossings and streets, yet, as an ordinary vehicle is more easily controlled than a train of cars and locomotive, it behooves those traveling in ordinary vehicles to check up and wait for approaching trains to pass": 2 Rorer on Railroads, 1049.

It may be that the author is in error in saying that the rights are equal, but, as the authorities show, he is correct in saying that both have rights in a public street. Another author says: "Where a highway is used as a part of a railway line, travelers on the highway have a right to cross the railway line at any point, and not merely at the intersection of other highways, and the railway is liable to one injured while crossing at a point other than the intersection of another highway, if the railway was in any respect negligent in the operation of its line; and under such circumstances the railway is bound to observe, at every point of its line on the highway, the same precautions which it is bound to observe at an ordinary highway crossing": Railway Accident Law, 157.

Many of the cases go much further than the cases we have cited, for they hold that if the place has been used as a highway for a long period of time, and this use is with the knowledge and permission of the railroad company, it is its duty to treat it as a highway, and to take precautions to prevent injury to those who travel over it: *Barry v. New York etc. R. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377; *Byrns v. New York etc. R. R. Co.*, 104 N. Y. 362; 53 Am. Rep. 512; *Harriman v. Pittsburgh etc. R. R. Co.*, 9 West. Rep. 438; *Chicago etc. R. R. Co. v. Hedges*, 105 Ind. 398; *Bellefontaine etc. R. R. Co. v. Snyder*, 18 Ohio St. 399; 98 Am. Dec. 175; *Graves v. Thomas*, 95 Ind. 361; 43 Am. Rep. 727. The doctrine of these cases is in harmony with the rule that has long prevailed and has been again and again enforced, and that is, that where the railroad company licenses the public to make a general use of its track, it cannot treat a citizen who walks upon it as a trespasser. Of the great number of cases asserting this principle we cite only a few: *Davis v. Chicago etc. R'y Co.*, 58 Wis. 646; 44 Am. Rep. 667; *Murphy v. Chicago etc. R. R. Co.*, 38 Iowa, 539; 30 Am. Rep. 721; *Bennett v. Railroad Co.*, 102 U. S. 577; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628; *Campbell v. Boyd*, 88 N. C. 129; 43 Am. Rep. 740.

We conclude our discussion of this branch of the case by a quotation from the opinion of the court in *Kansas Pacific R'y Co. v. Painter*, 9 Kan. 620. "If," said the court, referring to the plaintiff, "he should show that the place where the injury

occurred was on a public street, either in law or fact, he would not be such a trespasser as would relieve the railway company from exercising reasonable and ordinary care and diligence towards him. In fact, he would not be a trespasser at all. The railway company, in such a case, would be bound to run its trains with reference to him, and to every other person who might be rightfully occupying the street. Such persons would have the same right to be on the street as the railway company. In fact, in this case, the legal right of the railway company, and that of the public, to use this ground as a street, seem to be about equal. . . . The public used this ground for a street, however, long before the railroad was built. If the plaintiff and the railway company each had a right to use said ground, then it was incumbent on each alike to use ordinary care and diligence to prevent and avoid injuries."

The appellee, although not a trespasser in walking along the track laid in the highway, was, nevertheless, bound to exercise care to protect himself from injury. He had a right to walk on the track as part of the highway, but it was his duty to use a degree of care proportioned to the situation and circumstances, and this care extends to the condition of the track, and to the running of the trains. We are not inclined to adopt the view that the rights of travelers and the railroad company are equal, although they are mutual; for we think that as to the right of way for the running of trains, the rights of the company are paramount. It is, therefore, the duty of one who walks upon a track to use reasonable care to discover and avoid danger. He has no right to go upon the track, even though it is in a public highway, expecting that the company will check its trains to make way for him; on the contrary, he must exercise vigilance, and that vigilance must be correspondent to what he is bound to know is the paramount right of the railroad company. In this case, we think the evidence sustains the finding of the jury that the company was negligent and the appellee was not. It must not be forgotten that the appellee was fastened to the track, and could not leave it to avoid the coming train. He was powerless to avert the danger even had he seen it in time to have left the track. Nor must it be forgotten that it was through the negligence of the company that the track which traversed the street was made unsafe. It may be, even where the company changes the face of a highway for its own convenience, that it

is not bound to make it safer for travelers upon it than its use for a railroad will permit. It may be, too, that one who walks upon it is bound to know that it is a railroad track, and is not safer for use for passage than the object to which it is devoted will allow. But granting all this, there may still be a recovery, for the evidence satisfactorily shows that the appellee was using such care as even a prudent and careful person of adult age would have used in making his way along the track, that the unsafe condition of the track was due to the negligence of the company, and that it was also negligent in managing its train. The case is an unusually strong one, for there was double negligence on the part of the company.

There is, perhaps, a variance between the allegations of the complaint, as to the precise character of the defect in the track, and the evidence, but the variance is not a material one. Under our statute, a verdict cannot be set aside for such a variance: R. S., 1881, secs. 391-393.

This is not a case where the plaintiff declares on one theory and gives evidence upon another, so that the cases of *Chicago etc. R. R. Co. v. Bills*, 104 Ind. 13, *Mescall v. Tully*, 91 Id. 96, and cases of like character, do not apply.

We have not stopped to inquire as to the effect of the appellee's tender age, for we think he is entitled to a recovery if bound by the same rules as an adult person.

We have disposed of all the questions that the record properly presents, and do not deem it necessary to notice in detail the phases in which they are presented.

Judgment affirmed.

IF RAILWAY IS LOCATED UPON PUBLIC HIGHWAY, or if, though not upon a public highway, the track has been so used for a long period of time, without objection by the railway company, such company is bound to exercise care to prevent injury to any person thereon, and he cannot properly be regarded as a trespasser to whom no care is due: *Byrne v. New York R. R.*, 58 Am. Rep. 512; *Barry v. New York R. R.*, 44 Id. 377; *Bellefontaine R. R. v. Snyder*, 98 Am. Dec. 175; *Baltimore etc. R. R. Co. v. Breinig*, 90 Id. 49, and note 55-67; *Ernst v. Hudson River R. R. Co.*, 90 Id. 761, and note 780-787.

THE PRINCIPAL CASE IS CITED and followed in *Ohio etc. R. R. Co. v. Walker*, 113 Ind. 196.

ONE WHO IS NOT RIGHTFULLY ON TRACK OF RAILROAD cannot recover for injuries sustained by him, unless the company or its employees are grossly or willfully negligent: *Donaldson v. Mississippi R. R. Co.*, 87 Am. Dec. 391, and note; *Lafayette etc. R. R. v. Huffman*, 92 Id. 318, and note.

TOWN OF GOSPORT v. EVANS.

[112 INDIANA, 132.]

MUNICIPAL CORPORATION IS REQUIRED TO EXERCISE VIGILANCE in keeping its streets and sidewalks in reasonably safe condition for public travel, by night as well as by day, but it is not an insurer against accidents; nor is it required to maintain the surface of its sidewalks free from all inequalities, and from every possible obstruction to more convenient travel.

MUNICIPAL CORPORATION DOES NOT NECESSARILY BECOME INVOLVED IN LIABILITY from fact that a pavement may have become uneven from use, or that the material of a sidewalk may have become loose or displaced by the action of the elements, so that persons are liable to stumble or be otherwise inconvenienced in passing, so long as the defect can be readily discovered and easily avoided by persons exercising due care, or if the defect be of such a nature as not of itself to be dangerous to persons so using the sidewalk.

PERSON TAKES RISK UPON HIMSELF, WHO, SEEING OBSTRUCTION IN STREET OR SIDEWALK, and knowing its dangerous character, deliberately goes into or upon it when he was under no compulsion to do so, or might have avoided it by going around, and if injured thereby, he is without remedy, because of contributory negligence.

G. W. Grubbs, J. C. Robinsen, and I. H. Fowler, for the appellant.

D. E. Beem, W. Hickam, J. R. Fritts, and R. W. Miers, for the appellees.

By Court, MITCHELL, J. The town of Gosport prosecutes this appeal from a judgment rendered by the Owen circuit court in favor of Lydia E. Evans, against the appellant, for one thousand dollars, that being the amount awarded the plaintiff by a jury in an action for damages for injuries sustained from a fall upon an alleged defective and dangerous sidewalk.

The argument for a reversal of the judgment is predicated mainly upon two propositions. It is contended,—1. That there was no evidence which tended to show such a defect in the sidewalk at the place where the plaintiff fell as rendered the town liable to the imputation of actionable negligence; 2. That there was no evidence tending to show that the plaintiff was in the exercise of due care at the time she sustained the injury.

Concerning the first point, it is only necessary to say the evidence does not make it entirely clear that the town was guilty of such negligence in respect to the sidewalk in question, considering its condition at the time of the injury com-

plained of, as would have sustained a recovery even if the plaintiff had been without fault.

While a municipal corporation is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for public travel, by night as well as by day, it is by no means an insurer against accidents, nor can it be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to mere convenient travel. A contrary rule would, or might, burden municipal corporations beyond endurance. That a pavement may have become uneven from use, or that bricks therein may have become loose or displaced by the action of the elements, so that persons are liable to stumble or be otherwise inconvenienced in passing, does not necessarily involve the municipality in liability, so long as the defect can be readily discovered and easily avoided by persons exercising due care, or provided the defect be of such a nature as not of itself to be dangerous to persons so using the walk: *City of Indianapolis v. Cook*, 99 Ind. 10; *City of Quincy v. Barker*, 81 Ill. 300; 25 Am. Rep. 278; *City of Richmond v. Courtney*, 32 Gratt. 792; *City of Chicago v. Bixby*, 84 Ill. 82; 25 Am. Rep. 429; *City of Aurora v. Pulfer*, 56 Ill. 270.

Adapting the language of the court in *Hubbard v. City of Concord*, 35 N. H. 52, 69 Am. Dec. 520, to the case in hand, towns are not required to make their sidewalks perfect, or to correspond with any given standard. In each case, the sidewalk is to be pronounced sufficient or insufficient, according as it is or is not reasonably safe and convenient for the travel passing upon it, under the particular circumstances which exist in connection with that particular case.

Accepting as true the evidence most favorable to the plaintiff below, and it appears that some of the bricks in a pavement had been displaced and removed, leaving a depression of from two and a half to six inches in depth, covering an area of about three by four feet in the surface of the walk. The authorities had notice of the condition of the walk, and had directed the owner of the abutting lot to repair the pavement. At the time of the injury complained of, all the streets and sidewalks in the town were covered with snow, sleet, and ice, rendering them difficult and dangerous for foot-travelers to pass over. The depression above described had become partially, and some of the witnesses say completely, filled with frozen snow, sleet, and ice, presenting a surface not substan-

tially different from that around it, except that it was perhaps somewhat lower.

There was evidence tending to show that some of the bricks which had become loose and displaced were frozen fast in the snow and ice in and about the depression in the pavement, and that some of these projected some inches above the icy surface. The plaintiff, who was well acquainted with the defect in the walk, and who had it in mind at the time, while passing over the place in the night-time, struck her foot against one of the projecting bricks, which caused her to fall upon the icy pavement.

Since, therefore, it does not appear that the defective condition of the sidewalk occasioned an accumulation of snow and ice at that point, or made the surface of the walk substantially different there from what it was elsewhere, we are not prepared to say that, as respects its condition when the injury complained of was suffered, the town was remiss in its duty for not having removed the projecting brick which caused the plaintiff to fall. The fall was not occasioned by the plaintiff stepping in a hole, or slipping on ice accumulated therein, but by striking her foot against a brick which projected above the surface of the icy walk. If we should assume, however, that the walk was defective and dangerous at the time of the injury, and that the town neglected its duty in not repairing it, principles too firmly established to be departed from require that the judgment should be reversed, nevertheless.

The plaintiff was guilty of contributory negligence; and it is too well settled to require reference to authority, that contributory negligence prevents a recovery in an action like this.

It is disclosed in the evidence given on the stand by the plaintiff herself that she was returning home from church, after the evening service, in company with and by the side of another lady. She had passed over the sidewalk in question frequently. Quoting her own language, as we find it repeated again and again in the record of her testimony, she said: "I knew it was a bad place, but thought I could pass it; had passed it before; . . . I put on old shoes, and socks over them; I put them on that night to go through this place safely, and for all other bad places; . . . I knew it was a bad place, but thought I had prepared for it; knew just where it was; I could tell it as well after night as in daytime; . . . I could see the place when I came up; knew it was a bad and dangerous place, but thought I could get through safe; I

stepped carefully, but stumbled and fell; . . . nothing to prevent me from walking next to the fence, except that Mrs. O'Maris was walking there; don't know why I did not let go her arm and walk there; . . . had passed there often going to and from church."

Thus it appears that a person of mature years, and in the possession of all her faculties, deliberately walked into a place which, upon her hypothesis of the case, was one of known danger, and which she could have avoided by simply disengaging herself from and following in the footsteps of her friend.

The statement of Lord Ellenborough in *Butterfield v. Forrester*, 11 East, 60, that "a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right," was hardly less applicable to the case in which it was made than to the one under consideration. "Two things must concur," said that learned judge, "to support this action,—an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

This rule, stated in different language, has been consistently and uniformly declared and adhered to by appellate courts in every common-law jurisdiction: *Beach on Contributory Negligence*, secs. 7, 77; *Brucker v. Town of Covington*, 69 Ind. 33; 35 Am. Rep. 202; *President etc. v. Dusouchett*, 2 Ind. 586; 54 Am. Dec. 467; *Riest v. City of Goshen*, 42 Ind. 339; *Jonesboro etc. Turnpike Co. v. Baldwin*, 57 Id. 86.

One who knows of a dangerous obstruction in a street or sidewalk, and yet attempts to pass it when, on account of darkness or other hindering causes, he cannot see so as to avoid it, takes the risk upon himself. For a much greater reason does he take the risk upon himself, if, seeing an obstruction, and knowing its dangerous character, he deliberately goes into or upon it, when he was under no compulsion to go, or might have avoided it by going around: *Thompson v. Cincinnati etc. R. R. Co.*, 54 Ind. 197; *Louisville etc. R. R. Co. v. Schmidt*, 81 Id. 264; *King v. Thompson*, 87 Pa. St. 365; 30 Am. Rep. 364; *Toledo etc. R'y Co. v. Brannagan*, 75 Ind. 490; *City of Erie v. Magill*, 101 Pa. St. 616; 47 Am. Rep. 739; *Wilson v. City of Charlestown*, 8 Allen, 137; 85 Am. Dec. 693; *Durkin v. City of Troy*, 61 Barb. 437; *City of Centralia v. Krouse*, 64 Ill. 19.

We do not question the doctrine of the cases which hold

that because one has knowledge that a highway or sidewalk is out of repair, or even dangerous, he is not therefore bound to forego travel upon such highway or sidewalk: *City of Huntington v. Breen*, 77 Ind. 29; *Wilson v. Trafalgar etc. G. R. Co.*, 83 Id. 326; *Wilson v. Trafalgar etc. G. R. Co.*, 93 Id. 287; *Nave v. Flack*, 90 Id. 205; 46 Am. Rep. 205; *City of South Bend v. Hardy*, 98 Ind. 577; 49 Am. Rep. 792; *Town of Albion v. Hetrick*, 90 Ind. 545; 46 Am. Rep. 230; *Turner v. Buchanan*, 82 Ind. 147; 42 Am. Rep. 485.

The doctrine to be extracted from these cases is, that although a sidewalk or highway may be in an apparently defective or dangerous condition, yet a person with knowledge of the defect or danger is not on that account obliged to abandon travel upon the highway, if, by the exercise of care proportioned to the known danger, he may reasonably expect to shun or avoid the defect. If the defect be one which does not render the way wholly impassable, and which can only result injuriously to the traveler if not shunned, if there be an apparently safe way of passage without going into the obvious defect, the traveler is not to be held to a rigorous account if he is deceived or misled, notwithstanding his effort to avoid the danger.

The authorities, however, lend no countenance to the notion that a person having knowledge of an obvious defect, or of a place in a highway which naturally suggests to a person of common understanding that it is dangerous, may, nevertheless, voluntarily cast himself into or upon the defect, upon the theory that he is not obliged to forego travel upon the highway.

In *Horton v. Inhabitants of Ipswich*, 12 Cush. 488, the court said: "The real point is, not whether the plaintiff was chargeable with any negligence in making his way over the road, after he had entered upon it, but whether he knew, or had reason to believe, that the road was dangerous when he entered on it, or before he reached any dangerous place. If so, he could not, in the exercise of ordinary prudence, proceed and take his chance, and if he should actually sustain damage, look to the town for indemnity": *Parkhill v. Town of Brighton*, 61 Iowa, 108.

"Where there is danger, and the peril is known, whoever encounters it voluntarily and unnecessarily cannot be regarded as exercising ordinary prudence, and therefore does so at his own risk": *Corlett v. City of Leavenworth*, 27 Kan. 673;

Schaeffer v. City of Sandusky, 33 Ohio St. 246; 31 Am. Rep. 533.

If the defect in the pavement, which the plaintiff voluntarily encountered, presented an obstruction, or was of such a character that the town of Gosport was bound to take notice of it, so that it was guilty of negligence in not repairing it, the conclusion follows necessarily that the plaintiff, having full and equal knowledge of its character, was guilty of contributory negligence in venturing upon it, no matter how carefully she may have prepared for the encounter, nor with how much care she went upon it. Her duty was to avoid the obstruction, or venture upon it at her own risk: *Durkin v. City of Troy*, *supra*.

These conclusions lead to a reversal of the judgment.

Judgment reversed, with costs.

OBLIGATION OF MUNICIPAL CORPORATIONS TO KEEP STREETS AND HIGHWAYS IN GOOD REPAIR AND SAFE CONDITION: See *Hutchinson v. Town of Concord*, 98 Am. Dec. 584, and cases collected in note 587; *Detroit v. Blakeby*, 4 Am. Rep. 450; *Manderschid v. Dubuque*, 4 Id. 196; *O'Neill v. New Orleans*, 31 Id. 221; *Noble v. City of Richmond*, 31 Id. 726; *Abrittin v. Mayor etc.*, 31 Id. 46; *McCutcheon v. Homer*, 38 Id. 212; *Young v. Charleston*, 47 Id. 827; *City of Navasota v. Pearce*, 26 Id. 279; *Campbell v. City of Montgomery*, 25 Id. 656; *Monongahela City v. Fischer*, 56 Id. 241; *City of Chicago v. Keefe*, 55 Id. 860; *Du Bois v. City of Kingston*, 55 Id. 804; *McArthur v. Saginaw*, 55 Id. 687; *Seifert v. Brooklyn*, 54 Id. 664; *Gilhuly v. City of Madison*, 53 Id. 299; *Sherwood v. District of Columbia*, 51 Id. 776; liability for injuries from overhanging structures: *Grove v. Fort Wayne*, 15 Id. 262, and note 269; *Bohen v. Waseca*, 50 Id. 564; compare *Taylor v. Peckham*, 5 Id. 578; *Hewison v. New Haven*, 9 Id. 342; *Jones v. Boston*, 6 Id. 194; injuries from snow and ice: *Cook v. Milwaukee*, 1 Id. 183; *Street v. Inhabitants etc.*, 7 Id. 500; *Collins v. Council Bluffs*, 7 Id. 200, and note 206; *McLaughlin v. City of Corry*, 18 Id. 432; *Seeley v. Town of Litchfield*, 44 Id. 213; *Taylor v. City of Yonkers*, 59 Id. 492; *Chase v. City of Cleveland*, 58 Id. 843; *McKellar v. Detroit*, 58 Id. 357; *Grosenback v. Milwaukee*, 56 Id. 614; *Broburg v. Des Moines*, 50 Id. 756; *Cloughessey v. City of Waterbury*, 50 Id. 38; coasting in streets: *Shultz v. Milwaukee*, 35 Id. 779; *Pierce v. New Bedford*, 37 Id. 387; *Faulkner v. Aurora*, 44 Id. 1; *Burford v. Grand Rapids*, 51 Id. 105; *Taylor v. Mayor etc.*, 54 Id. 759; nuisances and obstructions, generally: *Branahan v. Hotel Company*, 48 Id. 457; *Cushing v. Boston*, 35 Id. 383; *Little v. Madison*, 24 Id. 435; *Town of Suffolk v. Parker*, 52 Id. 640; *Fort North v. Crawford*, 53 Id. 753; *Agnew v. City of Cornuba*, 54 Id. 383; *Kiley v. City of Kansas*, 56 Id. 443; *Town of Rushville v. Adams*, 57 Id. 124; duty to fence dangerous places: *Hey v. Philadelphia*, 22 Id. 733; *Puffer v. Inhabitants etc.*, 23 Id. 368; *Bassett v. St. Joseph*, 14 Id. 446; *Manderschid v. Dubuque*, 4 Id. 196; *McGill v. District of Columbia*, 54 Id. 256; *Hubbell v. City of Yonkers*, 58 Id. 522.

PEDESTRIAN IN CITY IS NOT NECESSARILY NEGLIGENT in walking on sidewalk which he knows to be unsafe, in a dark night, as the nearest way to his destination, instead of taking another way which is also unsafe: *City of Altona v. Lots*, 60 Am. Rep. 346.

CITY IS NOT LIABLE FOR INJURY TO PASSER IN STREET CAUSED BY NEGLIGENCE OF CONTRACTOR IN BLASTING: *Blumb v. City of Kansas*, 54 Am. Rep. 87.

THE PRINCIPAL CASE IS CITED to the point that where the free use of a highway has been interfered with by the failure of a railroad company to restore it to its former state, as the statute required it to do, the company is liable to any one who, in the exercise of ordinary care, sustains injury therefrom, although it did not render the highway positively dangerous, in *Evansville etc. R. R. Co. v. Carver*, 113 Ind. 53.

MOORE v. MOORE.

[112 INDIANA, 142.]

WHERE OWNER OF CHATTEL, ALTHOUGH INDUCED THERETO BY FRAUD, INVESTS ANOTHER WITH APPARENT LEGAL TITLE, in pursuance of a contract, the person so clothed may transfer an unimpeachable title to a purchaser in good faith, and there is no distinction to be made in this respect between chattels and such instruments as may be assigned by indorsement, so as to give the assignee a complete legal title.

WHERE OWNER OF THINGS IN ACTION, ALTHOUGH NOT TECHNICALLY NEGOTIABLE, HAS CLOTHED ANOTHER, to whom they are delivered in the method common to all mercantile communities, with the usual apparent *indicia* of title, he will be estopped from setting up against a second assignee, to whom the securities have been transferred for value and without notice, that the title of the first assignee was not perfect and absolute. The estoppel thus applied between assignors and assignees in no wise affects the right of the makers of such paper to set up any defenses which the statute makes available to them. The purchaser of such paper cannot affect the makers by an estoppel against any prior assignor as to any defenses or equities between the original parties.

J. B. Brown, for the appellant.

W. K. Marshall, for the appellees.

By Court, MITCHELL, J. This was a suit by Robert W. Moore against William and Kate Lee to foreclose a mortgage executed by the latter as a security for the payment of five promissory notes, payable by the mortgagors to Louis Schneck, guardian of Charles H. Moore, a person of unsound mind.

As appears from the complaint, the notes were indorsed by Schneck to Mary A. Moore, and by her to James E. Moore, and by the latter to the plaintiff, Robert W. Moore.

The appellant, Mary A. Moore, upon her intervening petition, was admitted a party defendant. She thereupon filed a cross-complaint, in which she alleged that the indorsement and delivery of the notes by her had been procured by fraud and false representations, and by the inducement and persua-

sion of James E. Moore, to whom she indorsed them without any consideration, and that she was, therefore, in fact the owner of the notes in suit. She prayed that the mortgage might be foreclosed, and that the court give its decree perpetually enjoining the plaintiff from claiming any interest in the notes or in the decree of foreclosure.

Issue was taken upon the cross-complaint, the makers of the notes making no contest, and upon due request the court made a special finding of the facts.

So far as they are material to be stated, the facts found are that the notes and mortgage in suit had been assigned and delivered to Mary A. Moore by the guardian of her deceased husband, as part of her share in her husband's estate. It was also found that the appellant, Mary A. Moore, indorsed and delivered the notes and mortgage to James E. Moore without any consideration whatever, and that the indorsement and delivery had been obtained by the false and fraudulent representations of James E. Moore and one Amy Jones. On the twenty-fourth day of April, 1884, long after the notes had matured, they were indorsed and delivered, with the mortgage, by James E. Moore to the plaintiff, Robert W. Moore, who paid their full face value, without any notice that they had been obtained from Mary A. Moore by fraud and false representations, or that she had or claimed any title or interest whatever in the notes and mortgage.

The court having found that Robert W. Moore was a purchaser for full value, without notice, the question is, whether his title to the notes will prevail over the appellant's equity, notwithstanding the indorsement and delivery were obtained by the appellee's assignor from the appellant by fraud, and without consideration.

The argument for a reversal rests mainly on the proposition that the assignee of a non-negotiable instrument can take no greater interest or better title to the instrument assigned than was possessed by the assignor at the time of the transfer; hence, the argument proceeds, the notes in suit having been transferred to the appellee after they had matured and were dishonored, the latter took them subject, not only to all defenses and equities between the original parties, but subject also to all equities in favor of the appellant, a prior indorser. In short, the appellee's position is, that "a purchaser of a chose in action must always abide by the case of the person from whom he buys "

This doctrine ruled the case of *Bush v. Lathrop*, 22 N. Y. 535, and some earlier cases in the state of New York. As applied to instruments or things in action, the legal title to which is transferable by assignment in writing, the doctrine relied upon has been distinctly and repeatedly repudiated by the more recent decisions in New York, as also in other jurisdictions: *McNeil v. Tenth Nat. Bank*, 46 Id. 325; 7 Am. Rep. 341; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; 14 Am. Rep. 173; *Trustees etc. v. Wheeler*, 61 N. Y. 88, 104; *Davis v. Bechstein*, 69 Id. 440; 2 Daniel on Negotiable Instruments, sec. 1708 g.

Section 5501, Revised Statutes of 1881, provides that "all promissory notes, bills of exchange, bonds, or other instruments in writing, signed by any person who promises to pay money, . . . shall be negotiable, by indorsement thereon, so as to vest the property thereof in each indorsee successively."

The section following authorizes the assignee of any such instrument so indorsed to recover in his own name from the person who made the same.

The effect of these provisions is to vest in the indorsees of the instruments named therein, whether such instruments be technically negotiable by the law merchant or not, a complete legal title, as well as a right of recovery by indorsees in their own names, respectively.

Whatever right remains in the assignor of an instrument thus assignable, after the holder has transferred it by an unrestricted indorsement, must of necessity be of a purely equitable character. It is not perceived, therefore, why an innocent purchaser, who takes such an instrument by indorsement for value, and without notice of the latent equities of prior indorsers, may not stand upon the rule that where the equities are equal, he is in the situation of advantage who holds the legal title. If one of two equally innocent parties must suffer, that one who, by his indorsement of the instrument, has conferred upon another the apparently absolute ownership of the paper must bear the loss. This doctrine ruled the case of *Stoner v. Brown*, 18 Ind. 464, which is not distinguishable in principle from the case before us. It is familiar law that if the owner, although induced thereto by fraud, invests another with the apparent legal title to chattels, in pursuance of a contract, the person so clothed may transfer an unimpeachable title to a good-faith purchaser: *Parrish v. Thurston*, 87 Id. 437; *Curme v. Rauh*, 100 Id. 247; *Alexander*

v. *Swackhamer*, 105 Id. 81; 55 Am. Rep. 180; *Weaver v. Bar-den*, 49 N. Y. 286; 1 Benjamin on Sales, sec. 450.

We are unable to discover any good reason for a distinction in that regard between chattels and such instruments as may be assigned by indorsement, so as to give the assignee a complete legal title.

The more modern rule upon the subject under consideration seems to be, that where the owner of things in action, although not technically negotiable, has clothed another, to whom they are delivered in the method common to all mercantile communities, with the usual apparent *indicia* of title, he will be estopped from setting up against a second assignee, to whom the securities have been transferred for value and without notice, that the title of the first assignee was not perfect and absolute: 2 Pomeroy's Eq. Jur., sec. 710; Pomeroy on Remedies, sec. 161; *Combes v. Chandler*, 33 Ohio St. 178; *McNeil v. Tenth Nat. Bank*, *supra*, and cases cited; *Burton's Appeal*, 93 Pa. St. 214; *Wood's Appeal*, 92 Id. 379; 37 Am. Rep. 694.

The estoppel thus applied between assignors and assignees in no wise affects the right of the makers of such paper to set up any defenses which the statute makes available to them. The purchaser of such paper cannot affect the makers by an estoppel against any prior assignor as to any defenses or equities between the original parties: *Davis v. Bechstein*, *supra*.

The authorities already cited cover every feature of the questions under consideration so fully that further discussion of the subject could add nothing to what has been there said.

The case of *Carithers v. Stuart*, 87 Ind. 424, although clearly distinguishable in its facts, recognizes the doctrine and authorities which control our judgment in this case; nor is our conclusion here in any manner opposed by the case of *Kastner v. Pibilinski*, 96 Id. 229, and the authorities upon which that judgment rests.

There was no error. The judgment is affirmed, with costs.

GENERAL RULE THAT DERIVATIVE TITLE CANNOT BE BETTER THAN THAT FROM WHICH IT IS DERIVED is subject to many necessary exceptions: *McAusland v. Pundt*, 93 Am. Dec. 358.

VALIDITY OF TITLE ACQUIRED BY BONA FIDE PURCHASER FROM FRAUDULENT PURCHASER: *Sargent v. Sturm*, 83 Am. Dec. 118, and cases collected in note 122; *Barnard v. Campbell*, 17 Am. Rep. 206; *Le Grand v. Bufault Nat. Bank*, 60 Id. 140; when bona fide purchaser is not protected: *Barker v. Dinwore*, 13 Id. 697; *Moody v. Blake*, 19 Id. 594; *Farley v. Lincoln*, 12 Id. 182; *Bodiff v. Dallinger*, 55 Id. 439.

JOHNSON v. MURRAY.

[112 INDIANA, 154.]

SALE OF LAND UNDER ALIAS WRIT OF EXECUTION will not be set aside as void because the writ was improvidently issued by the clerk without the order of the judgment plaintiff.

PERSON CLAIMING IN CHARACTER OF JUDGMENT CREDITOR cannot avail himself of a mere irregularity to defeat a consummated sale. As a general rule, it is only the execution defendant who can avail himself of an irregularity, even by a proceeding instituted before the sale is made.

PLAINTIFF SEEKING TO QUIET TITLE TO LAND, upon specific claim that he is absolute owner of it, cannot succeed by showing that he is entitled to partition, or to some relief of an entirely different character.

PARTY SUING TO QUIET TITLE TO LAND must show title in himself, and that the defendant has none, or at least not such as he asserts.

G. W. Harvey and C. E. Shipley, for the appellant.

I. Van Devanter and R. T. St. John, for the appellees.

By Court, ELLIOTT, J. The facts stated as the cause of action in the appellant's complaint are substantially these: The appellant and each of the appellees recovered judgments against John C. Harris and Noah Harris, on the sixth day of February, 1878. Executions were issued on these several judgments at the same time, were received by the sheriff at the same time, and were levied on the same land at the same time. There was no sale of the land levied on; the executions were returned by the sheriff, and immediately upon their return, *alias* writs were issued by the clerk upon returns made by the sheriff, until the number of writs reached five; on the fifth and last issue of the *alias* writs, the land was sold. Each of the appellees, as judgment creditors, became purchasers, but paid no money on their respective bids, except the amount of the costs, the remainder being paid by crediting it upon the writs. The *alias* writs were issued without any order from the appellees. The appellant claims title, and asks to have it quieted in him.

In the brief of appellant's counsel they say: "At least two questions are presented"; and, as we understand them, the first question is, Were the sales void because the writs issued subsequent to the original executions were not ordered by the several judgment plaintiffs?

We shall, in accordance with the settled rule, confine our discussion to the questions stated by counsel, and shall consider those questions in the order adopted by them.

It is conceded by counsel that, prior to the enactment of the fee and salary bill of 1879, the issuing of a writ by the clerk without the order of the judgment plaintiff was an irregularity which would not invalidate the sale, and which might be waived. Undoubtedly this was the law: *Jones v. Carnahan*, 63 Ind. 229; *Richey v. Merritt*, 108 Id. 347. But counsel assert: "All this has been changed by the enactment of the statute." The provision upon which they rely was originally found in the fee and salary bill, but is also now incorporated in the code: Acts of 1879, p. 137; R. S. 1881, sec. 678. The provision to which they refer reads thus: "No execution shall in any case be issued in any cause, except on the written *præcipe* of a party to such suit, his representatives or assigns, or of his attorney of record." This provision is little more than a declaration of the common-law rule, and under that rule it was uniformly held, as counsel admit, that the issue of an execution without the authority of the plaintiff did not render the sale void. There is no reason why it should do so under the statute. Neither by expression nor by implication does the legislature declare that the breach of duty on the part of the officer shall vitiate the sale. There is nothing that indicates an intention to break away from the long-settled rule that such an irregularity will not make the sale void. It would be putting much into the statute that is not there, to hold that it was meant to change the rule that had so long existed. The statute does no more than prescribe the duties of the officer; it does not enact that a failure to perform it shall avoid the sale. It was the officer's duty under the common law, as much as it is under the statute, not to issue an execution without the authority of the plaintiff, and there would be just as much reason for holding under that rule as under the statute that a failure of the officer to perform his duty made the writ void; and yet, without hesitation, it was always held that the writ was not void as against the execution plaintiff, or an innocent purchaser who bought at the sale made on such a writ.

The improvident issue of a writ does not render it void: *Richey v. Merritt*, *supra*. Freeman says: "A void writ is one which can have no force whatever, unless, perhaps, as a justification to an officer having no notice of its invalidity": Freeman on Executions, sec. 73.

If the writ is not void it must be attacked directly, and not collaterally; at all events, it must be attacked prior to the

acquisition of title by a sale made under it: *Bisbey v. Merritt*, *supra*. We think the irregularity in this instance is one falling within the general principle stated by Mr. Freeman in sections 339 and 340 of his work, and that it is not of such a character as to avoid the sale. It would, indeed, be an evil rule that would permit sales to be set aside after a long lapse of years because the clerk had issued *alias* writs without the direct authority of the judgment plaintiff; for such a rule would make titles insecure, destroy confidence in sheriff's sales, and injure the debtor, because it would make men unwilling to pay fair prices for property sold upon execution. The true and just rule is that recognized by the text-writers and by our decisions, and that is, where there is a mere improvident issue of the writ there must be a motion to quash it, or some such direct attack, and that a suit to quiet title after the sale has been perfected will be unavailing.

Another rule is decisively against the appellant, and that is this: One who claims in the character of a judgment creditor cannot avail himself of a mere irregularity to defeat a consummated sale. It is, as a general rule, only the execution defendant who can avail himself of an irregularity, even by a proceeding instituted before the sale is made. This is so decided in *Jones v. Carnahan*, *supra*, and the decision is well supported.

The second question which counsel say the record presents is, Does the complaint entitle the appellant to any relief? But this is a mistaken view, for the question is, Does the complaint entitle the appellant to have his title quieted?

Where a plaintiff seeks to quiet title to all the land in controversy upon a specific claim that he is the absolute owner of it, he cannot succeed by showing that he is entitled to partition, or to some relief of an entirely different character. A complaint to quiet title, where the claim is to the whole interest in the land as absolute owner, cannot be good as a complaint for partition. Where a party sues to quiet title, he must show title in himself to the land he claims, and that the defendants have none, or at least not such as they assert: *Ragsdale v. Mitchell*, 97 Ind. 458. If the appellees have any interest in the land, it cannot be cut off by an action to quiet title, and therefore the appellant cannot maintain the action, even though he may have some interest with the appellees in the land.

Judgment affirmed.

JUDGMENT CREDITOR PURCHASING AT SHERIFF'S SALE IS CHARGEABLE WITH NOTICE OF ALL IRREGULARITIES IN SALE: *Piel v. Brayer*, 95 Am. Dec. 699, and note 708.

EXECUTION SALE IS IRREGULAR, BUT NOT VOID, where an execution was levied upon property and the sale made under an *alias* instead of a *venditionis exponas*: *Stein v. Chumblee*, 87 Am. Dec. 411.

REGULARITY OF PROCESS CANNOT BE QUESTIONED COLLATERALLY BY STRANGER TO SALE UNDER EXECUTION: *Durham v. Heaton*, 81 Am. Dec. 275.

IRREGULARITY IN SALE OF LANDS UNDER EXECUTION CAN BE TAKEN ADVANTAGE OF BY JUDGMENT DEBTOR ONLY, in a direct proceeding: *Lawsom v. Jordan*, 70 Am. Dec. 598.

IN SUIT TO QUIET TITLE, COMPLAINANT IS NOT BOUND TO SHOW PERFECT TITLE against all the world, as in a possessory action: *Bucher v. Dooley*, 95 Am. Dec. 614.

BROOKE v. LOGAN.

[112 INDIANA, 188.]

PARENT IS NOT ESTOPPED FROM RECLAIMING CUSTODY OF CHILD, where he places it in the care and keeping of another, verbally agreeing that the latter might have its care and custody during minority.

WHEN FATHER IS SUITABLE PERSON, HE IS ENTITLED TO CUSTODY OF HIS INFANT CHILD, as against its statutory guardian; but if a sufficient reason exists why he should not have its custody, it will be given to others better fitted.

IN ORDER THAT APPOINTMENT OF STATUTORY GUARDIAN MAY BE CONCLUSIVE as against father's right to custody of his child, it must in some way appear that he was in court in such manner that the court, in appointing the guardian, must have passed upon the question of his fitness to have such custody.

QUESTION OF CUSTODY OF MINOR CHILD once properly and finally adjudicated, whether in the *habeas corpus* proceeding or otherwise, is settled for all time, unless there be an appeal, and the judgment rendered cannot be collaterally attacked.

HABEAS CORPUS PROCEEDING BY FATHER TO OBTAIN CUSTODY OF PERSON OF HIS CHILD is not necessarily barred by an adjudication refusing the relief sought on a proceeding by him to have the statutory guardian of his child removed and himself appointed.

RETURN TO WRIT OF HABEAS CORPUS IS SUFFICIENT, which states in general terms the unfitness of the relator to have the custody, care, training, and education of his child, and it will stand as against a general exception to it.

C. Kellison, for the appellant.

A. C. Capron, for the appellee.

By Court, ZOLLARS, C. J. Appellant instituted this proceeding of *habeas corpus* against appellee to recover from him the custody of his, appellant's, daughter, near five years of age.

He seeks her custody upon the ground that he is her father, and has a good home for her, and that he and his wife, who is a second wife without children, are suitable persons to be intrusted with her custody, care, and education. He alleges in his petition, amongst other things, that, notwithstanding his demand upon appellee, he has refused to surrender the custody of the child.

In his return to the writ, appellee states the several grounds upon which he claims the custody of the child as against appellant, which may be summarized as follows:—

1. When the child was a mere babe, appellant placed her in the care and custody of appellee and his wife, who is a relative of the child. After she had been with them for about a year, appellant gave up and surrendered to them her care and custody so long as she should remain a minor.

2. At appellant's request, and to carry out the agreement as to the custody of the child, appellee made the proper application, and was duly appointed the guardian of her person and estate.

3. Prior to the commencement of this proceeding, appellant made application to the court for the removal of appellee, and for the appointment of himself in his stead, as such guardian of the person and estate of the child, stating in his application the same facts as the basis of his right to the custody of the child as are stated in his petition in this case. Appellee appeared to the application, and the court, after hearing evidence, found against appellant, and refused to remove appellee, or to appoint appellant as such guardian of the person and estate of the child. The judgment of the court in that case is yet in full force.

4. "The petitioner is not a fit and suitable person to have the care and custody of the child."

We examine the grounds upon which appellee claims the custody of the child in the order above stated:—

1. The placing of the child in the care and keeping of appellee, and the verbal agreement by appellant that he might have her care and custody during her minority, did not, of themselves, estop appellant from thereafter reclaiming that custody. The rulings of this court have been uniform upon that question, and in accord with authority in England and most of the American states. It will be sufficient here to cite some of the authorities, without extending this opinion to state the reasons upon which they rest: *Dalton v. State*, 6 Blackf.

357; *State v. Banks*, 25 Ind. 495; *Wishard v. Medaris*, 34 Id. 168; *Child v. Dodd*, 51 Id. 484; *Copeland v. State*, 60 Id. 394; *Johns v. Emmert*, 62 Id. 533; *McGlennan v. Margowski*, 90 Id. 150; *McKenzie v. State*, 80 Id. 547; *Lee v. Back*, 30 Id. 148; Schouler on Domestic Relations, sec. 251, and cases there cited; Church on Habeas Corpus, sec. 428.

2. The appointment of appellee as guardian of the person and estate of the child did not, of itself, deprive appellant, as the father, of her custody. Section 2518, Revised Statutes 1881, is as follows: "Every guardian so appointed shall have the custody and tuition of such minor, and the management of such minor's estate during minority, unless sooner removed or discharged from such trust; provided that the father of such minor (or if there be no father, the mother, if suitable persons respectively) shall have the custody of the person and the control of the education of such minor." If the father is a suitable person, he has a right to the custody of his infant child as against the statutory guardian. So the statute declares, and so it has been held: *Garner v. Gordon*, 41 Ind. 92, 104; *Johns v. Emmert*, *supra*; *Bryan v. Lyon*, 104 Id. 227; 54 Am. Rep. 309; *State v. Baldwin*, 5 N. J. Eq. 454; 45 Am. Dec. 397; *State v. Clover*, 16 N. J. 419; *State v. Nachtwey*, 43 Iowa, 653; *People v. Mercein*, 3 Hill, 399; 38 Am. Dec. 644; *Regina v. Smith*, 16 Eng. L. & Eq. 221; *State v. Smith*, 6 Me. 462; 20 Am. Dec. 324; *Pool v. Gott*, 14 L. R. 269.

In order that the appointment of a statutory guardian may be conclusive as against the father's right to the custody of his child, it must in some way appear that he was in court in such manner that the court, in appointing the guardian, must have passed upon the question of his fitness to have such custody. Such is not the case here.

3. Appellant's counsel passes the third ground upon which appellee claims the custody of the child, with the remark that the doctrine of *res adjudicata* does not apply to *habeas corpus* proceedings.

In that, counsel is very clearly mistaken. The question of the custody of a minor child, once properly and finally adjudicated, whether in a *habeas corpus* proceeding or otherwise, is settled for all time, unless there be an appeal, and the judgment rendered is impregnable as against a collateral assault.

A subsequent writ may be awarded; but upon the subsequent hearing, evidence will not be heard which goes back of the previous adjudication: *Mercein v. People*, 25 Wend. 64;

Freeman on Judgments, sec. 324; Church on Habeas Corpus, sec. 387, and cases there cited; *Dubois v. Johnson*, 96 Ind. 6, 14; Tyler on Infancy and Coverture, p. 291; *People v. Mercein*, *supra*.

We think, however, that the adjudication upon appellant's application to have appellee removed, and himself appointed guardian of the child, is not conclusive as against this proceeding.

These tests have been applied in determining whether or not the cause of action in two cases is the same, and whether, therefore, an adjudication in one is a bar to the other.

In the case of *Taylor v. Castle*, 42 Cal. 367, 372, it was said: "The cause of action is said to be the same where the same evidence will support both actions; or rather the judgment in the former action will be a bar, provided the evidence necessary to sustain a judgment for the plaintiff in the present action would have authorized a judgment for the plaintiff in the former."

That the cause of action in two cases is the same is a test by which it is determined that an adjudication in one is a bar to the other: *Herman on Estoppel and Res Judicata*, secs. 106, 107, 111; *Kalisch v. Kalisch*, 9 Wis. 529; *Stowell v. Chamberlain*, 60 N. Y. 272.

In the case of *Veeder v. Baker*, 83 N. Y. 156 (160), it was said that a cause of action may be said to be composed of the right of the plaintiff and the obligation, duty, or wrong of the defendant, and that it is sufficiently accurate to say that these combined constitute the cause of action.

Applying those tests, it cannot be said that the judgment of the court in refusing to remove appellee and appoint appellant as guardian is a bar to this proceeding.

In that proceeding what may be called the right of the plaintiff was the right to have appellee removed and himself appointed guardian of the person and estate of the child in his stead. In this proceeding the right asserted on the part of the plaintiff is simply the right to have the custody of the child, as that right is given him by the statute under which appellee was appointed. Nor would the evidence necessary to sustain this proceeding or action, without more, have sustained the former proceeding or action. This proceeding may be sustained by evidence which in no way affects appellee's rights, powers, and duties as guardian under the statute. In that proceeding it was necessary to go further, and show some cause

why he should be removed as such guardian both of the person and estate of the ward.

4. It is stated in general terms, as we have seen, that appellant is not a fit and suitable person to have the custody and education of his daughter.

It is contended that that statement is too general. On the other hand, it is contended that the exception to the return is too general. There is ground for both contentions, under the rules of correct pleading, but we think that the return should not be overthrown upon the ground stated. Doubtless the court, upon a proper motion by appellant, might have required the return to be made more certain.

We hold the return good, therefore, upon the one ground that it asserts the unfitness of appellant to have the custody, care, training, and education of the child. Being sufficient upon that ground, it will stand as against the general exception made to it.

This brings us to the evidence. We do not think it necessary to set out the evidence in detail, nor to give an extended summary of it. It is enough to say that appellant is the father of the child, and that he and his wife, who is a second wife without children, are shown, without conflict in the evidence, to be persons in every way fit and suitable to be intrusted with the custody, care, training, and education of the child; that he denies that he made any permanent surrender of the custody of the child to appellee; and that, since it has been in his custody, he, appellant, has contributed somewhat towards its support.

On the other hand, while it is shown that appellee's wife has, in the main, done a mother's part by the child, and at a time when it most needed a mother's care, there is evidence tending to show that she has discriminated, in some measure, in favor of her own children; and it is shown that things have occurred in the family that ought not to occur in the presence and hearing of children.

It is said by counsel for appellee that it could have been shown that appellant is not in all respects a fit and suitable person to have the custody and training of his child, but that the court below regarded it as unnecessary.

If there is anything showing, or tending to show, that appellant is not a proper person to have the custody, training, and education of the child, it should have been brought forward and shown. While the law awards the custody of minor

children to the father as against the statutory guardian, it is only when he is a fit and suitable person to have such custody.

In each case due regard will be given to the feelings and wishes of the father; yet the controlling consideration is the welfare of the child, and if a sufficient reason exists why the father should not have the custody of the child, it will be given to others better fitted to have such custody, and for the training and education of the child. When the father is a fit and suitable person to have the custody and care of the child, he is entitled to it, by force of the statute, as against the statutory guardian: See *Jones v. Darnall*, 103 Ind. 569; 53 Am. Rep. 545, and cases there cited; *Bryan v. Lyon*, 104 Ind. 227; 54 Am. Rep. 304, and cases there cited.

Upon the whole case, as presented by the evidence, we feel constrained to hold that the judgment must be reversed.

Judgment reversed, with costs, and cause remanded, with instructions to the court below to sustain appellant's motion for a new trial.

NIBLACK, J., dissenting. I agree generally to the conclusion reached in this case, but cannot concur in the intimation given that the question of the custody of a minor child may be settled in an incidental way at the time, and as a part of the proceedings, when letters of guardianship over its person and estate are applied for and issued.

An application for letters of guardianship is, in its nature, *ex parte*. If the question of the custody of a child may then be so settled, I cannot see upon what principle such custody may not be determined upon an application for the removal of a guardian. Such an application is an adversary proceeding, requiring notice to the guardian, and involving a judicial inquiry: *Dibble v. Dibble*, 8 Ind. 307. Such an inquiry may, therefore, be made to take a wider range, and to be, hence, much more comprehensive than proceedings upon an application for letters of guardianship.

CUSTODY OF INFANT. — Jurisdiction of in equity: *Faulkner v. Davis*, 98 Am. Dec. 734, note.

FATHER IS ORDINARILY ENTITLED TO CUSTODY OF HIS MINOR CHILDREN; and upon *habeas corpus*, the courts have power to award it to him: *State v. Libbey*, 82 Am. Dec. 223, and note 228; *Matter of Scarritt*, 43 Am. Rep. 768, and note 779.

WHEN FATHER WILL BE DEPRIVED OF CUSTODY OF CHILD: *Jones v. Darnall*, 53 Am. Rep. 545; *McKim v. McKim*, 34 Id. 694, and note 698; *Heine-*

man's Appeal, 42 Id. 532; *Matter of Bort*, 37 Id. 255; *Sturtevant v. State*, 48 Id. 349; *Chapely v. Wood*, 40 Id. 321, and extended note 327.

RELEASE OF PATERNAL RIGHT TO CUSTODY OF CHILD: *Bentley v. Terry*, 27 Am. Rep. 399; *Clark v. Bayer*, 30 Id. 593; *Bonnett v. Bonnett*, 47 Id. 810.

AWARD OF CUSTODY OF CHILD TO MOTHER ON HABEAS CORPUS: *Moore v. Christian*, 31 Am. Rep. 375.

CONSTITUTIONALITY OF STATUTE AWARDING CUSTODY OF CHILD TO OVERSEERS OF POOR: *Farnham v. Pierce*, 55 Am. Rep. 452, and extended note 456.

LEGAL MARRIAGE OF FEMALE INFANT TERMINATES FATHER'S RIGHT TO HER CUSTODY: *Aldrich v. Bennett*, 56 Am. Rep. 529.

FATHER IS ENTITLED TO SERVICES AND EARNINGS and liable for support of his minor child, notwithstanding his divorce from its mother: *Gilley v. Gilley*, 1 Am. St. Rep. 307.

RIGHT OF PARENT TO CUSTODY OF CHILD, AND PROCEEDINGS TO VINDICATE IT. — *Nature of Father's Right to Custody of Child.* — The ancient Roman law held children to be the property of the father, and placed them, in relation to him, in the category of things, instead of that of persons; and he had over them the power of life and death: See 1 Bla. Com. 452; *The Etna*, 1 Ware, 462, 465. By the common law, the father has a paramount right to the custody and control of his infant children, upon the principle that he is in duty bound, by the law of nature as well as of society, to maintain, protect, and educate them: *People v. Olmstead*, 27 Barb. 9; *Henson v. Walte*, 40 Ind. 170; *Cole v. Cole*, 23 Iowa, 433; *Johnson v. Terry*, 34 Conn. 259; *McBride v. McBride*, 1 Bush, 15; *State v. Stigall*, 22 N. J. L. 236; *Vereer v. Ford*, 37 Ark. 27; *Miller v. Wallace*, 71 Ga. 479; *Rea v. Greenhill*, 6 Nev. & M. 244; 4 Ad. & E. 624; *Habswill's Case*, 22 Eng. L. & Eq. 395. But the right is neither unlimited nor inalienable, and it continues no longer than it is properly exercised: *State v. Smith*, 6 Me. 462; *Mercein v. People*, 25 Wend. 64; 35 Am. Dec. 653. The good of the child is to be regarded as the prominent consideration, and the courts will withhold its custody from the father if its interests and welfare demand it: *Commonwealth v. Addick*, 5 Binn. 520; *United States v. Green*, 3 Mason, 482; *Matter of McDowle*, 8 Johns. 328; *Drumb v. Keen*, 47 Iowa, 435; *Dumain v. Gwynne*, 10 Allen, 270; *Joab v. Sheets*, 99 Ind. 328; *Jones v. Darnall*, 103 Id. 569; 53 Am. Rep. 545; *Sturtevant v. State*, 15 Neb. 459; 48 Am. Rep. 349; and see *Faulkner v. Davis*, 98 Am. Dec. 734, note. So the right of the state to care for its children is undoubted, and has always been exercised; and it is clearly within the province of the legislature to prescribe the cases in which children shall be rescued from their custodians, and provide a mode for their summary disposition: *Matter of Donohue*, 1 Abb. N. C. 1. Hence a statute authorizing courts and magistrates to award to the overseers of the poor the custody of children found to be neglected by their parents, and growing up without education or salutary control, and in circumstances exposing them to lead idle or dissolute lives, is held to be constitutional: *Farnham v. Pierce*, 141 Mass. 203; 55 Am. Rep. 452; it is a provision by the commonwealth, as *parens patrie*, for the custody and care of neglected children, and is intended only to supply to them the parental custody which they have lost: Id. And upon this ground, the detention of abandoned, dependent, or depraved children in houses of refuge, or in industrial or reform schools, is upheld in numerous decisions: See *Ex parte Crouse*, 4 Whart. 9; *Roth v. House of Refuge*, 31 Md. 329; *Prescott v. State*, 19 Ohio St. 184; 2 Am. Rep. 338; *House of Refuge v. Ryan*, 37 Ohio St.

197, 204; *Milwaukee Industrial School v. Supervisors*, 40 Wis. 328; 22 Am. Rep. 702; *Ferrier's Petition*, 103 Ill. 267; 42 Am. Rep. 10; *McLean County v. Humphreys*, 104 Ill. 378. But the state does not, and could not, intrude this assumption of authority between parent and child standing in no need of it. It assumes the authority only upon the destitution and necessity of the child, arising from want or default of parents: *Milwaukee Industrial School v. Supervisors*, 40 Wis. 328; 22 Am. Rep. 702; and see *People v. Turner*, 55 Ill. 280; 8 Am. Rep. 645. So statutes authorizing the commitment of infants without care or guardianship to reform schools and like institutions, so far as they purport to give inferior tribunals jurisdiction of offenses punishable by infamous punishment, are held to be unconstitutional: *Commonwealth v. Horregan*, 127 Mass. 450; so they are unconstitutional so far as they authorize the commitment to such institution of an infant charged with the commission of a crime, without some kind of a trial and conviction: *State v. Ray*, 63 N. H. 406; 55 Am. Rep. 458; and see *People v. Catholic Protectorate*, 38 Hun, 127; *Ballenger v. McLain*, 54 Ga. 159; *People v. New York Catholic Protectory*, 44 Hun, 525; 19 Abb. N. C. 142; affirmed, 106 N. Y. 604.

Right of Father to Transfer Custody of Child. — The care and custody of a minor child is held to be a personal trust in the father: *State v. Baldwin*, 5 N. J. Eq. 454; 45 Am. Dec. 200. And according to the English doctrine, in which some of the American authorities concur, the father cannot, by the common law, irrevocably divest himself, even by contract with the mother, or any other person, of the custody of his children; and that an agreement, whereby he surrenders such custody, is not binding, and he may afterwards revoke his consent, and reclaim the custody by *habeas corpus*: *Regina v. Smith*, 16 Eng. L. & Eq. 221; *In re Agar-Ellis*, L. R. 10 Ch. D. 49; *People v. Mercier*, 3 Hill, 410; 38 Am. Dec. 644; *State v. Baldwin*, 5 N. J. Eq. 454; 45 Am. Dec. 399; *Matter of Sauritt*, 76 Mo. 565; 43 Am. Rep. 768; *State v. Libbey*, 44 N. H. 321; 82 Am. Dec. 223; *Johnson v. Terry*, 34 Conn. 259. On the other hand, the weight of authority in this country sustains the position that a father can, by agreement, surrender the custody of his infant child to another, so as to make the custody of that other legal: *Drumb v. Keen*, 47 Iowa, 435; *Taylor v. Jeter*, 33 Ga. 195; *Clark v. Bayer*, 32 Ohio St. 299, 310; *Chapeky v. Wood*, 26 Kan. 650; 40 Am. Rep. 321; *Commonwealth v. Gillespie*, 1 Phila. 194; *State v. Barrett*, 45 N. H. 15; *Ellis v. Jesup*, 11 Bush, 403. And in all controversies subsequently arising respecting its custody, the court will consider the welfare of the child as the matter of primary importance: *Bonnett v. Bonnett*, 61 Iowa, 199; 47 Am. Rep. 810; and see *Merritt v. Swinley*, 23 Rep. 158 (Va.); *Verser v. Ford*, 37 Ark. 27. But where it is insisted that the father has relinquished his right to the custody of his child to a third person, by contract, the terms of the contract, to have the effect of depriving him of his control, should be clear, definite, and certain: *Drumb v. Keen*, 47 Iowa, 435; *Miller v. Wallace*, 76 Ga. 479. The legal marriage of a female infant terminates the father's right to her custody and services: *Aldrich v. Bennett*, 63 N. H. 415; 56 Am. Rep. 529.

Mother's Right to Custody of Child. — As a general rule, the father, during his lifetime, and after his death, the mother, is entitled to the custody of the person of their infant child: *Moore v. Christian*, 56 Miss. 408; 31 Am. Rep. 375; *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344; *People v. Wilcox*, 22 Barb. 178; *Clark v. Bayer*, 32 Ohio St. 299. And it is held that the authority of the father to dispose of the custody of his infant child in any other manner than by lawfully binding him as an apprentice, or appointing for him a testamentary guardian, ceases at the time of the father's death, and

that he cannot, by any agreement, in writing or otherwise, relinquish the custody of the person of his infant child for any longer period than his own lifetime, so as to deprive the mother of such child of her right to its custody and the care of its education after the father's death: *State v. Reuff*, 29 W. Va. 751; *Moore v. Christian*, 56 Miss. 408; 31 Am. Rep. 375. But by the strict rule of the common law, if the widowed mother of infant children marries again, her legal right to their custody is lost: *Re Goodenough*, 19 Wis. 274; *Worcester v. Marchant*, 14 Pick. 510; *Whitehead v. St. Louis R. R. Co.*, 22 Mo. App. 60; *State v. Scott*, 30 N. H. 274; compare, as holding an opposite doctrine, *Armstrong v. Stone*, 9 Gratt. 102; *Cotton v. Wolf*, 14 Bush, 238; *Leavel v. Betts*, 3 Id. 74.

The right of the father or mother to the custody of their minor child is not an absolute right, to be accorded to them under all circumstances, and it may be denied to either, if it appears to the court that the parent otherwise entitled to this right is unfit for the trust: *State v. Reuff*, 29 W. Va. 751; *Armstrong v. Stone*, 9 Gratt. 102; *Maples v. Maples*, 49 Miss. 393; *State v. Kirkpatrick*, 54 Iowa, 373. In all cases of controverted right to custody, the welfare of the infant is of paramount consideration: *Corrie v. Corrie*, 42 Mich. 509; *In re Bort*, 25 Kan. 308; 37 Am. Rep. 255. When the question of custody arises between the father and mother, or between either of them and another, as to rightful custody, and the minor is of an age to make an intelligent and discreet choice, the courts will respect the minor's election: *Clark v. Bayer*, 32 Ohio St. 299, 305; *State v. Bratton*, 15 Am. Law Reg. N. S., 359 (Del.). Where the father and mother have separated, and their infant children must of necessity be deprived of the care, protection, and training of one of them, then it is the duty of the courts to confide the custody of the infants to that parent, whether father or mother, best suited to maintain, protect, and educate them, and bring them up in moral courses: *McKim v. McKim*, 12 R. I. 462; 34 Am. Rep. 694; *Goodrich v. Goodrich*, 44 Ala. 670. In determining whether the custody of an infant ought to be given to or retained by the mother, under the English infants' custody act (36 & 37 Vict., c. 12, sec. 1), the court will take into consideration the paternal right, the marital duty, and the interest of the child: *In re Taylor*, L. R. 4 Ch. Div. 157. For this purpose the marital duty includes, not only the duty which the husband and wife owe to each other, but the responsibility of each of them towards their children so to live that the children shall have the benefit of the joint care and affection of both father and mother. The father having committed a breach of the marital duty, as thus defined, it was held that for this, among other reasons, the mother, in whose custody two children of the marriage of tender years were, ought to retain the custody until further order: *In re Elderton*, L. R. 25 Ch. Div. 220. If the parents have abandoned their infant children, or by act or word transferred their custody to another, and the custodian is in every way a fit person to have the care, training, and education of the infant, and the court is satisfied that its social, moral, and educational interests will be best promoted by remaining in the custody of the person to whom it was transferred when abandoned, the new custody will be treated as lawful and exclusive: *Clark v. Bayer*, 32 Ohio St. 299, 306; 30 Am. Rep. 593; and see *Bonnett v. Bonnett*, 61 Iowa, 199; 47 Am. Rep. 810; *Jones v. Darnall*, 103 Ind. 569; 53 Am. Rep. 545.

Mother's Right to Custody of Illegitimate Child. — The mother of an illegitimate child is its natural guardian, and *prima facie* she is entitled to its

custody: *Bustamento v. Analla*, 1 N. M. 255; *Wright v. Bennett*, 7 Ill. 587; *Matter of Doyle*, 1 Clarke Ch. 156; *People v. Mitchell*, 44 Barb. 245; *Copeland v. State*, 60 Ind. 394; *State v. Stigall*, 22 N. J. L. 286; *Regina v. Nash*, L. R. 10 Q. B. Div. 454. The putative father, if a proper person, is, however, entitled to its custody, as against all but the mother: *Pote's Appeal*, 106 Pa. St. 574; *Commonwealth v. Anderson*, 1 Ashm. 55; *Barela v. Roberts*, 34 Tex. 551. But see *Matthews v. Hobbs*, 51 Ala. 210. But in this case, as in the case of legitimate children, the welfare of the child is chiefly to be had in view, and the rights of the mother or of the putative father are to be regarded no further than they are consistent with the best good of the child: *People v. King*, 6 Barb. 366; *Robalina v. Armstrong*, 15 Id. 247; and see *State v. Noble*, 70 Iowa, 174; *Matter of Nofsinger*, 25 Mo. App. 116.

Parent's Right to Custody of Child, how Vindicated. — A parent, however clearly he may deem himself entitled to the custody of his infant child, must not resort to force and artifice to obtain possession of it: *Commonwealth v. Fee*, 6 Serg. & R. 255. "He should enter through the straight gate of the law to obtain such possession, and not attempt to climb over it in some other and wrongful way": *Jones v. Cleghorn*, 54 Ga. 9, 13; *Clark v. Bayer*, 32 Ohio St. 299, 312; 30 Am. Rep. 593. But where the father resorted to a stratagem to take his minor child from the possession of its maternal grandmother, in order to avoid an altercation, it was held that this did not injuriously affect his right to have the custody and control of the child: *Miller v. Wallace*, 76 Ga. 479. Questions as to the rightful custody of minor children are generally determined in *habeas corpus* proceedings, and the writ of *habeas corpus* is the appropriate remedy, when such children are improperly detained out of the custody of the parent entitled thereto: *Ellis v. Jessup*, 11 Bush, 403; *Clark v. Bayer*, 32 Ohio St. 299; 30 Am. Rep. 593; *Moore v. Christian*, 56 Miss. 408; 31 Am. Rep. 375; *Matter of Mitchell*, R. M. Charl. 489; *Dowling v. Todd*, 26 Mo. 267; and see *State v. Smith*, 6 Me. 462; 20 Am. Dec. 324, and extended note on the subject 330; *Davis v. Davis*, 75 N. Y. 221, 227; *Turkington v. State*, 1 Ind. 171, 173. Statutory provisions exist in many of the states recognizing this use of the writ, and the proceeding is for the most part regulated by statute. Nevertheless it should be remembered that the writ is one which the courts have the inherent power to issue, derived from the common law: *People v. Mercein*, 8 Paige, 55; *Cannon v. Stewart*, 3 Houst. 223; *In re Glenn*, 54 Md. 572, 595. In deciding cases involving the rightful custody of infants upon writs of *habeas corpus*, it is said that no rigid rules to regulate the practice have or can be formulated, and that the principles adopted by the courts of chancery should generally govern. Only a few general principles can be taken as guides, subject to which the chancellor, or the judge in a *habeas corpus* proceeding, must exercise his judgment upon the peculiar circumstances of the case, and act as humanity, respect for the parental affection, and regard for the infant's best interests may prompt. All three should be considered, but no one ought to be conclusive: *Verser v. Ford*, 37 Ark. 27. If the child is of very tender age, it is the duty of the court to determine for the child whether it is restrained of its liberty or unlawfully detained. The court must be guided by the true interests of the infant, in respect of its nurture, education, sex, and associations, and should decide as the infant would, if possessed of the discretion to determine rightly and truly for itself: *In re McKain*, 17 Abb. Pr. 399, note. Again, it is said that the judge who hears the case is not restricted to the ordinary modes of trial, but may direct that the infants be brought before him, and may examine them privately, and may also avail himself of affidavits or other reasonable and

proper sources of evidence: *Dumain v. Gwynne*, 10 Allen, 270, 275; and see *Matter of McDowle*, 8 Johns. 328; *Shaw v. Nachtmay*, 43 Iowa, 653; *Stewart v. Stewart*, 8 DeGex, M. & G. 760. The general rule amply sustained by the decisions is, that the rights and interests of the child are paramount upon the question of custody: See *In Matter of Bort*, 25 Kan. 308; 37 Am. Rep. 255; *Startsvant v. State*, 15 Neb. 459; 48 Am. Rep. 349; *People v. Allen*, 40 Hun, 611; *People v. Brown*, 35 Id. 324; *Corrie v. Corrie*, 42 Mich. 509; *Bustamento v. Analla*, 1 N. M. 255; and with this end in view, the court or judge may commit the child to the custody of another than a parent: *In Matter of Bort*, 25 Kan. 308; 37 Am. Rep. 255; and see *Rez v. Delaval*, 3 Burr. 1434; 1 W. Black. 412; *Jones v. Darnall*, 103 Ind. 569; 53 Am. Rep. 545; *Bryan v. Lyon*, 104 Ind. 227; 54 Am. Rep. 304.

The courts look with a watchful eye at the returns to writs of *habeas corpus*, and if there be any attempt at evasion in the terms employed, the return will be deemed insufficient: *Rez v. Winton*, 5 Term Rep. 89; *United States v. Green*, 3 Mason, 482; *Commonwealth v. Reed*, 59 Pa. St. 425. The usual correct form of the return denying detention or restraint is, that the respondent has not the child in his "possession, custody, or power," and the omission of the words "power" and "possession" would render the return equivocal: *Matter of Stacy*, 10 Johns. 328, 332. As it regards the form of judgment, it is held that, in writs of *habeas corpus* directed to private persons to bring up infants, the court is bound, *ex debito justitiz*, to set the infant free from improper restraint, but is not bound to deliver it over to anybody. The true rule is, that the court is to judge upon the circumstances of the particular case, and give its directions accordingly: *Rez v. Delaval*, 3 Burr. 1434; 1 W. Black. 412; and to the same effect are the American decisions: See *Mercein v. People*, 25 Wend. 64; 35 Am. Dec. 653; *Matter of Waldron*, 13 Johns. 418; *State v. Richardson*, 40 N. H. 272, and the more recent cases cited above. In the case of a child of tender years, the good of the child is to be regarded as the prominent circumstance to be taken into consideration by the court: *Commonwealth v. Briggs*, 16 Pick. 203; *Commonwealth v. Taylor*, 3 Met. 72; and see *State v. Neel*, 48 Ark. 233, 290. If the child has reached the age of discretion, the court will, in the exercise of a sound discretion, remove all restraint, and allow it to make its own choice, and go where it pleases, but will never order it into the custody of an improper person, or under some circumstances permit it to go into such custody: *State v. Bratton*, 15 Am. Law Reg., N. S., 359 (Del.); *Clark v. Bayer*, 32 Ohio St. 299, 306; 30 Am. Rep. 593; and see *Matter of McDowle*, 8 Johns. 328.

VOGEL v. BROWN TOWNSHIP.

[112 INDIANA, 299.]

JUDGMENT BASED ON COMPLAINT AGAINST BROWN "CIVIL" TOWNSHIP IS NOT VOID because of the inaccuracy in the name of the political corporation. The word "civil" correctly describes the township, and no one could have been misled or prejudiced by its use.

WHERE WRIT IS SERVED ON PARTY BY WRONG NAME, and he fails to appear and plead misnomer, he is concluded, and in all future proceedings may be connected with the judgment by proper averments. This rule applies to corporations as well as to natural persons.

FAILURE TO CALL PARTY BEFORE ENTERING DEFAULT is mere irregularity, and is not, even on appeal, considered as a material error.

SUMMONS ISSUED AGAINST TRUSTEE cannot be regarded as writ against township, and will not sustain a judgment against the township. The people of a locality constitute the political corporation, and not the officers chosen by them, unless it is otherwise expressly declared by law.

T. J. Brooks, S. M. Reeve, E. Moser, and H. Q. Houghton,
for the appellant.

W. R. Gardiner, S. H. Taylor, and J. T. Rogers, for the appellee.

By Court, **ELLIOTT, J.** The object of this suit is to set aside a judgment obtained by the appellant in April, 1884.

One point upon which the appellee's counsel rest their case is, that the judgment is void because it is based on a complaint against Brown Civil Township. There is no substantial merit in this contention. The addition of the word "civil," while it created an inaccuracy in the name of the political corporation, did not render the judgment void. We have very many decisions defining and declaring the difference between civil and school townships, and it is by no means uncommon to speak of an ordinary township as a civil township. The word "civil" correctly describes the township, and no one could have been misled or prejudiced by its use.

The general rule is, that if the writ is served on the party by a wrong name, and he fails to appear and plead the misnomer, he is concluded, and in all future proceedings may be connected with the judgment by proper averments: *First National Bank v. Jagers*, 31 Md. 38; *Smith v. Patten*, 6 Taunt. 115.

This rule applies to corporations as well as to natural persons: *Lafayette Ins. Co. v. French*, 18 How. 404; *Bloomfield R. R. Co. v. Burress*, 82 Ind. 83.

The failure to call the appellee before entering a default was a mere irregularity, and is not, even on appeal, considered as a material error: *Doherty v. Chase*, 64 Ind. 73.

The summons issued in the original action was against "Valentine Strange, trustee of Brown Civil Township, Martin County, Indiana." This cannot be regarded as a writ against the township. Strange, although the trustee, was not the township. At most he was its special agent, with naked statutory powers: *Union School Township v. First Nat. Bank*,

102 Ind. 464; *Bloomington School Township v. National etc. Co.*, 107 Id. 43.

Unless it is otherwise expressly declared by law, it is the people of a locality who constitute the political corporation, and not the officers chosen by them: *City of Valparaiso v. Gardner*, 97 Ind. 1; Grant on Corporations, 357; *Lowber v. Mayor*, 5 Abb. Pr. 325; *Clarke v. City of Rochester*, 24 Barb. 446.

It is apparent, therefore, that the utmost that can be granted the appellant is, that he asked and obtained a writ against the agent, and not against the principal. This, certainly, will not support a judgment against the principal, for the general rule—and it is an elementary one—is, that the summons must issue against the principal, and not against the agent. Here there is no summons against the township, and consequently no legal notice, for the summons does not purport to be directed against the corporation.

The fact that knowledge of the action was possessed by the trustee will not avail, for his principal, the governmental corporation, was entitled to be notified, as the law directs. It is, indeed, held by respectable authority that knowledge on the part of the defendant himself will not supply the place of a summons: *Peabody v. Phelps*, 9 Cal. 213; Wade on Notice, sec. 1146.

Judgment affirmed.

AMENDMENT OF WRITS BY CHANGING NAME OF PARTY: *Barber v. Swan*, 61 Am. Dec. 127, note; *Crafts v. Sikes*, 64 Id. 62; *Parry v. Woodson*, 84 Id. 51.

THOUGH DEFENDANT MAY BE SUED BY WRONG NAME, YET SO LONG AS HE CAN BE IDENTIFIED as the one against whom the judgment was rendered, it is binding against him: *Parry v. Woodson*, 84 Am. Dec. 51.

MISNOMER—PLEA OF IN ABATMENT TO INDICTMENT FOR MISDEMEANOR: *Commonwealth v. Carr*, 19 Am. Rep. 345.

THE PRINCIPAL CASE IS FOLLOWED in *Vogel v. Brown School Township*, 112 Ind. 317, and *State v. Wilson*, 113 Id. 502, as to the fourth point stated in the syllabus.

STULTS v. BROWN.

[112 INDIANA, 370.]

SPECIFIC PERFORMANCE — VENDEE'S LIEN. — The administrator of the estate of a decedent obtained an order to sell real estate, and sold it accordingly. The purchaser paid the purchase-money in full, and afterwards sold the property to another, who paid the purchase price, but received no deed. After the latter purchase, the administrator's sale was set aside because of some irregularity in the proceedings. *Held*, that the vendee of the purchaser from the administrator could not maintain an action for the specific performance of the contract of sale, but was entitled to a vendee's lien on the land for the amount of the purchase-money paid by him.

EQUITIES OF VENDEE WHO PAYS MONEY ON CONTRACT OF SALE ARE AS STRONG AS THOSE OF VENDOR who does not receive full payment for the land he sells.

COURT HAVING JURISDICTION OF MATTER IN WHICH JUDICIAL SALE IS ORDERED MAY REQUIRE DEED TO BE EXECUTED to the person entitled to it, but this rule is without force, where the sale upon which a deed is demanded has been conclusively adjudged invalid.

B. M. Cobb, B. F. Ibach, and G. W. Stults, for the appellants.

J. C. Branyan, M. L. Spencer, and W. A. Branyan, for the appellee.

By Court, ELLIOTT, J. John Stults was appointed the administrator of the estate of Conrad Forst, deceased, on the tenth day of June, 1873. The personal property of the estate was insufficient to pay the debts, and he petitioned for an order to sell real estate. His petition was granted, and the order made. On this order sale was made to Joseph Best for \$1,602; this was more than the appraised value of the land. Subsequently the sale was approved, and the deed confirmed. The purchase-money was paid in full, and final settlement of the estate was made. After the final settlement Best sold the land to John Stults, who paid for it the sum of sixteen hundred dollars. Some time after this purchase the widow of Conrad Forst brought an action against John Stults, Joseph Best, and the heirs of Conrad Forst, deceased. On the trial of this case it was discovered that there was some irregularity in the proceedings, and the parties agreed that the sale should be set aside, and it was so adjudged. Before further proceedings were had, John Stults, the purchaser from Joseph Best, died, leaving as his heirs these appellants. The appellee was subsequently appointed administrator *de bonis non* of the estate of Conrad Forst. The parties agree as to the facts, but differ as to the law.

We do not believe that the appellants have shown a right to

a specific performance. The judgment setting aside the sale must be regarded as conclusive. That judgment establishes the invalidity of the sale, and consequently no title flowed from it. This effectually bars a right to enforce specific performance.

A further question remains. The father of the appellants paid sixteen hundred dollars in good faith, and in expectation of securing title to the land he bargained for, and this money he ought not to lose. This result is forbidden by equity and good conscience. The estate has this money, or it has been used for its benefit. The title to the land which John Stults bargained for is still in the heirs of the decedent, and there is no necessity for resorting to proceedings to compel creditors to refund. That probably could not be done, as there is no warranty of title. The land, however, may still be made assets, if there is a deficiency of personal property. Under these circumstances, we think the appellants ought not to be sent from the courts without relief, and the only debatable question that can arise is as to the nature of the relief to be awarded. There is a clear equitable right to the money paid by their ancestor. Where there is a right there is a remedy, and there is one here. Where there is a clear equitable claim on land, the claimant will not be turned away remediless. There is such a thing as a vendee's lien, and the appellants are entitled to it. This lien is the creation of courts of equity, and is a beneficent and just one: *Jones v. French*, 92 Ind. 138; *Seller v. Lingerman*, 24 Id. 264; 1 Pomeroy's Eq. Jur., sec. 167; 3 Id., sec. 1263; 2 Story's Eq. Jur., sec. 1231; *Overton on Liens*, 694.

The equities of a vendee who pays money on a contract of sale are as strong as those of a vendor who does not receive full payment for the land he sells. The principle which applies in such cases is closely analogous to the principle of subrogation: *Lowrey v. Byers*, 80 Ind. 443; *Stout v. Duncan*, 87 Id. 383; *Dunning v. Seward*, 90 Id. 63; *Short v. Sears*, 93 Id. 505; *Curtis v. Gooding*, 99 Id. 45.

We have no doubt that the appellants are entitled to the equitable lien of a vendee, but we are not so clear that their petition proceeds on this theory. Our conclusion is, that it does not, for there is no averment that there was any denial of the lien, nor is there any allegation that the appellee refuses to make sale of the land; on the contrary, the entire frame of the petition indicates that the claim which the appellants assert

is a title to the land sold under the order obtained by John Stults. On this theory the petition is not good, and it must fall: *Mescall v. Tully*, 91 Ind. 96, and cases cited; *Green v. Groves*, 109 Id. 519, and cases cited; *First National Bank v. Root*, 107 Id. 224.

The case is not that of a petition presenting a cause of action entitling the petitioner to some relief, but that of a petition claiming a relief of an entirely different character from that which the general scope of the pleading entitles the petitioner to receive. It is like the case of an absolute claim of title where there is nothing but a plain mortgage.

Upon a petition showing the same facts as those stated in the one before us, and showing, in addition, a denial of the lien, and a refusal to enforce it, the appellants would make a *prima facie* case entitling them to an order directing the appellee to sell the land. That, however, is not what they do here; for here they assert a title to the land upon the sale, which had been adjudged invalid. If that sale was not valid, of course title could not be founded on it, although out of it might arise a vendee's lien. But it is not a sale to enforce that lien that is here demanded; on the contrary, the demand is, that the title be put in the appellants without a second sale.

The case is not at all like *Voorhees v. United States Bank*, 10 Pet. 449, for there the validity of the sale was not questioned; that was conceded, and the only controversy was as to the authority to execute a deed to a person other than the original purchaser.

We have no doubt that a court having jurisdiction of a matter in which a judicial sale is ordered may require a deed to be executed to the person entitled to it: *Rorer on Judicial Sales*, sec. 438. But that rule cannot be of force where, as here, the sale upon which a deed is demanded has been conclusively adjudged invalid.

Judgment affirmed.

VENDOR'S LIEN, AGAINST WHOM IT PREVAILS: *Walton v. Hargrove*, 97 Am. Dec. 429, and note 432; *Ellis v. Temple*, 94 Id. 200.

TITLE AND RIGHTS OF VENDEE IN POSSESSION, having paid the purchase-money: *Peterson v. Orr*, 58 Am. Dec. 484; *Tibben v. Tibben*, 59 Id. 329; and see *Brill v. Stiles*, 85 Id. 364.

WABASH, ST. LOUIS, AND PACIFIC RY Co. v. LOCKE.

[112 INDIANA, 404.]

RAILROAD COMPANY NOT LIABLE FOR UNFORESEEN ACCIDENT. — Telegraph wires extended over the defendant's track, and one of them was broken by coming in contact with a brakeman who was standing erect on a moving freight-car. The wire fell, and in some unaccountable manner coiled around the body of the deceased, who was at work upon a flat-car twenty-five feet from the main track, and, catching at the same time upon a brake-handle of the moving train, it was carried forward, dragging the deceased along, thus causing his death. The freight-car upon which the brakeman stood was above the average height, and the brakeman was very tall, but he had frequently passed under the wires, standing erect on the top of the cars, and had no thought of danger from contact therewith. The wire which was broken had by some means become lowered in the center, of which the defendant was without notice. *Held*, that the accident was one which the defendant was not bound to anticipate, and for which it could not be held liable.

CLASSIFICATION OF ACTS OR OMISSIONS OUT OF WHICH ACTIONS IN TORT, to recover for injury to persons or property, ordinarily arise, or are predicated upon.

EVENT, REAL CAUSE OF WHICH CANNOT BE TRACED, or is at least not apparent, ordinarily belongs to class of occurrences designated as purely accidental, and the party who asserts negligence must show enough to exclude the case from the class so designated.

IT IS DUTY OF RAILROAD COMPANY TO HAVE ITS PREMISES IN REASONABLY SAFE CONDITION, and to prevent damage to all persons having lawful occasion to transact business with it, from any unseen or unusual danger of which it had, or of which by the exercise of reasonable vigilance it should have had, knowledge. The company is not, however, bound to keep its grounds absolutely safe, and where the circumstances of the accident suggest, at first blush, that it may have been unavoidable, notwithstanding ordinary care, the plaintiff charging negligence assumes the burden of proving that the defendant has, by some act or omission, violated a duty incumbent on it, from which the injury followed in natural sequence.

MISCHIEF WHICH COULD BY NO REASONABLE POSSIBILITY HAVE BEEN FORESEEN, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong.

PERSONS WHO ARE CHARGED WITH DUTY IN RELATION TO PARTICULAR MATTER OR THING have right to rely upon sufficiency of a structure or contrivance, such as is in common use for the purpose, and which has been in fact safely used under such a variety of conditions as to demonstrate its fitness for the purpose. But if the thing which occasioned the accident was inherently dangerous or insecure, the fact that no such occurrence had ever taken place before would not be conclusive evidence that due caution was observed.

IN ORDER THAT LIABILITY MAY ATTACH FOR INJURY occasioned by something not inherently dangerous and defective, which is found upon the grounds of or in use by one who is under a qualified obligation to the injured person, it must be shown that the defendant either knew, or that by the exercise of such reasonable skill, vigilance, and sagacity as

are ordinarily possessed and employed by persons experienced in the particular business to which the thing pertains he should have known, of its dangerous and defective condition, and that the natural and probable consequence of its use would be to produce injury to some one.

TELEGRAPH WIRE CARRIED FROM ONE POLE TO ANOTHER is not dangerous object in and of itself. And where telegraph wires extend over a railroad track, the railroad company is only bound to anticipate such combinations of circumstances, and accidents and injuries therefrom, as, taking into account its own past experience and the experience and practice of others in similar situations, together with what was inherently probable in the condition of the wires as they related to the conduct of its business, it might reasonably forecast as likely to happen.

IT IS DUTY OF JURY, UNDER PROPER INSTRUCTIONS, to determine whether or not, upon any given state of facts, negligence ought to be inferred; but it is the duty of the court first to say whether, upon the facts most favorable to the plaintiff, negligence can be inferred. The jury cannot arbitrarily, and without evidence, infer negligence.

C. B. Stuart and W. V. Stuart, for the appellant.

J. L. Farrar, J. Farrar, H. J. Shirk, and J. Mitchell, for the appellee.

By Court, **MITCHELL, C. J.** Abia K. Locke, as administrator of the estate of John Bradley, deceased, brought this action against the Wabash, St. Louis, and Pacific Railway Company and the Western Union Telegraph Company to recover damages for wrongfully causing the death of Bradley.

There was a verdict against both defendants below, and a judgment against the railway company alone.

The evidence most favorable to the plaintiff tended to establish the following facts:—

On the fourteenth day of November, 1882, John Bradley, a citizen of Wabash County, aged about forty-four years, was engaged with some workmen in loading logs on a flat-car, which stood upon one of the side-tracks on the south side of the railway company's main line at Keller's Station. The side-track upon which the flat-car stood was twenty-five feet distant from the main line, which ran east and west, there being also another track between the main line and side-track above mentioned. The depot was on the north side of the main line, and a short distance easterly from the place occupied by the flat-car.

The Western Union Telegraph Company had a line of telegraph poles of the usual height, which supported a number of telegraph wires, in the customary manner, running east and west along the south side of the railway company's right of way. In order to afford facilities for telegraphic communica-

tion to and from the station, the company carried some of its wires from a pole standing on the south side of the right of way, and west of the depot, and west of the point where the flat-car stood, diagonally across the tracks to a pole on the north side of the right of way, and thence eastwardly along the north side into an office in the depot building.

These wires had been placed across the track about the year 1874, and had been maintained substantially in the same position until the happening of the accident which gave rise to this suit. One of the wires was used by the railway company in its business. The others were employed in the business of the telegraph company.

While Bradley was occupied with his work on the flat-car, the location of which has been described, an east-bound freight train, running on its usual time, at a moderate rate of speed, approached the station over the main track. On one of the cars, which was of a height somewhat above that of an ordinary freight-car, stood a brakeman, six feet three and one half inches in height. His head came in contact with one of the wires which crossed the track in the manner above described, the wire striking the back of his head or neck, about the lower part of the ear. A slight bruise was the extent of the injury suffered by the brakeman. The effect of the contact was, however, to break the insulator on the south pole, thereby causing the wire to become detached from its place, and to fall down on the top of a moving car. One of the brake-handles, which extended above the car to the usual height, caught the wire, and carried it forward with the moving train.

In falling, the wire in some unaccountable manner coiled around the body of Bradley as he stood on the flat-car, and, being carried eastward by the moving train, the wire dragged him from the car on which he stood, and eastward in the direction the train was proceeding, some 125 feet, inflicting injuries which resulted in his instant death.

So far, the facts are substantially undisputed, except that the brakeman who came in contact with the wire testified that the car upon which he stood was of the ordinary height, while witnesses for the plaintiff, not connected with the train, reckoned it to be from twelve to eighteen inches above an average.

The "tall brakeman," as he is described, testified that he had passed under the wires, standing erect on the top of the cars, almost daily for sixty days immediately preceding the

accident, without thought of danger, and without supposing that he could touch the wires. He passed under it the day before, as he and many others had frequently done at other times, without stooping his head or apprehending danger. During all the years that the wires crossed the tracks, brakemen standing on cars of various heights had passed under them many thousand times, and it had never been suggested or supposed that there could be any contact between persons standing on the top of trains and the telegraph wires. The superintendent of the telegraph line and the line repairers had passed along the line frequently and regularly, and had discovered no defect or displacement of the wires or fastenings at the place in question.

The record contains no direct notice of any kind from any source that the wires were dangerous. If there was any notice at all, it was such as the structure itself, and the position of the wires thereon, afforded.

The evidence tends to show that one of two things made the accident possible. The plaintiff's case proceeded upon the theory that one of the telegraph wires had "sagged" some ten or twelve inches below its usual and proper height, and that a brakeman some inches taller than the average, standing erect on a car some twelve to eighteen inches above the ordinary height, came in contact with the depressed wire.

There was some evidence tending to show that one of the wires had presented the appearance of being slackened, and somewhat lower than the other for some months prior to the accident. All the railroad and telegraph men, however, disputed this fact, the latter affirming that a "sagged" wire in the position of the one described could not have been used, and that these wires were all in daily use.

The defendant's theory was, that the guy-wire which held the north telegraph pole in position had been broken or cut a short time prior to the accident, and that on account of the breaking or cutting thereof, of which it remained ignorant until after the accident, the top of the pole was slightly pulled to the south, thus making contact with the wires possible under the peculiar circumstances of this case.

The jury adopted the plaintiff's theory. Assuming, therefore, that the evidence justified the jury in finding that one of the wires had by some means become lowered in the center, and that it continued in that position for a period of six or eight months before the accident, so that a brakeman six feet

three and one half inches in height, standing erect on a freight-car from twelve to eighteen inches above the height of an ordinary car, might come in contact with the wire in the manner already described, and the question remains, Was the railroad company bound to take notice that the wire created a condition of things such as it might reasonably have been anticipated would result in accident and injury to some one for whose safety the corporation was bound to take due and reasonable precaution?

Actions in tort, to recover for injury to persons or property, ordinarily arise out of, or are predicated upon, acts or omissions which are or may be classified under the following divisions:—

1. The action may be brought to recover for an injury caused by an act which was done purposely and willfully, without lawful excuse or justifiable occasion, and with the actual or constructive intent to produce harm.

2. The injury may have resulted from the commission of a distinct legal wrong, or from the failure to discharge some special or absolute duty which, in itself, constituted an invasion of the rights of, or an infraction of the obligation due to, another, who was without fault; or an act done or omitted, in violation of a positive statute, may have resulted in injury to some one, within the protection and purpose of the statute, who was, without fault, materially contributing to the injury; there being in either case no intent or expectation, on the part of the defendant, that injury would result from the act or omission. Or,—

3. The injurious act or omission may not have been done or omitted with any intent to produce harm, nor in the invasion of any distinct or absolute legal right of another, nor in violation of any positive law or special or absolute obligation; nevertheless injury may have resulted therefrom which, in the exercise of due diligence and skill, might have been foreseen and prevented, and the person upon whom the injury has fallen may have been one for whose safety and protection the defendant was, at the time, under some qualified or limited obligation: *Pollock on Torts*, 19; *Cooley on Torts*, 85; *Bennett v. Ford*, 47 Ind. 284; *Brown v. Kendall*, 6 Cush. 292.

It is important therefore, in each particular case, that regard be had to the class within which the facts bring it. When the facts are such as to bring a case within either the first or second of the above divisions, the act itself constitutes the

wrong and fixes the right of action, leaving the amount of recovery to depend upon the injury which the evidence may show followed as a sequence of the act. "The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise": *Lane v. Atlantic Works*, 111 Mass. 136.

True, if the question be whether or not the injurious act was purposely committed, it may aid in arriving at a conclusion to inquire whether or not the wrong-doer had knowledge of such facts as rendered it probable that he contemplated or anticipated, or was bound to anticipate, the result which followed. It remains true, nevertheless, as a general proposition, that the commission of the wrongful act, under the circumstances above supposed, fixes the right of action.

Where, however, an action is predicated upon an injury resulting from an act or omission which could only become tortious on account of the relations which the parties sustained to each other, and where the very substance of the wrong complained of itself was the failure to act with due foresight, then the right of action depends primarily upon so fixing the relation of the parties as to show the defendant's obligation, and upon showing further that the harm and injury complained of was such as a reasonable man, in the defendant's place, should have foreseen and provided against.

In such a case, it is not enough to show that an accident happened, and that death or injury resulted therefrom. Negligence is not to be presumed from the fact of an occurrence like that involved in the present case, the statement of which suggests its anomalous, exceptional, and extraordinary character.

This is not, therefore, a case in which mere proof of the accident casts upon the defendant the burden of showing the real cause of the injury: *Hammack v. White*, 11 Com. B., N. S., 538 (593); *Baker v. Fehr*, 97 Pa. St. 70; *Nolan v. Shickle*, 3 Mo. App. 300; *Schultz v. Pacific R. R. Co.*, 36 Mo. 13, 32.

Where an event takes place, the real cause of which cannot be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences which are designated as purely accidental; and in a case like this, where the plaintiff asserts negligence, he must show enough to exclude the case from the class of accidental occurrences.

It is true the plaintiff's intestate was at the place where he

sustained the fatal injury upon lawful business with, and in a sense upon the invitation of, the railroad company. The company, therefore, owed him the duty to have its premises in a reasonably safe condition, and to prevent damage to him, and all others having lawful occasion to transact business with it, from any unseen or unusual danger of which it had, or of which by the exercise of reasonable vigilance it should have had, knowledge: *Indermaur v. Dames*, L. R. 1 Com. P. 274; *Gilbert v. Nagle*, 118 Mass. 278; *Pennsylvania Co. v. Marion*, 104 Ind. 239.

The relation and obligation of the parties are accurately expressed in the proposition found in the recent case of *Heaven v. Pender*, L. R. 11 Q. B. D. 503, the substance of which is, that, whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary prudence would recognize that if he did not use ordinary care and skill in his own conduct with regard to these circumstances, he might cause injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

The obligation of the railway company did not, however, require it to make the place absolutely safe. It was not required to make accidents impossible. Its duty was not to allow its depot and grounds, to and upon which people were invited to come, to become more dangerous than such a place would reasonably be, having regard for the necessities of its business and the nature of the contrivances necessarily employed in carrying it on.

The case, therefore, stands upon a different footing from the cases which involve the duties of carriers who contract to carry passengers safely to a particular destination. In such cases, proof of an injury ordinarily establishes a *prima facie* case of negligence in favor of a passenger which the carrier must overcome: *Cleveland etc. R. R. Co. v. Newell*, 104 Ind. 264; 54 Am. Rep. 312.

Where, as in the case under consideration, the obligation is not in its nature so nearly absolute, and the circumstances of the accident suggest, at first blush, that it may have been unavoidable, notwithstanding ordinary care, the plaintiff charging negligence assumes the burden of proving that the defendant has, by some act or omission, violated a duty incumbent on it, from which the injury followed in natural sequence: *The Nitroglycerine Case*, 15 Wall. 524; *Mitchell v. Chicago R'y Co.*, 51

Mich. 236; 47 Am. Rep. 566; Patterson on Railway Accident Law, sec. 373.

We are not unmindful of those cases in which it appeared that persons passing along public streets or highways had sustained injury by being struck with dangerous substances thrown, or by the falling of objects from buildings into public streets. It has been held that, from the happening of such an accident, in the absence of explanatory circumstances, negligence will be presumed. These cases go upon the theory that the injurious thing was inherently and intrinsically dangerous, hurtful, and insecure, and that it was hence necessary for the defendant to show that he was exercising reasonable care at the time of the accident: *Mullen v. St. John*, 57 N. Y. 567; 15 Am. Rep. 530; Pollock on Torts, 421.

Taking the admitted or established facts, and those most favorable to the plaintiff, and the inquiry in the present case must be, Does it appear, or can it be inferred, that the railroad company failed to observe such precaution for the safety of the plaintiff's decedent, and others similarly situate, as ordinarily regulates the conduct of reasonable men? or can it be inferred from the evidence that reasonable men engaged in like business would have anticipated and provided against the accident which happened? If no such inference could properly have been drawn, then there was no wrong; the company was not negligent, and there is no liability.

"If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom." The party upon whom such an injury chances to fall, no matter how much our sympathies may be excited in his behalf, is necessarily left to bear it: *Lewis v. Flint etc. R'y Co.*, 54 Mich. 55; 52 Am. Rep. 790; *Bennett v. Ford*, *supra*.

Mischief, which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong. "Now, a reasonable man," says a recent learned author, "can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste

his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things": Pollock on Torts, 36.

The proper inquiry is not whether the accident might have been avoided if the company had anticipated its occurrence, but whether, taking the circumstances as they then existed, the company was negligent in failing to anticipate and provide against the occurrence: *Beatty v. Central Iowa R'y Co.*, 58 Iowa, 242; 8 Am. & Eng. R. R. Cas. 210.

The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor that the company should have employed any particular means which, it may appear after the accident, would have avoided it. It was only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident: *Chicago etc. R. R. Co. v. Stumps*, 55 Ill. 367.

These principles are illustrated in a great variety of cases, some of which may with propriety be referred to more particularly.

In *Sjogren v. Hall*, 53 Mich. 274, the plaintiff, by some accident not explained, lost his leg by being caught in a wheel connected with the operation of a saw-mill in which he was employed. The plaintiff claimed that the defendant was negligent in leaving the wheel uncovered, and that at a very small expense the accident could have been prevented. Cooley, J., delivering the opinion of the court, said: "If the accident which occurred was one at all likely to happen,—if it was a probable consequence of a person working about the wheel that he would be caught in it as the plaintiff was,—there would be ground for pressing this argument. But the accident cannot be said to be one which even a prudent man would have been likely to anticipate. . . . So far as there is a duty resting upon the proprietor in any of these cases, it is a duty to guard against probable dangers; and it does not go to the extent of requiring him to render accidental injuries impossible": *Richards v. Rough*, 53 Mich. 212; *Mitchell v. Chicago etc. R'y Co.*, *supra*.

So in the case of *City of Allegheny v. Zimmerman*, 95 Pa. St. 287, 40 Am. Rep. 649, which was a suit to recover for injuries sustained by the falling of a liberty pole which had been erected in the street, it was held, following the general rule, that "one is answerable in damages for the consequences of his faults only so far as they are natural and proximate, and

may therefore have been foreseen by ordinary forecast, and not for those arising from a conjunction of his own faults with circumstances of an extraordinary nature": *Fairbanks v. Kerr*, 70 Pa. St. 86; 10 Am. Rep. 664; *Baker v. Fehr*, 97 Pa. St. 70; *Hoag v. Lake Shore etc. R. R. Co.*, 85 Id. 293; 27 Am. Rep. 653.

Loftus v. Union Ferry Co., 84 N. Y. 455, 38 Am. Rep. 533, involved analogous principles. That was a suit predicated upon a charge of negligence in maintaining an insufficient guard on the side of a float used by passengers going upon and leaving the ferry-boat. In some manner not clearly explained, a child, in leaving the ferry-boat in company with its mother, fell through or over the guard, and was drowned. The float had been used for five or six years before the accident, and was similar to the floats at other ferries. Great numbers of persons had passed over it, and no accident had happened before. The court, giving judgment for the defendant, said: "It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened; and this, so far as appears, could have been done without unreasonable expense or trouble. If the defendant ought to have foreseen that such an accident might happen, or if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. The company had the experience of years, certifying to the sufficiency of the guard. . . . That this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty": *Dougan v. Champlain etc. Co.*, 56 N. Y. 1; *Crocheron v. North Shore etc. Co.*, 56 Id. 656; *Cleveland v. New Jersey etc. Co.*, 68 Id. 306; *Burke v. Witherbee*, 98 Id. 562; *Marsh v. Chickering*, 101 Id. 396.

Crafter v. Metropolitan R'y Co., L. R. 1 Com. P. 300, was a suit to recover for an injury occasioned by the plaintiff falling on a stairway, which the defendant's duty required it to keep in a safe condition. The cause of the slipping was that the brass nosing of the stairs had been worn smooth by travel over it, and a builder testified that, in his opinion, the staircase was unsafe on account of the smooth condition of the nosing and the absence of a hand-rail. There was nothing to contradict this, except that great numbers of persons had passed over the stairs, and that no accident had ever happened before. Setting aside a verdict for the plaintiff, the court held there was

no evidence of negligence: *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781; *Metropolitan R'y Co. v. Jackson*, L. R. 3 App. C. 193; *Sharp v. Powell*, L. R. 7 Com. P. 253.

In a very recent case it appeared that a passenger seated in a railway car was injured by the falling of a clothes-wringer from the rack above the seat, another passenger having placed it there. There was no evidence that the position of the wringer in the rack was such as to indicate that it was insecure, or that there was any reason to anticipate that an accident might happen. It was held that the failure of the trainmen to notice the wringer, or, if noticed, to order its removal, was not negligence: *Morris v. New York Central etc. R. R. Co.*, 106 N. Y. 678.

These cases, to a greater or less extent at least, go upon the theory that persons who are charged with a duty in relation to a particular matter or thing have a right to rely upon the sufficiency of a structure or contrivance, such as is in common use for the purpose, and which has been in fact safely used under such a variety of conditions as to demonstrate its fitness for the purpose. When a structure or appliance, such as is in general use, has uniformly answered the purpose for which it was designed and used, under every condition supposed to be possible in the business, it cannot in reason be said that a person has not acted with ordinary prudence and sagacity in not anticipating an accident which afterwards happens in the use of the thing, notwithstanding it continued substantially in the same condition all the time. Of course, if the structure or thing was inherently dangerous, or had become intrinsically insecure, and the person who was responsible for its safety had actual or constructive notice of its condition, the fact that it had been used before without injury would not exempt the person so responsible from liability when an accident happened on account of its defective condition. So, also, if the thing which occasioned the accident was inherently dangerous or insecure, the fact that no such occurrence had ever taken place before would not be conclusive evidence that due caution was observed. Extraordinary and unusual occurrences are not to be as readily anticipated, under any circumstances, as are those which frequently happen.

The rule deducible from the authorities in cases analogous to the present is, that in order that liability shall attach for an injury occasioned by something not inherently dangerous and defective, which is found upon the grounds of, or in use by, one who is under a qualified obligation to the injured

person, it must be shown that the defendant either knew, or that, by the exercise of such reasonable skill, vigilance, and sagacity as are ordinarily possessed and employed by persons experienced in the particular business to which the thing pertains, he should have known, of its defective and dangerous condition, and that the natural and probable consequence of its use would be to produce injury to some one: *City of Chicago v. Starr*, 42 Ill. 174; 89 Am. Dec. 422; *Joy v. Winnsimmet Co.*, 114 Mass. 68; *Lane v. Atlantic Works*, 111 Id. 186.

Is there anything in the evidence to show that a prudent person, prior to the unfortunate accident which gave rise to this suit, would have regarded the wires crossing the tracks in the manner described as a source of probable danger to persons at or about the railroad company's depot and grounds? The evidence shows affirmatively that it was not so regarded. There is no law fixing the height at which telegraph wires shall be maintained at points where they cross railroads or other highways. Their height must, therefore, be regulated primarily so as not to put in jeopardy the safety of those who have occasion to pass under them by the customary modes, and incidentally, so as not to unnecessarily expose others who have occasion to come where they are to danger.

A telegraph wire carried from one pole to another is not in and of itself a dangerous object. If it should become unfastened, or detached from one or more of the poles which carried the wire, and should fall to the ground, or upon some one, it would not, under ordinary circumstances, put life or limb in jeopardy. It could only become a source of danger to persons other than those who came in contact with it by some combination of circumstances or conjunction of forces beyond the telegraph wire itself.

Now, the railroad company was only bound to anticipate such combinations of circumstances, and accidents and injuries therefrom, as, taking into account its own past experience, and the experience and practices of others in similar situations, together with what was inherently probable in the condition of the wires as they related to the conduct of its business, it might reasonably forecast as likely to happen.

Naturally, the first and chief consideration would be as to the height of the wires above the track, so as to make them safe for those whose duty required them to pass under on the top of trains. Upon this subject, what are the facts? All

those connected with the railroad and telegraph service, including the "tall brakeman," unite in saying that it never occurred to any of them before the day of the accident that there was any danger, or that contact with the wires was ordinarily possible. On that day, by a combination of extraordinary circumstances not at all satisfactorily explained, the brakeman already mentioned did what to him, and all others connected with the service, so far as the evidence shows, seemed, up to that moment, impossible. He came unexpectedly in contact with the wire, with the result already mentioned.

Now, if any dependence is to be placed in the testimony of human witnesses, who are wholly uncontradicted, it is very clear that neither the brakeman who came in contact with the wire, nor any other employee of the railway company, could have maintained an action against it for an injury from the telegraph wires. This is so, because all of them testify that they passed under it daily, and always considered it safe. As is said in *Burke v. Witherbee*, *supra*, a case closely analogous in principle: "Under such circumstances, can the defendants be charged with negligence? Were they bound to know more than every one else? Ought they to have perceived danger that was not visible to any one else, and which those whose lives were most exposed were not sufficiently wise or vigilant to foresee?"

In *Baltimore etc. R. R. Co. v. Rowan*, 104 Ind. 88, the liability of a railroad company for an injury to one of its brakemen, who came in contact with an overhead bridge, was made to depend upon the following propositions: 1. The maintenance of a bridge over the railroad track at an insufficient height to enable brakemen to discharge their duties in safety; 2. Knowledge by the railroad company that the bridge was dangerous; 3. Ignorance of the brakeman that it was dangerous for him to undertake the duties imposed upon him while passing under the bridge.

Every element of liability as set forth in the case cited is absent in the present case.

If, then, the railroad company maintained its track, and the wires crossing over it, so that it discharged its duty to those whose safety was directly and primarily involved, could it reasonably have anticipated an accident such as the one which happened?

There is no evidence in the record which enables us to an-

swer this inquiry in the affirmative. Of course, we do not mean to say that there might not have been circumstances which would have defeated an action by the brakeman who came in contact with the wire, and yet have permitted a recovery by an injured third person. If, through the fault or negligence of the brakeman, the wire had been thrown down, and the injury of the decedent had resulted, there would be no doubt but that a recovery might be had. No one pretends, however, that the brakeman was in fault. His contact with the wire was wholly unexpected, and a surprise to him.

He relied upon the fact that he had passed under it daily, and was, therefore, fully justified in supposing he could pass under safely again. That he acted as he did is a circumstance which indicates almost conclusively that his contact with the wire was the result of a combination of circumstances that the railroad company could not have foreseen. Upon the broadest assumption that the appellee makes of the facts, this must be so. Take it, and this is the most that it is claimed the evidence shows, that one of the wires "sagged" so that a brakeman some inches above the average height of men, happening at the moment of passing under the wire to stand erect upon a car some inches above the average height of cars, came in contact, by, say three to three and a half inches, with the wire, and can it be said that the company, notwithstanding this brakeman and all others supposed the wire to be above the possibility of contact, must have anticipated, not only the remarkable conjunction of the depressed wire with the tall brakeman erect upon a high car, but that it must have looked beyond the brakeman thus situate, and anticipated that the wire might be knocked down, — which in itself would ordinarily have hurt no one, — and that such a combination of circumstances would then follow as might result in serious injury to some one? Unless the rule is to be that everything which by any possibility may happen is to be anticipated and provided against, or that because a thing has happened it must have been anticipated, there can be no liability on the facts proven in this case.

But it is said, finally, that it was the peculiar province of the jury to determine whether or not the railroad company was guilty of negligence in not anticipating and providing against the accident which resulted in the intestate's death. Hence, it is argued, the jury, having found a verdict for the plaintiff, must have determined that the railroad company

was negligent, and as this court, under the rule, cannot weigh the evidence, that should be the end of the matter.

While it is quite true that it is the duty of the jury, under proper instructions, to determine whether or not, upon any given state of facts, negligence ought to be inferred, it is nevertheless the duty of the court first to say whether, upon the facts most favorable to the plaintiff, negligence can be inferred. It is settled law that the jury cannot arbitrarily, and without evidence, infer negligence. "When the evidence fails to establish the defendant's duty, and its non-performance,—that is, when the evidence is equally consistent with the existence or non-existence of negligence,"—there is no evidence which justifies the jury in finding negligence: *Toledo etc. R'y Co. v. Brannagan*, 75 Ind. 490; *Searles v. Manhattan R'y Co.*, 101 N. Y. 661; Patterson on Railway Accident Law, sec. 373, and cases cited in note 5.

The evidence must affirmatively establish circumstances from which the inference fairly arises that the accident resulted from the want of some precaution which the defendant ought to have taken: *Hayes v. Michigan Central R. R. Co.*, 111 U. S. 228.

"The judge," said the lord chancellor in *Metropolitan R'y Co. v. Jackson*, *supra*, "has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever."

The rule, as thus stated, has often been recognized by the courts of this country: *Randall v. Baltimore etc. R. R. Co.*, 109 U. S. 478; *Gregory v. Cleveland etc. R. R. Co.*, 112 Ind. 385; *Conner v. Citizens' etc. R'y Co.*, 105 Id. 62; 55 Am. Rep. 177, and

cases cited; *Woolery v. Louisville etc. R'y Co.*, 107 Ind. 281; 57 Am. Rep. 115, and cases cited; *Pallock on Torts*, 365.

We have been unable to discover any evidence in the record of the present case from which a reasonable inference can fairly arise that the railroad company had omitted any precaution which prudent persons engaged in like business would have taken.

There are other questions in the record, but as they may not arise again in case of another trial, if there should be one, we do not now consider them.

The judgment is reversed, with costs, with directions to the court below to sustain the appellant's motion for a new trial.

ACCIDENT, LIABILITY IN CONSEQUENCE OF: See *Welch v. Durand*, 4 Am. Rep. 55; *Holmes v. Mather*, 16 Id. 384, note; *Brown v. Collins*, 16 Id. 372; no liability in case of misadventure or unforeseen accident: *Laffin v. Buffalo etc. R. R. Co.*, 60 Id. 433.

NEGLIGENCE, WHEN JURY MAY INFER: *Memphis etc. R. R. Co. v. Stringfellow*, 51 Am. Rep. 598, and note 602; and see *Jackson v. Bruner*, 100 Am. Dec. 613, and note 618; *Detroit etc. R. R. Co. v. Curtis*, 99 Id. 141, and note 144; *Pennsylvania R. R. Co. v. Barnett*, 98 Id. 246, and note 350.

DUTY OF RAILROAD COMPANY TO KEEP ITS STATION, PLATFORMS, AND APPROACHES THERETO IN SAFE CONDITION: *Hamilton v. Texas etc. R. R. Co.*, 53 Am. Rep. 756; *McKone v. Mich. etc. R. R. Co.*, 47 Id. 506; *Montgomery etc. R. R. Co. v. Thompson*, 54 Id. 72; *Gillis v. Penn. R. R. Co.*, 98 Am. Dec. 317, and note 322; *Wichita R. R. v. Davis*, 1 Am. St. Rep. 275.

WHERE TORT IS COMMITTED, IT IS GENERAL CHARACTER OF ACT, AND NOT PARTICULAR RESULT, that the law regards. It is true, however, that the act which causes the injury must be a negligent one, and this it cannot be unless the facts show that it was one which ordinary care would have enabled the person who did it to foresee and provide against: *Louisville etc. R. R. Co. v. Wood*, 113 Ind. 566, citing the principal case. It is also cited in *Evansville etc. R. R. Co. v. Carver*, 113 Id. 53, to the point that a defendant who, in violation of an express statutory duty, places or causes an obstruction in a public highway will not be heard to say that he did not anticipate an injury, which was the direct result of his unlawful act, when the person injured was without fault. It is cited to the point that where the facts are undisputed and unequivocal, the court must apply the law to them, in *Indianapolis etc. R'y Co. v. Watson*, Sup. Ct. Ind., March 7, 1888.

DOOLEY v. TOWN OF SULLIVAN.

[112 INDIANA, 461.]

LIABILITY OF TOWN FOR NEGLIGENCE — UNGUARDED EXCAVATION IN SIDEWALK. — A complaint against a town alleged that the corporation caused an excavation to be made in a sidewalk, which was left unguarded, and that the plaintiff, without his negligence, fell into the excavation in the night-time, and was greatly injured. The answer averred that the excavation was made by the owner of a lot abutting on the street, in accordance with an ordinance requiring him to improve the sidewalk; and that when the work was left, on the night the plaintiff was injured, such lot-owner, using all care and diligence, placed near the excavation a good and sufficient danger-signal, which the plaintiff carelessly and wholly disregarded. *Held*, that the answer was unquestionably good.

ONLY ORDINARY CARE IS REQUIRED OF MUNICIPAL CORPORATION, its agents, and contractors; and such care does not require that a watch be kept during the night over an excavation, unless there are circumstances peculiar to the particular case making it necessary. It is sufficient, as a general rule, to show that proper signals or secure guards were placed about an excavation on quitting work, and no liability attaches if a wrong-doer removes the signals during the night.

MUNICIPAL CORPORATION IS NOT LIABLE FOR LEGISLATIVE OR JUDICIAL ACTS, and can only be held liable for negligence where it performs ministerial acts.

ACTS OF LOT-OWNER IN IMPROVING SIDEWALK, LIABILITY OF TOWN FOR. — The Revised Statutes of Indiana, 1881, section 3357, authorizes the board of trustees of any incorporated town to compel abutting lot-owners to improve the sidewalks: *held*, that the acts of a lot-owner who improves a sidewalk, under an ordinance adopted in pursuance of the statute, cannot be deemed the acts of the town in such a sense as to charge it with his negligence; that in order to charge the corporation, evidence of the negligence of the lot-owner must be supplemented by evidence that the town authorities were negligent, or that the work directed to be done was intrinsically dangerous.

C. E. Barrett, W. C. Barrett, J. W. Shelton, and J. S. Bays, for the appellant.

J. T. Beasley and A. B. Williams, for the appellee.

By Court, **ELLIOTT, J.** The complaint of the appellant alleges that the appellee caused the sidewalk on one of the public streets of the town to be torn up and an excavation to be made therein; that the excavation was left unguarded; that there were no barriers or signal-lights placed about it; and that the plaintiff, without any negligence on his part, fell into the excavation on the night of the twenty-second day of September, 1885, and was greatly injured.

The second paragraph of the appellee's answer avers, in substance, that Stephen A. White is the owner of a lot abut-

ting on the street; that he was required by an ordinance passed by the board of trustees of the town to improve the sidewalk in front of his lot; that the only connection the town had with the improvement was to enact the ordinance and notify White to proceed under it to make the improvement; that he proceeded in accordance with the ordinance and notice; that he tore up the sidewalk, and made the excavation into which the plaintiff fell; that when the work was left on the night of September 22, 1885, White placed near it a good and sufficient danger-signal, and "used all the care and diligence he possibly could do in the prosecution of the work and in the placing of a danger mark, warning, and signal at the excavation; and that the plaintiff, carelessly, recklessly, and wholly disregarding said signal, and without any fault on the part of White," went into the excavation.

This answer is unquestionably good. It is good because it shows that the plaintiff was guilty of contributory negligence. It is good because it shows that White was not guilty of any negligence. In cases like this, only ordinary care is required of a municipal corporation, its agents, and contractors, and ordinary care does not require that a watch be kept during the night over an excavation, unless there are circumstances peculiar to the particular case making it necessary. As a general rule, it is sufficient to show that proper signals or secure guards were placed about an excavation on quitting work, and neither the corporation nor its contractor is liable if a wrong-doer removes the signals during the night: *Doherty v. Waltham*, 4 Gray, 596; *Shearman and Redfield on Negligence*, sec. 360.

The difficult and controlling question arises on the ruling denying a new trial. The evidence shows that the work was done by the property owner, White, under an ordinance passed by the board of trustees, and that the corporate authorities had no notice of the excavation. If White is to be regarded as occupying the position of an independent contractor, then it is quite clear that to fasten a liability on the town it must be shown that the work was intrinsically dangerous, or that the town authorities had notice of the danger, or were negligent in not acquiring notice: *Ryan v. Curran*, 64 Ind. 345; 31 Am. Rep. 123; *Corporation of Bluffton v. Mathews*, 92 Ind. 213; *City of Evansville v. Wilter*, 86 Id. 414; *City of Madison v. Baker*, 103 Id. 41; 2 Dillon on Municipal Corporations, 3d ed., secs. 1025, 1029.

There is no evidence that the improvement was intrinsically dangerous, nor is there evidence that the corporate authorities had notice, or were negligent in not acquiring notice. The case cannot, therefore, be maintained unless the act of the property owner be deemed that of the town.

On the one side it is contended that the act was not that of the town, but of a person standing substantially in the position of an independent contractor, and that the town did no more than it had a lawful right to do in enacting the ordinance; while, on the other side, it is contended that the act of the property owner was the act of the municipal corporation, and that the corporation is liable for his negligence.

It is quite well settled that a municipal corporation is not liable for legislative or judicial acts: *City of Terre Haute v. Hudnut*, 112 Ind. 542. It is only where the corporation performs ministerial acts that it can be held liable for negligence. There is, therefore, nothing in the act of the board of trustees in enacting the ordinance directing the making of the improvement upon which a cause of action can be based. If there is any liability at all, it must be because of some negligence in the discharge of ministerial duties.

We think that the authority of a town extends to sidewalks, and that their liability is commensurate with their duty. It is beyond controversy that a sidewalk is part of a street, and consequently a statute referring to streets embraces sidewalks: *State v. Berdett*, 73 Ind. 185; 38 Am. Rep. 117; *City of Kokomo v. Mahan*, 100 Ind. 242; 2 Dillon on Municipal Corporations, sec. 780, note 1.

It is clear that the town has authority over sidewalks, and is under a duty to use ordinary care to keep them in a reasonably safe condition for use by those who exercise ordinary care. This appeal cannot, therefore, be disposed of, as appellee's counsel affirm, upon the ground that the corporate duty does not extend to sidewalks.

If the acts of White are to be regarded as those of the town, then there may be a liability for his negligence without proof of notice, as it is the duty of the town to exercise ordinary care in performing work undertaken by it. But in our judgment the acts of a property owner who improves a sidewalk under an ordinance of a town cannot be deemed the acts of the town in such a sense as to charge the town with his negligence. In order to charge the corporation, evidence of the negligence of the property owner must be supplemented by

evidence that the town authorities were negligent, or that the work directed to be done was intrinsically dangerous.

The statute expressly authorizes the board of trustees to compel abutting lot-owners to improve the sidewalks. It is, indeed, doubtful whether the board has power to cause the improvement to be made in any other method. The statute reads thus: "Whenever, in the opinion of the board of trustees of any incorporated town in this state, public convenience requires that the sidewalks of any street in such town should be graded, or paved, or planked, such board of trustees may by an ordinance, compel the owners of lots adjoining such street to grade, pave, or plank the same": R. S. 1881, sec. 8357.

This statute requires the corporate authorities, in cases where they proceed under it, to compel the property owners to make the improvement, and does not invest them with authority to select the persons who shall do the work. Under this statute there is no authority vested in the municipal authorities to choose agents or servants to do the ministerial work; that is left with the property owner. Where there is no right of selecting or choosing, the relation of principal and agent cannot exist; and where the relation of principal and agent does not exist, the maxim *respondeat superior* cannot apply.

It is therefore logically inconceivable that a municipal corporation, which is itself free from fault, should be held responsible for the negligence of a person not voluntarily chosen by it to perform an act. The authorities are harmonious upon this point, for all agree that where the person, artificial or natural, is not vested with the authority of selecting, the maxim *respondeat superior* has no force: *Summers v. Board etc.*, 103 Ind. 262; 53 Am. Rep. 512, and cases cited; *Bryant v. City of St. Paul*, 21 Cent. L. J. 33, and cases cited, note; 2 Dillon on Municipal Corporations, 3d ed., secs. 974, 1028.

Judgment affirmed.

POWER OF CITY TO IMPROVE STREETS AT EXPENSE OF LOT-OWNERS: *Dean v. Charlton*, 99 Am. Dec. 205.

DUTY OF MUNICIPAL CORPORATION TO MAINTAIN GUARDS AND LIGHTS ABOUT EXCAVATION IN STREET OR SIDEWALK UNDERGOING REPAIRS: *Kimball v. City of Bath*, 61 Am. Dec. 243, and note 245; *Manderschid v. Dubuque*, 4 Am. Rep. 196; *Bassett v. St. Joseph*, 14 Id. 446; *Niblett v. Nashville*, 27 Id. 755; *Hubbell v. Yonkers*, 58 Id. 522.

LIABILITY OF MUNICIPAL CORPORATION FOR ACTS OF ITS OFFICERS: *Hilsdorf v. St. Louis*, 100 Am. Dec. 352, and note 357-360; *City of Richmond v. Long*, 94 Id. 461, 468.

SISK v. CRUMP.

[112 INDIANA, 604.]

ACT OF PERSON ERECTING BARBED-WIRE FENCE on his own land, along line of highway, does not of itself render him liable to one who thereby sustains an injury; but the rule is otherwise if the fence is constructed and maintained in such a manner as to make the person erecting and maintaining it guilty of negligence.

ONE WHO NEGLIGENCELY CONSTRUCTS AND KNOWINGLY MAINTAINS BARBED-WIRE FENCE in dangerous condition, between his land and the adjacent highway, is liable for an injury thereby occasioned to domestic animals lawfully running at large, and which are attracted within the inclosure by the presence of other animals and growing pasture.

P. T. Hord and M. D. Emig, for the appellant.

W. F. Norton and S. W. Smith, for the appellee.

By Court, ELLIOTT, J. Stated in a condensed form, the material allegations of the appellant's complaint are these: On and prior to May 5, 1885, the appellee owned fifteen acres of land, bounded on the east by a public street of the city of Columbus, and along the line of this street he had constructed a barbed-wire fence. The fence was composed of wooden posts and five strings of barbed iron wire. It was negligently constructed, the posts being insufficient to keep the wire at a proper tension, and the wires were not drawn into proper position. The wires were armed with sharp iron barbs placed along them at a distance of two inches apart. They were negligently suffered to sag down near the ground. They hung loosely from the posts, and in such a condition as that a horse coming in contact with them would be entangled and thrown down. The fence was not such as a good husbandman would construct or maintain, but was insufficient and dangerous, its height not being sufficient to keep off horses or cattle, and there being no plank or other thing to warn them of the existence of the fence. The fence could have been made safe by placing a board along the top of it, and the wires could have been kept at a proper height and tension, but the defendant, knowing its dangerous condition, suffered it to remain insufficient to warn off animals. It was not sufficient in height, as the defendant knew, to prevent animals from attempting to cross it. On the fifth day of May, 1885, the horse escaped from the stable of the plaintiff, in which it had been fastened, and, without fault on her part, wandered upon the street bounding the defendant's land. At that time the land was covered with green grass, on which the horses of the

appellee were feeding. The appellant's horse was attracted by the green pasture and the horses feeding on it, and attempted to cross into the field. In attempting to cross the fence, it was, by reason of the dangerous and unsafe condition thereof, entangled in the loose wires, thrown down, and killed. The proper county and city officers had, by orders duly made, authorized owners of horses and cattle to permit them to run at large.

The complaint cannot be upheld on the ground that erecting a barbed-wire fence along the line of a highway, but on private property, is in itself an actionable wrong. The courts cannot say, as matter of law, that erecting such a fence is a tort. We cannot, therefore, yield to the contention of counsel that the act of an individual in erecting a fence of that kind in itself renders him liable to one who sustains an injury. Courts cannot judicially know that such a fence is dangerous. Our statute recognizes the right to use such fences, for it is expressly provided that railroad companies may use them in fencing their tracks: Act of 1885.

The complaint before us, however, does not rest solely on the theory that the erection of a barbed-wire fence is necessarily a tort. It goes much further, and with great particularity avers that the fence was so constructed as to be dangerous to horses and cattle passing along the highway. Nor does it stop there. It avers that beyond the fence was growing grass, on which horses were feeding, and that these things would attract horses, and induce them to attempt to cross the fence and enter the inclosure. There are, therefore, two important elements to be considered: 1. The negligence in constructing and knowingly maintaining a dangerous fence along the line of a highway; 2. The probability that animals would be attracted by what they saw within the inclosure, and would probably attempt to enter it.

These two elements exert an important influence upon that branch of the case which presents the question whether the appellee's act was culpably negligent.

It is well settled that a lawful act may be done in such a negligent manner as to make the person who does it a wrongdoer. It may be, therefore, that although erecting a barbed-wire fence is not in itself a tort, yet the manner in which it is constructed and maintained may be such as to make the person erecting and maintaining it guilty of negligence. A thing may not be dangerous if properly constructed, but dan-

gerous if improperly constructed. The complaint before us shows that the appellee was negligent in constructing and maintaining the fence, and on that point we have no hesitation in declaring it to be sufficient.

Negligence is not always actionable. A man may do many negligent things on his own premises, and yet not incur any liability. Negligence is only actionable where it involves a breach of duty. This rule is illustrated by the cases which hold that there can be no recovery for injuries caused by the negligence of the owner of land in suffering the premises to become unsafe, unless the injured person came on the land under an express or implied invitation: *Nave v. Flack*, 90 Ind. 205; 46 Am. Rep. 205; *Evansville etc. R. R. Co. v. Griffin*, 100 Ind. 221; 50 Am. Rep. 783; *Indianapolis etc. R'y Co. v. Pitzer*, 109 Ind. 179; 58 Am. Rep. 387.

There can, as a general rule, be no action, although there is negligence, unless the party guilty of negligence was under some duty to the person who sustains the injury.

While it is essential that the defendant should be under some duty to the plaintiff, it is not essential that the duty should be directly owing to him as an individual. A defendant who owes a duty to the community owes it, as a general rule, to every member of the community; and if any member suffers a special injury from a breach of that duty, an action will lie. The pivotal question in this case therefore is, whether the defendant was under a general duty to maintain the wire fence so that it would not inflict injury upon animals which might be tempted from the highway into his inclosure.

The theory of the complaint is, that the horse was injured while attempting to cross the fence into the defendant's inclosure, and not that it was injured while simply wandering along the highway. If the horse had been injured while going along the highway, a very different question would have been presented; but that is not the case which the complaint undertakes to make. The case is, therefore, not governed by the authorities which hold that an action will lie against one who makes the use of a highway dangerous; and the cases of *Graves v. Thomas*, 95 Ind. 361, 48 Am. Rep. 727, and *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, are not in point.

The complaint does not aver that the fence was intentionally made dangerous for the purpose of injuring persons or animals that might trespass on the defendant's land. The

cases which assert and extend the old doctrine, that spring-traps and guns shall not be set to catch trespassers, have no application; for here the negligence charged against the defendant is nothing more than the failure to exercise proper care in constructing and maintaining the fence. The cases of *Hooker v. Miller*, 37 Iowa, 613, 18 Am. Rep. 18, *Deane v. Clayton*, 7 Taunt. 489, and similar cases, can exert no influence upon this investigation.

The case of *Henry v. Dennis*, 93 Ind. 452, 47 Am. Rep. 378, does not belong to the same class as the present; for in that case the poisonous substance which caused the injury was placed in the street. Here the fence was on the defendant's own land, and the rule declared in the case cited cannot apply.

The defendant did nothing to entice the plaintiff's horse to leave the highway. If the defendant had purposely placed feed near the highway, and thus tempted animals wandering along it to enter his inclosure, a different case would confront us; but here the land was covered with grass and herbage, the usual and natural growth of the season. Nature clothed the field with the grass, not the defendant.

At common law, this action could not be maintained, because owners of animals are forbidden to allow them to run at large; but our statute changes this rule of the common law, and invests the board of county commissioners with authority to permit domestic animals to run at large: *Welch v. Bowen*, 103 Ind. 252.

The complaint avers that the proper order had been made, so that, in permitting the horse to wander upon the highway, the appellant was not guilty of any wrong.

The order of the board permitting animals to run at large forms an important element in the case, not only as bearing upon the question of contributory negligence, but also as bearing upon the question of the appellee's negligence. It bears upon the latter question, because it made it the duty of the appellee to take notice that horses and cattle might wander upon the highway; and with this knowledge, he had no right to do anything that was reasonably certain to cause injury to animals passing along the highway. Knowing, as he did, that animals might lawfully wander along the highway, he owed a duty to the community to use ordinary care to prevent any act of his from causing injury to animals wandering near his land.

Enjoy your own property in such a manner as not to injure

that of another person, is a maxim of the law that rules many cases, and we think it must rule the one at bar. The appellee had a right to select his own fence, but he had no right, under the circumstances stated in the complaint, to construct it so as to make it dangerous to animals passing along the highway, for, in doing so, he violated the maxim we have quoted. Suppose he had dug a deep trench along the line of the highway and had covered it with planks so thin as to give way beneath the weight of the smallest domestic animal, would he not be liable to the owner of a horse killed in attempting to cross the trench? Again, suppose that a land-owner places posts along the line of his land and attaches wires near the ground, where they would be hidden by the grass or weeds, would he not be liable to the owner for the value of a horse caught in the wires and killed? The case as made by the complaint is in principle the same as the cases we have given as illustrations.

The land-owner is not bound to maintain a secure fence, nor indeed, any fence; but if he does undertake to maintain a fence along a highway, he must not negligently suffer it to become dangerous to passing animals. His duty is to exercise reasonable care to prevent his fence from becoming dangerous, but it extends no further. If the fence he elects to build is built as such fences are usually built, there is no liability; but if it is allowed to get out of repair, and thus become essentially dangerous, he may be liable. He is not under any duty to place boards on the top of a wire fence, or to do any like act; but he is bound to use care to keep the fence from becoming a trap to passing animals.

It is the duty of land-owners to take notice of the natural propensity of domestic animals; and under the allegations of this complaint, it was the duty of the appellee to take notice of the propensity of horses to seek the pasture within his inclosure and join others of its kind feeding there. In view of the facts that the board of commissioners authorized animals to run at large, that the appellee was chargeable with notice of this order, that he was bound to know that it was probable that animals wandering on the highway would seek his pasture, and that the fence was so maintained along the highway as to be in effect a trap to passing animals, we think the complaint must be held good. These are the controlling facts, and they make the complaint good. It is not the kind of fence selected, nor is it the absence of top planks or the like,

that influences our judgment; but what chiefly influences it is this: the fence was so negligently maintained that, under the circumstances stated in the complaint, it was in effect a trap into which it was in a great degree probable that passing animals would be caught and injured. Had the fence, although composed of barbed wires, been constructed and maintained as ordinarily prudent husbandmen usually construct such fences, our conclusion would be altogether different; but the complaint very clearly avers that it was not so constructed or maintained. The appellant assumed all risks from fences, whatever their kind, constructed and maintained with ordinary care, but she did not assume risks from fences known to be intrinsically dangerous constructed along the line of a public highway.

We regard the location of the dangerous fence immediately along the line of the highway as an important element in the case. The strong probability that the pasture within the inclosure, and the presence of other horses feeding there, would allure horses on the highway to enter it, rendered such a fence almost certain to injure passing animals. This fact, considered in conjunction with the other facts to which we have especially directed attention, brings the case fully within the reasoning of the court in *Durham v. Musselman*, 2 Blackf. 96, 18 Am. Dec. 183, and directly within the decision in *Young v. Harvey*, 16 Ind. 814.

In the former case it was said: "If the injury is the natural or probable consequence of the act, and such as any prudent man must have foreseen, it is but reasonable that the perpetrator of the act should be held accountable for the injurious consequences. As in the case of a man baiting his trap with flesh so near the highway, or the grounds of another, that dogs passing the highway, or kept in another's grounds, are attracted into his traps and thereby injured, he is liable for the injury: *Townsend v. Wathen*, 9 East, 277. In the second place, when the injury is accidental, the liability of the actor must depend on the degree of probability there was that such an event would be produced by the act."

In *Young v. Harvey*, *supra*, the horse of the plaintiff, wandering upon the streets and commons of a suburb of the city of Indianapolis, fell into an old well on the lot of the defendant, and it was held that an action would lie. This decision is strongly approved by a writer of excellent standing: 1 Thompson on Negligence, 300. The case has been approved in many

subsequent cases: *Graves v. Thomas*, 95 Ind. 361; 48 Am. Rep. 727; *Smith v. Thomas*, 23 Ind. 69; *Indianapolis etc. R. R. Co. v. Wright*, 22 Id. 376; *Howe v. Young*, 16 Id. 312.

In *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575, the defendant left open an unguarded excavation some distance from the highway, and the plaintiff's cow, which had been turned out upon the commons, fell into the excavation, and it was held that the action would lie.

Our ultimate conclusion is, that the facts stated in the complaint at least make a *prima facie* case, and that it is strong enough to drive the defendant to answer.

Judgment reversed.

IN THE CASE of *Bullard v. Mulligan*, 69 Iowa, 416, the parties owned adjoining farms, and the plaintiff's horse entered upon the defendant's premises through a portion of the partition fence which the plaintiff was bound to maintain, but which he had failed to maintain, as a lawful fence. The defendant, in attempting to drive the animal from his premises, caused him to become entangled in the barbed wire of which the fence was composed, whereby he received injuries from which he died. The plaintiff brought action to recover the value of the horse, which he alleged was killed by the negligence of the defendant. It was held that the negligence of the plaintiff in failing to maintain the fence was immaterial, and, in the absence of evidence of any other negligence on his part, an instruction that, before he would be entitled to recover, he must prove that he was not himself guilty of any negligence which contributed to the injury, was erroneous.

RIGHT TO SET TRAPS OR DANGEROUS IMPLEMENTS UPON ONE'S PREMISES to protect property or persons: See *State v. Moore*, 83 Am. Dec. 159, and note 166.

NORDYKE AND MARMON COMPANY v. GERY.

[112 INDIANA, 585.]

MORTGAGEE, MERELY AS SUCH, HAS NO INTEREST, either in law or equity, in policy of insurance effected by the mortgagor upon the mortgaged premises for his own benefit, in the absence of any covenant or agreement requiring the latter to insure for the benefit of the former.

GENERAL RULE IS THAT, BETWEEN INSURER AND INSURED, policy of fire insurance is purely personal contract, by which the former agrees to indemnify the latter against any loss he may sustain by the destruction of his interest in the property insured.

WHERE MORTGAGOR HAS COVENANTED TO KEEP MORTGAGED PREMISES INSURED FOR BENEFIT OF MORTGAGEE, and either has effected, or thereafter effects, insurance in his own name, though without the mortgagee's knowledge, or without any intent to perform the agreement, equity will treat the insurance as effected under the agreement, and will give the mortgagee his equitable lien accordingly.

MORTGAGOR HAS DONE THAT WHICH HE OUGHT TO HAVE DONE where, having covenanted to insure mortgaged premises for benefit of mortgagee, he has effected solvent insurance, in good faith, in the name and to the acceptance of the mortgagee, to an amount adequate to secure the debt. Having kept the policies alive until the mortgage debt is paid, or a loss occurs, he is not in default, and will be responsible thereafter only for such infirmities as existed and were inherent in the insurance at the time the policies were accepted, or such as may have resulted from his own subsequent conduct.

H. W. Chase, F. S. Chase, F. W. Chase, A. P. Stanton, and J. E. Scott, for the appellant.

J. R. Coffroth, T. A. Stuart, and J. H. Adams, for the appellees.

By Court, MITCHELL, J. This was a proceeding commenced in the Tippecanoe superior court by the Nordyke and Marmon Company to foreclose two mortgages executed by Gery, Hall, and Company to the plaintiff below.

The mortgages covered a tract of real estate, the chief value of which consisted in a roller-mill thereon erected, with the furniture and fixtures therein contained. They were given to secure debts amounting respectively to \$2,399.80 and \$376.83. Both of the mortgages contained stipulations therein written, similar in legal effect, by which the mortgagors covenanted to keep the mortgaged premises fully insured for the benefit of the mortgagee, as its interest might appear. The mortgagors had caused the property to be insured in various fire insurance companies to the amount of seven thousand five hundred dollars. Of the policies so taken out, two, one issued by the Louisiana Insurance Company, the other by the Monarch Insurance Company, each for \$1,250, had been made payable to, and were delivered to, the mortgagee, as a compliance with the covenant contained in the mortgage securing the debt of \$2,399.80. No insurance was taken especially applicable to the other mortgage.

The mortgagee alleged that since the issuance of the policies, the roller-mill, with all the combustible material appertaining to it, had been destroyed by fire, and that the Monarch Insurance Company had become wholly insolvent, so that the mortgaged premises, with the insurance policies delivered to the appellant, were wholly inadequate to secure its debt, which, with the accumulated interest, amounted to about three thousand two hundred dollars. There was a prayer for the foreclosure of the mortgages, and that a lien might be declared

and enforced against the fund, generally, arising from the insurance policies, for an injunction to prevent the appellees from assigning or collecting the money on the policies, and for the appointment of a receiver to collect the money, etc.

The court granted a temporary restraining order enjoining the defendants from making any disposition of the policies, or the money arising therefrom, until a day certain, and until the further order of the court. At the time fixed, the matter respecting the continuance of the restraining order in force, and the appointment of a receiver, was heard by the court upon affidavits presented by the parties respectively. Pending the hearing, \$1,333 of the moneys arising from the policies had by agreement been paid into court. Of this sum the court found that \$360 ought to be paid to the mortgagee to reimburse it for a reduction, or "scaling," of the policies held by it, which scaling resulted from the taking out of other policies of insurance by the mortgagors subsequent in date to those held by the appellant. It was further found that the sum of \$396.82, the amount of the second mortgage debt, with the accumulated interest, should be paid out of this fund.

Thereupon the defendants entered of record their consent that the sums above mentioned should be paid. Upon this being done, the court dissolved the temporary restraining order theretofore issued, refused to appoint a receiver, and released the residue of the fund in the hands of the clerk, and ordered it to be paid to the defendants.

From the interlocutory order so made, this appeal is prosecuted.

Since the order of the court rendered available to the appellant a sum sufficient to satisfy the debt secured by the second mortgage, the consideration of any question connected with that instrument can be of no practical moment.

It was a disputed question, but the court may have found from the evidence before it that the appellant accepted the policies delivered to and retained by it as a compliance with the covenant contained in the first mortgage. That being so, the propriety of the order made by the court in denying the application for a receiver, and in ordering that the residue of the money in its custody be paid to the appellees, depends upon whether or not, after the acceptance of the policies, the appellant may nevertheless resort to the insurance taken out by the mortgagors for their own benefit, on account of the total or partial insolvency of one of the companies whose policy

appellee were feeding. The appellant's horse was attracted by the green pasture and the horses feeding on it, and attempted to cross into the field. In attempting to cross the fence, it was, by reason of the dangerous and unsafe condition thereof, entangled in the loose wires, thrown down, and killed. The proper county and city officers had, by orders duly made, authorized owners of horses and cattle to permit them to run at large.

The complaint cannot be upheld on the ground that erecting a barbed-wire fence along the line of a highway, but on private property, is in itself an actionable wrong. The courts cannot say, as matter of law, that erecting such a fence is a tort. We cannot, therefore, yield to the contention of counsel that the act of an individual in erecting a fence of that kind in itself renders him liable to one who sustains an injury. Courts cannot judicially know that such a fence is dangerous. Our statute recognizes the right to use such fences, for it is expressly provided that railroad companies may use them in fencing their tracks: Act of 1885.

The complaint before us, however, does not rest solely on the theory that the erection of a barbed-wire fence is necessarily a tort. It goes much further, and with great particularity avers that the fence was so constructed as to be dangerous to horses and cattle passing along the highway. Nor does it stop there. It avers that beyond the fence was growing grass, on which horses were feeding, and that these things would attract horses, and induce them to attempt to cross the fence and enter the inclosure. There are, therefore, two important elements to be considered: 1. The negligence in constructing and knowingly maintaining a dangerous fence along the line of a highway; 2. The probability that animals would be attracted by what they saw within the inclosure, and would probably attempt to enter it.

These two elements exert an important influence upon that branch of the case which presents the question whether the appellee's act was culpably negligent.

It is well settled that a lawful act may be done in such a negligent manner as to make the person who does it a wrongdoer. It may be, therefore, that although erecting a barbed-wire fence is not in itself a tort, yet the manner in which it is constructed and maintained may be such as to make the person erecting and maintaining it guilty of negligence. A thing may not be dangerous if properly constructed, but dan-

gerous if improperly constructed. The complaint before us shows that the appellee was negligent in constructing and maintaining the fence, and on that point we have no hesitation in declaring it to be sufficient.

Negligence is not always actionable. A man may do many negligent things on his own premises, and yet not incur any liability. Negligence is only actionable where it involves a breach of duty. This rule is illustrated by the cases which hold that there can be no recovery for injuries caused by the negligence of the owner of land in suffering the premises to become unsafe, unless the injured person came on the land under an express or implied invitation: *Nave v. Flack*, 90 Ind. 205; 46 Am. Rep. 205; *Evansville etc. R. R. Co. v. Griffin*, 100 Ind. 221; 50 Am. Rep. 783; *Indianapolis etc. R'y Co. v. Pitzer*, 109 Ind. 179; 58 Am. Rep. 387.

There can, as a general rule, be no action, although there is negligence, unless the party guilty of negligence was under some duty to the person who sustains the injury.

While it is essential that the defendant should be under some duty to the plaintiff, it is not essential that the duty should be directly owing to him as an individual. A defendant who owes a duty to the community owes it, as a general rule, to every member of the community; and if any member suffers a special injury from a breach of that duty, an action will lie. The pivotal question in this case therefore is, whether the defendant was under a general duty to maintain the wire fence so that it would not inflict injury upon animals which might be tempted from the highway into his inclosure.

The theory of the complaint is, that the horse was injured while attempting to cross the fence into the defendant's inclosure, and not that it was injured while simply wandering along the highway. If the horse had been injured while going along the highway, a very different question would have been presented; but that is not the case which the complaint undertakes to make. The case is, therefore, not governed by the authorities which hold that an action will lie against one who makes the use of a highway dangerous; and the cases of *Graves v. Thomas*, 95 Ind. 361, 48 Am. Rep. 727, and *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, are not in point.

The complaint does not aver that the fence was intentionally made dangerous for the purpose of injuring persons or animals that might trespass on the defendant's land. The

absolved from all liability, although the performance may by matter subsequent be defeated or rendered unavailing": Platt on Covenants, 140.

In such a case the mortgagor will have satisfied his covenant as completely as has a debtor who has paid his debt in compliance with his contract. He will be responsible thereafter only for such infirmities as existed and were inherent in the insurance at the time the policies were accepted, or such as may have resulted from his own subsequent conduct. "Though the covenantor performs the letter of his covenant, yet if he does any act to defeat its intent or use, he is guilty of a breach": Platt on Covenants, 139.

In respect to insurance effected by the mortgagor for his own benefit, after and so long as the covenant to insure for the benefit of the mortgagee remains satisfied, the parties stand in the relation of mortgagor and mortgagee, between whom no contract to insure exists.

The application of what has been said to the case under consideration is this: the court may have found that the appellees purchased insurance, in the name and to the acceptance of the appellant, to an adequate amount, in companies which were solvent at the time, thereby fully complying with and satisfying the covenant contained in the mortgage. It may have found further that they had in good faith complied with their contract, by continuing the policies thus accepted and held by the appellant, under the belief that they were affording their creditor available indemnity against loss by fire, and that they had done nothing since to impair or defeat the validity of the policies, except to take out subsequent insurance for their own protection, the effect of which was to scale the policies held and owned by the appellant, which scaling the court required them to make good. Upon the assumption that the foregoing may have appeared as the probable situation, the propriety of the orders made by the court is apparent. Whether the final hearing shall result in establishing what may have seemed probable at the preliminary hearing, remains to be determined by the court below when the evidence shall have been fully heard.

The orders and judgment of the court are affirmed, with costs.

MORTGAGEE HAS INSURABLE INTEREST: *Smith v. Columbia Ins. Co.*, 55 Am. Dec. 546; *Bell v. West. etc. Ins. Co.*, 39 Id. 542; *Williams v. Roger Williams*

Ins. Co., 9 Am. Rep. 41; *Foster v. Van Reed*, 26 Id. 544; character and nature of insurance by mortgagee: *King v. State Mut. Fire Ins. Co.*, 54 Am. Dec. 683, and note 693.

INSURANCE BY MORTGAGOR AND MORTGAGEE SEVERALLY MAY BE EFFECTED without the insurance of either impairing that of the other: *Jackson v. Insurance Co.*, 34 Am. Dec. 69.

INSURANCE—LOSS PAYABLE TO MORTGAGEE, AND RECOVERY BY HIM: *Fire Ins. Co. v. Felrath*, 54 Am. Rep. 58; and see *Coates v. Pa. Fire Ins. Co.*, 42 Id. 327.

AM. ST. REP., VOL. II.—15

CASES
IN THE
SUPREME COURT
OF
IOWA.

GEGNER v. WARFIELD, HOWELL, AND COMPANY

[72 IOWA, 11.]

RIGHT OF PARTY HAVING JUDGMENT AGAINST PARTNERS TO ENFORCE PAYMENT thereof against them is not affected by his having released land which at one time belonged to them, and upon which the judgment was a lien. He has the right to enforce such payment to the same extent, and in the same manner, as if no such release had been executed.

ACTION in equity. The opinion states the case.

Ira W. Anderson, for the appellant.

Smith and Morris, for the appellees.

By Court, **SEEVERS, J.** The petition states that the plaintiff and one John Longhenry were partners, and as such became indebted to the defendant, who procured a judgment against the plaintiff and Longhenry. At the time the judgment was rendered, the plaintiff and Longhenry were each the owner of one undivided one half of certain real estate. After the recovery of said judgment, the plaintiff sold the undivided one half of the real estate belonging to him to one Camp, subject to the lien of said judgment; that afterwards Camp conveyed the said real estate to Barbary Longhenry on like terms and conditions; that afterwards the defendant, with full knowledge of the foregoing facts, and without the consent of the plaintiff, executed the following writing: "Received, September 22, 1885, of J. Longhenry, \$150, to apply on the judgment" in favor of the defendant above referred to, "and in

consideration thereof, . . . release from the lien of the judgment" the real estate conveyed by plaintiff to Camp, and also the undivided one half thereof belonging to Longhenry. Both Longhenry and Camp are insolvent, and the defendants, having caused execution to issue on the judgment, are seeking to compel the plaintiff to pay the balance due thereon, and by reason of the matters stated, he asked to enjoin it from so doing. There was a demurrer to the petition, which was sustained, and the plaintiff appeals.

Counsel for the appellant insists that when plaintiff conveyed the real estate to Camp, charged with the payment of the defendant's judgment, he became a surety, and a release of the property had the effect to release him. But we think the conveyance to Camp is immaterial, and in no respect changed the rights and relations of the parties to this action. It is unquestionably true that the partners are jointly liable for the payment of the debt of the partnership, and it will be conceded that the release of one partner ordinarily operates as a release of all the partners. But it must appear that such was the intention. Now, it is evident that the release in question does not release any one, but simply is a release of certain real estate which at one time belonged to the partners, and upon which the judgment was a lien. The defendants had a right to proceed against the property of either partner to obtain satisfaction of the judgment, and we see no reason why they could not release from the lien any property belonging to either partner, without in any manner affecting their right to enforce the payment of the judgment to the same extent and in the same manner as if no such release had been executed. To our minds, it is clear that the plaintiff, by no act of his, or by the action of himself and Camp combined, could affect or deprive the defendants of any legal right. These views, we think, are sustained by *Seymour v. Butler*, 8 Iowa, 304, and *Gardner v. Baker*, 25 Id. 343.

Affirmed.

LIABILITY OF PARTNER FOR FIRM DEBT: See *Fogg v. Lowry*, 23 Am. Rep. 19; *Manhattan Ins. Co. v. Webster*, 98 Am. Dec. 332, note 335.

RELEASE OF ONE OF SEVERAL JOINTLY BOUND, EFFECT OF: See *Yates v. Donaldson*, 61 Am. Dec. 283, note 294, where other cases in that series are collected.

LEVY OF EXECUTION UPON ONE ARTICLE DOES NOT DESTROY LIEN thereof on other articles equally liable: *Johnson v. McLane*, 43 Am. Dec. 102.

MILLS COUNTY NATIONAL BANK v. PERRY.

[73 Iowa, 15.]

ORAL AGREEMENT IS NOT ADMISSIBLE TO CONTRADICT OR VARY WRITTEN CONTRACT expressed in note and mortgage; and in an action to foreclose the mortgage, allegations in the answer, setting up as a defense matters contradictory of the note and mortgage, and based upon oral agreements, should be stricken out.

AGREEMENT OR CONTRACT NOT BASED UPON CONSIDERATION CANNOT BE ENFORCED.

FACT THAT LOAN MADE BY NATIONAL BANK EXCEEDS LIMIT allowed by law does not defeat the right of the bank to collect such loan.

GRANTING OF ORDER FOR TRIAL OF CAUSE UPON DEPOSITIONS RESTS IN DISCRETION of the court; and where a party obtains one such order, but takes no depositions, the refusal of the court to make a similar order at a subsequent term will not be interfered with by the supreme court.

REPLY IS NOT NECESSARY TO ALLEGATIONS IN ANSWER which do not set up a counterclaim, nor plead any matter of defense which can only be avoided by new matter to be stated in the reply.

ERROR MUST AFFIRMATIVELY APPEAR TO JUSTIFY REVERSAL OF JUDGMENT; and where an abstract fails to show that the affidavit required by law for the allowance of attorney's fees in a foreclosure suit was not filed, it will be presumed, in support of the order allowing such fees, that such affidavit was filed.

ACTION to foreclose a mortgage. The opinion states the case.

A. L. Young and L. T. Genung, for the appellants.

E. B. Woodruff, for the appellee.

By Court, BECK, J. 1. The questions arising in the case, with the facts involved therein, will be considered in the order of their presentation by defendants' counsel.

The court sustained a motion to strike part of defendants' answers. This ruling is first complained of by counsel. The parts of the answers stricken contain allegations to the following effect: 1. The cashier of plaintiff represented to defendants, when the mortgage was executed, that he only wanted it to show to the bank examiner, and for no other purpose; 2. At the same time the cashier agreed that the principal defendant "might renew the note from time to time, until he could make the money out of his stock then on his farm"; 3. He also agreed that plaintiff would not foreclose the mortgage; 4. The notes and mortgage were given for a loan of ten thousand dollars, which exceeded the restriction of the statutes of the United States upon the amount of loans which may be made by national banks.

The first, second, and third defenses above stated involve

matters contradictory of the contracts and terms of the notes and mortgage, and are based upon oral agreements, which are not admissible to contradict or vary the written contract as expressed in the notes and mortgage. Besides this, these agreements were not based upon a consideration, and if in writing, could not, for that reason, be enforced.

2. The fourth defense stated above cannot be urged to defeat securities given for a loan made by a national bank: *Gold Mining Co. v. National Bank*, 98 U. S. 640.

3. An order was entered at the request of defendants that the case be tried upon depositions. At a subsequent term, after an amended answer had been filed, no depositions having been taken, defendants asked for another order to the same effect, which was refused. Of this ruling, defendants now complain. The ground of the court's refusal is not shown. The granting of the order rested in the exercise of the sound discretion of the court, as the section of the code (section 2742) under which a case may be ordered for trial upon depositions is not mandatory. It will be presumed that the court below rightly exercised its discretion. Indeed, we think the record shows a sufficient ground for the refusal of the order in the fact that the defendants refused to avail themselves of the opportunity to take depositions given them by the order at a former term. They could not, by repeating their request, delay the disposition of the cause.

4. The defendants insist that, as certain matters alleged in an amendment to their answer were not denied in the reply, they were thereby admitted, and the defense pleaded should have been sustained. But the amendments do not set up a counterclaim, nor plead any matter of defense which could only be avoided by new matter to be stated in the reply. The allegations were therefore considered as denied without a reply, which was not necessary: Code, sec. 2665.

5. It is lastly insisted that the court erroneously allowed attorney's fees provided for by the notes and mortgage, for the reason that no affidavits were filed as required by section 3, chapter 185, acts of eighteenth general assembly (Miller's Code, 906). But the abstract before us fails to show affirmatively that such an affidavit was not filed. We will presume, in support of the judgment, that it was filed.

The foregoing discussion disposes of all questions argued by counsel.

The judgment of the circuit court is affirmed.

PAROL EVIDENCE IS INADMISSIBLE TO CONTRADICT WRITTEN INSTRUMENT: See *Flynn v. Bourneuf*, 57 Am. Rep. 135; *MacLeod v. Skiles*, 51 Id. 254; *Allen v. Rundell*, 47 Id. 599; *Schultz v. Coon*, 37 Id. 839; *Martin v. Lewis*, 32 Id. 682; *Foster v. Clifford*, 28 Id. 603; *Doolittle v. Ferry*, 27 Id. 166; *Charles v. Denis*, 24 Id. 383; *Kochring v. Muenninghoff*, 21 Id. 402; *Stapleton v. King*, 11 Id. 109; *Walker v. Crausford*, 8 Id. 701; *Wemple v. Knops*, 2 Id. 147; *Cabot v. Christie*, 1 Id. 313; *Cobb v. Wallace*, 98 Am. Dec. 435, note 441, where other cases in that series are collected.

CONTRACT WITHOUT CONSIDERATION CANNOT BE ENFORCED: *University of Des Moines v. Livingston*, 42 Am. Rep. 42; *Cottage Street M. E. Church v. Kendall*, 23 Id. 286; *Shepard v. Rhodes*, 84 Am. Dec. 573.

REPLICATION, WHEN NOT NECESSARY: See *Powers v. Kueckhoff*, 97 Am. Dec. 281; *Viele v. Germania Ins. Co.*, 96 Id. 83.

ERROR MUST AFFIRMATIVELY APPEAR TO JUSTIFY REVERSAL: See *Davis v. Shaver*, 91 Am. Dec. 92; *Backus v. Clark*, 83 Id. 437, note 443, where other cases in that series are collected.

CLARK v. HOLLAND.

[72 IOWA, 24.]

PURCHASER OF LAND UPON WHICH RECORD SHOWED MORTGAGE, executed by one in whom the record showed no title to the person in whom the title stood of record, is affected with notice that at the time of the execution of the mortgage the mortgagor was the equitable owner of the property, and will take the land subject to the lien of the mortgage, where he knew of the record of the mortgage, and had heard it read, at least in part, before he purchased.

PLEDGEER OF NOTE AND MORTGAGE WHO DEPOSITS THEM IN BANK, WHERE THEY ARE SEIZED and sold under an execution against the pledgor, may become the purchaser thereof at the sale.

ACTION to foreclose a mortgage. Judgment was rendered against Holland, but not against Phelps. The plaintiff appealed. The other facts are stated in the opinion.

Boal and Jackson, and George W. Crooks, for the appellant.

No appearance for the appellees.

By Court, ADAMS, C. J. The mortgage in question was executed by the defendant Holland to one N. B. Brown, to secure a promissory note executed by Holland to Brown, and made payable to order. The note was sold upon an execution against Brown, and purchased by the plaintiff. The land upon which the mortgage was executed did not stand in Holland's name, and it seems probable that he never had the legal title. The defendant Phelps claims that he did not; and for the purposes of the opinion, it may be conceded that he did not. Phelps found the legal title belonging apparently to Susan

Brown, N. E. Brown, and H. T. Brown, and from them he obtained a deed, paying a valuable consideration therefor.

It seems to be conceded that the land belonged originally to N. B. Brown. He died, and the legal title, we infer, passed to his widow, Susan Brown, and his sons, N. E. and H. T. Brown, who are the defendant Phelps's grantors. At the time the mortgage was executed, N. B. Brown held the legal title, and we have a case where the mortgagor appears, so far as the record shows, to have attempted to mortgage land which not only did not belong to him, but which belonged to the mortgagee. The real fact appears to be that Brown sold the land to Holland, but for some reason omitted to make a deed. Notwithstanding such omission, however, he took a mortgage upon the land from Holland, which is the mortgage in question. Holland, then, at the time he executed the mortgage, was the equitable owner, and the mortgage had the effect to bind his interest, as against all persons who had actual knowledge of such interest, or knowledge of facts which were sufficient to put them upon inquiry.

The evidence shows that before Phelps purchased he discovered, in some way, the record of the mortgage, and heard it read, at least in part. The fact of the record known to Phelps was sufficient to lead to the inference that a mortgage had been executed, and we think that the case is not different from what it would have been if Phelps had seen the mortgage in the hands of the holder: *St. John v. Conger*, 40 Ill. 535.

It is true that, even then, the mortgage would not appear to be a lien upon the property, because Holland did not appear to have title. But the existence of the mortgage was a significant fact, and especially as it ran to the very person who appeared to be the owner of the land at the time it was made, and from whose heirs Phelps proceeded at once to obtain a deed. The inference, we think, would necessarily arise, in any person's mind possessed of ordinary intelligence, that Brown had sold the land to Holland, and that there had been an omission either to make a deed, or to record it, if made. Now, Phelps knew that if this was so, Holland became the equitable owner; that the mortgage bound the equitable interest; and that the holder of the note which the mortgage was given to secure must be claiming a mortgage interest. Our opinion then is, that Phelps saw enough to put him upon inquiry, and that he was chargeable with knowledge of the outstanding mortgage interest.

The plaintiff claims that the same result should be reached by reason of the character of the deed under which Phelps claims. His position is, that the deed is in effect a mere quitclaim, and that Phelps stands in no better position than his grantors, who must be regarded as charged with all that the intestate knew. The question raised upon the character of the deed is not quite free from difficulty, and, as it is not necessary to determine it, we omit to do so. Possibly the court below thought that the deed to Phelps operated as a discharge of the mortgage, upon the theory that he had a right to assume that it was made by those who had become owners of the mortgage. The evidence, however, shows that Phelps applied to the grantors for a conveyance to him, upon the theory that they had become the owners of the property, and not encumbrancers, and what he paid he paid simply as a purchaser from the owners. It does not appear to have occurred to any one that there was to be a discharge of the mortgage effected by the deed. Possibly the court below thought that the plaintiff did not appear to be the owner of the note and mortgage. While the note and mortgage were acquired by plaintiff by purchase at a sheriff's sale, the evidence shows that he had previously taken them as security. It may be that it was thought that he had taken them in trust, and that he could not acquire title to trust property by a purchase of the same. It is true enough that if a trustee becomes a buyer at his own sale, the beneficiary may, at his option, avoid the sale. But the sale in this case was not the trustee's sale. He had deposited the notes and mortgage in bank, where they were seized upon execution. The sale was made by a judgment creditor, through the sheriff. The plaintiff did not conduct the sale, nor procure it, nor was he charged with any responsibility in regard to it. The sale was made in pursuance of the sheriff's levy, and not in the execution of any trust which the plaintiff had assumed.

We think that the decree must be reversed.

PLEDGER, WHEN CANNOT PURCHASE AT SALE OF PLEDGE: See *Maryland* I. Co. v. *Dabrymple*, 89 Am. Dec. 779, note 791.

STEELE v. SANCHEZ.

[72 IOWA, 65.]

REPEAL OF ACT OF CONGRESS DECLARING RIVER PUBLIC HIGHWAY does not extend the boundaries of the land of the riparian owners, nor invest them with title to the middle of the stream.

TITLE OF RIPARIAN OWNER ON NAVIGABLE STREAM IS BOUNDED BY ORDINARY HIGH-WATER MARK, and if the line of ordinary high-water mark changes, the line of his land changes with it.

RIGHTS OF RIPARIAN OWNER ON NAVIGABLE STREAM IN LAND BETWEEN HIGH AND LOW WATER MARK are peculiar to himself, and cannot be sold or transferred by him independently of a conveyance of the land to which they are appurtenant. He cannot confer upon another the right to quarry stone in the bed of the river, although the stone was, at the time when the government of the United States disposed of the land, underneath his land, and was only brought within the high-water mark by the subsequent washing away of the bank.

ACTION to recover price of a quantity of stone. There was a verdict and judgment for the defendant, and the plaintiff appealed. Other facts are stated in the opinion.

Williams and Jaques, for the appellant.

Stiles and Beaman, for the appellee.

By Court, ROTHROCK, J. 1. It appears from the evidence in the case that the defendant is the owner of about one acre of land lying upon the Des Moines River at the city of Ottumwa. He became such owner in the year 1875. After the purchase was made, the water washed away some twenty feet of the bank of the river, so that the bed of the stream was changed to that extent, and that part of the land originally purchased was covered with the current of the stream. In front of this land, and in the bed of the river below ordinary high-water mark, but within the meander line of the original survey of the lot of which the land was a part, there is a ledge of stone which can be quarried by the building of dams to change the current of the stream and keep the water out. In 1882 and 1883 the plaintiff quarried stone in the river at the place above described, under contract with the defendant, by which he was to pay the defendant fifteen cents a perch for all stone quarried, and payment was to be made by delivering stone to the defendant at one dollar per perch. He delivered the stone for which this action was brought, and demands payment therefor, upon the ground that the defendant is not the owner of the quarry, because it is in the bed of the river below ordinary high-water mark. While working

the quarry, the plaintiff did not use any part of the defendant's land as an approach thereto. He obtained the privilege of a road or approach to the quarry from the owner of a lot adjoining that of the defendant.

The main question in the case is, whether the defendant was the owner of the stone in the bed of the river. The court instructed the jury as follows upon this feature of the case: "A question arises in this case concerning the power of defendant to grant to plaintiff the right to quarry stone from land lying within high-water mark of the Des Moines River. You are instructed that the law on that question is as follows: If the land where the stone was quarried was a part of the lands surveyed and disposed of by the United States government, and defendant was at the time the owner thereof, then he had the legal power and authority to grant plaintiff the right to quarry stone there; and this is true, although the soil covering the stone may have been washed away by the waters of the Des Moines River, and the spot where the stone was quarried may have been within high-water mark of that stream." The thought of this instruction is, if the stone-quarry was within the original surveyed line, it was the property of the defendant, although the channel of the stream had changed so that the quarry was below the ordinary high-water line; in other words, that the original meandered line of the stream remained as the boundary of defendant's land.

Counsel for the plaintiff combat the rule announced in this instruction, and insist that the defendant has no such ownership in or title to the stone as to authorize him to sell the same. We think the claim of counsel is correct. The Des Moines River was formerly regarded as a navigable stream. It was declared to be such by act of Congress, August 8, 1846. When the original government surveys were made, the Des Moines River was "meandered"; that is, the banks of the river were surveyed, and the lines thereof indicated by corners and distances. The river being then a navigable stream, the then owner of the lot now owned by the plaintiff had no title beyond ordinary high-water mark. The title to the whole bed of the river was in the public: *McManus v. Carmichael*, 3 Iowa, 1; *Tomlin v. Dubuque etc. R'y Co.*, 32 Id. 106; 7 Am. Rep. 106; *Musser v. Hershey*, 42 Iowa, 356. It is true that by an act of Congress passed January 20, 1870, the act of August 8, 1846, declaring the river to be a public highway, was repealed. But this repealing act did not invest riparian owners

with title to the middle of the stream. The boundaries of their land were not extended thereby: *Wood v. Railroad Co.*, 60 Iowa, 456; *Serrin v. Grefe*, 67 Id. 196. It follows that the defendant could confer no right on the plaintiff to quarry stone in the bed of the river. His title was bounded by ordinary high-water mark. He has certain rights in the land between high and low water mark, but these rights are peculiar to himself, and are not the subject of transfer or sale, independently of a conveyance of the land to which these rights are appurtenant: *Musser v. Hershey*, *supra*, and *Phillips v. Rhodes*, 7 Met. 322.

When, by the action of the water, the river bed was changed, the line of ordinary high-water mark was changed, and the defendant's ownership, or the line of his land, changed with it. The bank of a stream is what retains the water in its channel; and, if changed either by natural or artificial means, the river bank becomes the line: *Lockwood v. New York etc. R'y Co.*, 37 Conn. 387; *New Orleans v. United States*, 10 Pet. 662 (711). It was doubtless the right of the defendant to have prevented the washing away of the bank of the river by means of stone walls or other contrivances; but, not having done so, his boundary line must be regarded as changing with the changes in the banks of the stream. The fact that the "meandered" line was run where the bed of the river now is, does not affect the question. Meandered lines are not boundary lines. They are run merely for the purpose of ascertaining the quantity of land in the fraction subject to sale: *Railroad Co. v. Schurmeir*, 1 Wall. 272; *Kraut v. Crawford*, 18 Iowa, 549; 87 Am. Dec. 14.

2. It is claimed by counsel for appellee that plaintiff cannot recover for the stone, upon the principle that a tenant cannot dispute the title of his landlord so long as his possession is undisturbed. Whether that rule is applicable to the facts of this case, we do not think we should now determine. There is a conflict in the evidence as to what the contract really was. The verdict was general; and, as we have seen, the jury were required to enter upon the consideration of the case on what we regard as an erroneous rule as to the rights of the defendant in the bed of the river. Under the instruction above cited, they probably determined the case without considering the question as to the right of the plaintiff to deny the authority of the defendant to dispose of the stone in the quarry.

Reversed.

RIGHTS OF RIPARIAN OWNERS ON NAVIGABLE STREAM: See *Goodwin v. Thompson*, 54 Am. Rep. 410; *Wood v. Fowler*, 40 Id. 330; note to *People's Ice Co. v. Steamer Excelsior*, 38 Id. 255; *Ryan v. Brown*, 100 Am. Dec. 184, note 161, where other cases in that series are collected; *Stover v. Jack*, 100 Id. 566, note 569; *Gerriah v. Clough*, 97 Id. 561, note 565.

OWNERSHIP OF RIPARIAN PROPRIETOR ON NAVIGABLE RIVER IS NOT EXTENDED to the center of the stream by the enactment of a statute declaring the river non-navigable: *Wood v. Fowler*, 40 Am. Rep. 330.

WILDER v. SECOR, BURNOP. AND LAW.

[72 Iowa, 161.]

STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN AGAINST CLIENT until he discovers his cause of action arising from the conversion by his attorneys of a claim sent by him to them for collection, and which cause of action they conceal from him, when, by virtue of their relation to him, they were under obligation to reveal to him every fact in connection with the claim which might in any manner affect his interest.

ACTION for the conversion of a draft sent by the plaintiff to the defendants for collection. The opinion states the case.

Cyrus Foreman and G. E. Marsh, for the appellant.

Glass and Hughes, for the appellees.

By Court, REED, J. It is averred in the petition that in the year 1876, and prior thereto, defendants were employed by plaintiff, in their capacity as attorneys, to look after certain business matters in which he was concerned, and that, in the course of such employment, they collected a sum of money for him; that in remitting said amount, they sent to him a draft or check drawn by one Robert Clark on a bank in Chicago; that before said draft was presented for payment to the payee, Clark died, and when it was presented, payment was refused, and it was returned to plaintiff, who thereupon sent it to defendants, with direction to file the same in his name as a claim against the estate of Clark, and procure its allowance or establishment; but that defendants filed said draft in their own name, together with a large number of others held by them, and procured the allowance of the same as a claim in their own favor against the estate, and being indebted to the estate they subsequently settled with the administrator, and set off the amount of the claim so allowed in their favor against their indebtedness, and receipted to the administrator for the amount

thereof, and discharged him and the estate therefrom. This settlement is alleged to have been made more than five years before this suit was instituted, but it is averred that plaintiff was not informed of the transaction until a few months before the suit was brought. It is also averred that plaintiff relied upon defendants as his attorneys to prosecute said claim, and collect the amount due thereon; that he resided in another state, and all of his communications with them with reference thereto were by letter; and that they never disclosed to him that they had procured the allowance thereof to themselves, but concealed that fact from him, and led him to believe that it had been allowed in his name, and that it would be paid by the administrator in the settlement of the estate.

We are of the opinion that, under the facts pleaded, the statute of limitations did not begin to run until plaintiff discovered the existence of his cause of action against defendants. When they procured the allowance of the claim in their own favor, and availed themselves of it in their settlement with the administrator, they converted it to their own use, and a cause of action at once accrued against them in plaintiff's favor for the amount. They concealed the existence of the cause of action from him, and they did this when, by virtue of their relation to him, they were under obligation to reveal to him every fact, in connection with his claim against the estate, which might in any manner affect his interest. Their suppression or concealment of the facts was a fraud upon his rights. The allegations of the petition bring the case within the rule laid down in *District Township of Bloomer v. French*, 40 Iowa, 601, and subsequent cases, which is, that "when the party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment, prevented such other from obtaining a knowledge thereof, the statute of limitations would only commence to run from the time the cause of action was discovered, or might, by the use of diligence, have been discovered."

As plaintiff had the right to rely upon defendants to communicate the facts of the case to him, and as they were under obligation to communicate them, they cannot be permitted to say that he might have discovered the existence of the cause of action at an earlier date than he did by an examination of the records of the proceeding in which the claim was allowed against the estate, and settled by the administrator.

We think the district court erred in sustaining the demurrer.
Reversed.

STATUTE OF LIMITATIONS, WHEN BEGINS TO RUN AGAINST CLIENT FOR MONEY COLLECTED BY ATTORNEY: See *Roberts v. Armstrong*, 89 Am. Dec. 624, note 626, where other cases in that series are collected. The statute of limitations will not bar an action for conversion, in the absence of knowledge by the owner of the conversion, until a reasonable time elapses for learning the facts: *Houston etc. Ry Co. v. Adams*, 30 Am. Rep. 116. Mere concealment of fraud by defendant prevents the running of the statute of limitations, under a statute providing that, where a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party, the statute shall not begin to run until the fraud is discovered: *Wear v. Skinner*, 24 Id. 517.

MUMPER v. WILSON.

[72 IOWA, 163.]

WHEREA RESIDENT OF IOWA TAKES PROPERTY THERE EXEMPT FROM EXCISE DUTY TO ANOTHER STATE for a temporary purpose, a creditor of his who is also a resident of Iowa, will be restrained by the courts of the latter state from enforcing against the property a judgment obtained by him in such other state.

ACTION to restrain the defendant from enforcing a judgment which he holds in Nebraska against property of the plaintiff found in Nebraska, but which is exempt under the laws of Iowa. A temporary injunction was granted upon the petition which was dissolved on motion of the defendant, and the plaintiff appealed.

Anderson and Eaton, for the appellant.

No appearance for the appellee.

By Court, BECK, J. 1. The petition shows that both plaintiff and defendant are residents of this state; that plaintiff went for a temporary purpose, to Nebraska, leaving his family here and intending soon to return; that he took with him, for the purpose of using it to support his family, his team, consisting of two horses and a wagon and harness, the team being exempt from seizure for debts in this state, and that defendant had recovered certain judgments against plaintiff in this state upon which he brought suit in Nebraska, and caused an attachment to issue, which was levied upon plaintiff's team in Nebraska. The petition prays that defendant may be restrained from enforcing his judgment against the team in Nebraska.

2. In our opinion the court below erroneously dissolved the injunction. The facts in the case are not distinguishable from

those in *Teager v. Landsley*, 69 Iowa, 725, in which this court held that a creditor, resident of this state, could not, in an action brought in another state, subject to his judgment property of a debtor, also a resident of this state, which under our statutes is exempt from execution. In this case both debtor and creditor are residents of this state. The debtor and property are subject to the jurisdiction of the courts of Nebraska, and the property is exempt under the statutes of this state. In the other case just cited the facts are not explicitly stated, but there can be no mistake in regard to them. The debt, the property sought to be subjected to attachment through garnishment process, was of course within the jurisdiction of Nebraska, as the garnishee could not otherwise have been proceeded against by garnishment process. The debt, the obligation of the garnishee, is ambulatory, and exists and is found wherever he may be. The Nebraska court, of course, had jurisdiction of the *res* proceeded against in the attachment. So in this case, the *res*—the team—was subject to the jurisdiction of Nebraska. It does not appear whether the debtor was personally subject to the jurisdiction of Nebraska; but it does appear that jurisdiction attached to the *res*, and that was sufficient to subject it to the judgment rendered in the case. Such judgment, so far as the property seized in the proceeding is concerned, was just as effective as though the court had jurisdiction of the person of the debtor. In this case the Nebraska court had jurisdiction of the person of the debtor, which gave it jurisdiction of the property. The effect of jurisdiction cannot be different, whether acquired by personal service and seizure of the property, or by publication and seizure. We conclude that, in this case, the jurisdiction of the foreign court was just as complete as the jurisdiction of the Nebraska court in the other case. Indeed, so far as the power of the respective courts is concerned, there can be no distinction between them.

It is suggested that one fact distinguishes the cases; namely, the plaintiff voluntarily took the team to Nebraska. The team is the *res* subjected to the exercise of jurisdiction of the Nebraska court in this case. In the other case, the debt owed by the garnishee is the *res*. As we have seen, it was ambulatory, and accompanied the garnishee. The creditor (the plaintiff in that case), by permitting the garnishee to become his debtor, assented to the condition the law imposed. *viz.* that the debt should go with the debtor; and he could not restrain

the debt and debtor to remain in Iowa. Hence he consented that the debt should go with the debtor to Nebraska. We conclude that, in each case, the property sought to be subjected was found in the state where seized with the consent of the respective plaintiffs.

3. Sound policy, as well as reason, requires the application of the rule in *Teager v. Landsley*, 69 Iowa, 725, to this case. Residents of one state, in the prosecution of their ordinary business, often find it necessary to take exempted property, for temporary use in earning support for their families, into adjoining states. It would be unjust, oppressive, and absurd to permit creditors to follow such persons, and seize their property exempt from their debts the moment they passed the boundary line of the state. The doctrine of *Teager v. Landsley*, *supra*, forbids it, and provides a remedy where it is attempted.

The order dissolving the injunction is reversed.

EXTRATERRITORIAL EFFECT OF EXEMPTION LAWS.—Exemption laws, like other laws, are restricted in their operation and effect to the state which enacts them. The courts of a state are bound to enforce its own exemption laws, and cannot regard the exemption laws of other states in determining the rights of the parties to an action: *Freeman on Executions*, sec. 209; *Thompson on Homesteads and Exemptions*, secs. 20-23; *Boykin v. Edwards*, 21 Ala. 261; *Mineral Point R. R. Co. v. Barron*, 83 Ill. 365; *Roche v. Rhode Island Ins. Ass'n*, 2 Ill. App. 360; *Leiber v. Union Pacific R. R. Co.*, 49 Iowa, 688; *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497, *Morgan v. Neville*, 74 Pa. St. 52. In *Mineral Point R. R. Co. v. Barron*, 83 Ill. 365, 366, 367, Craig, J., in delivering the opinion of the court, said: "Under the laws of Wisconsin, had the proceedings been instituted in that state, the wages of the defendant in the original action were exempt from garnishment; and it is urged by appellant that, as the parties resided in that state, and the debt was there incurred, the exemption laws of Wisconsin must control, although the proceedings for the collection of the debt were commenced in this state. . . . The statute of Wisconsin, under which appellant was not liable to be garnished, was a law affecting merely the remedy where an action should be brought in the courts of that state. That law, however, cannot be invoked where the remedy is sought to be enforced in the courts of this state. The remedy must be governed by the laws of the state where the action is instituted." And Brewer, J., in delivering the opinion of the court in *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 183, 47 Am. Rep. 498, said: "We think these propositions are sound. The laws of a state have no extraterritorial force. This, as a general proposition, is unquestioned, and includes within its scope exemption as well as other laws. So, although the laws of Nebraska, where employer and employee reside, exempt laborers' wages absolutely, it does not follow that the courts of another state will, in controversies pending between them, enforce the same exemption. On the contrary, the matter of exemption, being one affecting the remedy, at least within certain limitations, is one controlled by the *lex fori*, and not by the *lex loci contractus*. Therefore, although both creditor

and debtor reside within the limits of the state, the exemption laws of that state do not control garnishee proceedings in another." So in *Boyles v. Edwards*, 21 Ala. 264, Dargan, C. J., in delivering the opinion of the court, said: "The Mississippi act is local, and can only protect the property exempted by it from execution so long as the property remains within the limits of that state; but when it passes from beyond her jurisdiction, it then loses the protection of her statute."

A peculiar decision was rendered in the case of *Pierce v. Chicago etc. Ry Co.*, 36 Wis. 283, which has been severely criticised. It was there held that when a corporation is garnished in the courts of one state for a debt due to a citizen of another state, it must set up the exemption laws of the latter state in the defendant's favor, and resist any judgment against him, and if it does not do so, it is liable to be sued by the defendant in such latter state. It is difficult to see why the garnishee should be compelled to contend for an exemption that cannot be recognized. If he does set up the exemption laws of another state, they cannot avail him; for it is no sufficient answer in garnishee proceedings that the debt of the garnishee to the defendant is, by the laws of the state where the defendant resides, exempt from execution, unless it is also exempt by the laws of the state where the garnishee is summoned: *Roche v. Rhode Island Insurance Association*, 2 Ill. App. 360; *Moore v. Chicago etc. R. R. Co.*, 43 Iowa, 385; *Leiber v. Union Pacific R. R. Co.*, 49 Id. 688; *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497; *Morgan v. Neville*, 74 Pa. St. 52. The theory upon which the Wisconsin court seems to have proceeded is, that it was the duty of the courts of a foreign state to give effect to the exemption laws of Wisconsin, and that the garnishee was bound to enforce the performance of that duty. But, as has been shown, the great weight of authority holds that the courts of a state are in duty bound to execute the exemption laws of their own states, and that in doing so they have no right to take into account the exemption laws of other states. In the recent case of *Missouri Pacific Ry Co. v. Malby*, 34 Kan. 125, Valentine, J., in delivering the opinion of the court, said: "Not wishing to state the law more or less broadly than the facts of this case will warrant, we shall decide it purely upon its own facts, and therefore the decision will be in substance as follows: In a proceeding in garnishment, where all the parties are non-residents of the state of Kansas, and are residents of the state of Missouri, and the thing attempted to be attached by the garnishment proceedings is a debt created and payable in the state of Missouri, but the garnishee does business in Kansas, and is liable to be garnished in this state, and the other parties come temporarily into Kansas, and while in Kansas the plaintiff, who is a creditor of the defendant, who is a creditor of the garnishee, commences an action in Kansas against the defendant, and serves a garnishment summons upon the garnishee, and the debt of the garnishee to the defendant is by the laws of the state of Missouri exempt from garnishment process, and such debt also seems to come within the exemption provisions contained in section 490 of the Civil Code of Kansas, and section 157 of the Justice's Code of Kansas, exempting certain earnings of the debtor from the enforced payment of his debts, such debt is exempt from garnishment process in Kansas."

Laws granting exemptions from execution affect the remedy only: *Helfenstein v. Case*, 3 Iowa, 287; *Newell v. Hayden*, 8 Id. 140. And where a law affects the remedy, it is the *lex fori*, and not the *lex loci contractus* that must govern: *Woodbridge v. Wright*, 3 Conn. 523; *Atwater v. Townsend*, 4 Id. 47; 10 Am. Dec. 97; *Toomer v. Dickerson*, 37 Ga. 428; *Whittemore v. Adams*,

2 Cow. 626; *Smith v. Atwood*, 3 McLean, 545; *Hinkley v. Maroon*, 3 Mason, 33.

But while the laws of a state have no extraterritorial force, the courts of a state may nevertheless compel its own citizens resident therein to respect its laws, even beyond its own territorial limits: *Engel v. Schenckman*, 40 Ga. 206; *Keyser v. Rice*, 47 Md. 203; *Dehon v. Foster*, 4 Allen, 545; *Vail v. Knapp*, 49 Barb. 299. And a court of a state has the power to enjoin its own citizens resident within its territory from resorting to the courts of other states for the purpose of evading the exemption laws of his own state: *Teager v. Landsley*, 69 Iowa, 725; *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497; *Snook v. Snetser*, 25 Ohio St. 516.

Exemption laws generally apply to all classes of persons, whether residents or non-residents of the state. And unless the statute restricts the exemption to residents, it will be held to apply to non-residents as well as to residents: *Mineral Point R. R. Co. v. Barron*, 83 Ill. 365; *Missouri Pacific R'y Co. v. Maltby*, 34 Kan. 125; *Kansas City etc. R. R. Co. v. Gough*, 35 Id. 1; *Wright v. Chicago etc. R. R. Co.*, 19 Neb. 175; *Hill v. Loomis*, 6 N. H. 263; *Sprout v. McCoy*, 26 Ohio St. 577; *Haskill v. Andros*, 4 Vt. 609; 24 Am. Dec. 645; *Lowe v. Stringham*, 14 Wis. 222. "The courts will interfere to protect their citizens in their rights of exemption, when sought to be evaded by recourse to proceedings in other states. The wages of an employee may be exempt by the laws of the state in which he lives and in which they are earned; but his creditor, to avoid such exemption, may commence an action against him in another state in which they are not exempt, and seek to levy upon them under attachment or execution. If the creditor is a citizen of the state in which the debtor lives, the courts of such state will protect the debtor's right of exemption by enjoining the creditor from proceeding in the other state. As the court has jurisdiction over both parties, there is no doubt of its power to prevent the creditor from proceeding, if the case presented against him is a proper one in which to exercise such power. Upon this subject the authorities seem to uniformly affirm that courts of equity will, if necessary, compel persons within their jurisdiction to obey and respect the laws of the state, and will not suffer them to evade those laws, and thereby obtain preferences, to the injury of the debtor or of other creditors. This rule has been extended in Iowa to protect from execution in Nebraska a team which had been taken to the latter state by a resident of Iowa, for a temporary purpose. 'Residents of one state, in the prosecution of their ordinary business, often find it necessary to take exempted property, for temporary use, in earning support for their families, into adjoining states. It would be unjust, oppressive, and absurd to permit creditors to follow such persons and seize their property, exempt from their debts, the moment they had passed the boundary line of the state': Freeman on Executions, 2d ed., sec. 209, citing *Mumper v. Wilson*, 72 Iowa, 163; *Snook v. Snetser*, 25 Ohio St. 516; *Keyser v. Rice*, 47 Md. 203; *Teager v. Landsley*, 69 Iowa, 725.

REED v. BURLINGTON, CEDAR RAPIDS, AND NORTH- ERN RAILWAY COMPANY.

[72 IOWA, 186.]

WHERE EMPLOYEE OF RAILROAD COMPANY USES TELEPHONE, PLACED IN SWITCH-YARD of the company for the purpose of communicating with the office, to communicate the fact that one of the cars is out of order, and receives a reply from some one in the office directing him to send it off if it will hold together, it will be presumed, in the absence of evidence to the contrary, that the communication was sent to and answered by some one having authority to give directions touching the matter inquired about, and such communication is admissible in evidence against the company in an action for injuries subsequently caused by the defective car. *Seevera, J., dissenting.*

KNOWLEDGE BY SWITCHMAN WHO MAKES UP TRAIN, OF DEFECTIVE CONDITION OF CAR placed therein, is notice to the railroad company; and where there is such additional evidence as to place the fact of notice beyond dispute, it is not necessary that the court should instruct the jury that without such notice the company would not be liable for the injury resulting from the use of the defective car.

BRAKEMAN'S VIOLATION OF RULE OF RAILROAD COMPANY IN COUPLING CARS will not defeat his right to recover for an injury caused by a defect in one of the cars, where it is manifest that the injury would not have been avoided if he had observed the rule.

ACTION to recover damages for a personal injury. The facts are stated in the opinion.

S. K. Tracy, for the appellant.

Stivers and Loutham, and J. W. Willett, for the appellee.

By Court, **ROTHOCK, J.** 1. The plaintiff was hind brakeman upon a freight train running between Cedar Rapids and Burlington. On the trip upon which the injury was received the train left Cedar Rapids, going south, at about three o'clock in the morning. The train was made up at Cedar Rapids immediately before it started on the road. There was a Star Union Line car placed at the head of the train, and coupled to the locomotive tender. The plaintiff came into the train-yard after the train was made up. When it reached Columbus Junction, the engine was cut off, and went upon a side-track for some purpose, and then came back, and the plaintiff went between the tender and the Star Union car to couple them, when he received the injury of which he complains. He claims that the Star Union car was broken and defective on account of the absence of what is called a "follow-plate" under the car, and by which the draw-bar is prevented from sliding back; and that, by reason of said defect, the draw-bar

was driven back, and shoved under the car so far that there was not sufficient space left between the car and the tender of the locomotive to safely make the coupling; and that in consequence thereof he was caught between them and permanently injured in his hips.

The defendant claimed that there was no such defect in the car, and that the plaintiff, at the time he was injured, was knowingly violating an express printed rule of the company in not using a stick to make the coupling, and that this violation of the rule increased his danger, and that, by such disobedience, he contributed by his own negligence in causing the accident.

The fact that the car was out of repair so that the draw-bar would slide back under the car ought not to be a matter of serious dispute. To say the least, the jury were fully warranted in finding from the evidence that such was its condition. It is true that other persons, before and after the accident, succeeded in coupling the car, but the jury may have fairly found that it was done with a knowledge of the defect. Of course the question whether it could be safely coupled to another car depended altogether upon the force with which the other car was bunted against it.

It appears from the evidence of one Montgomery, who was a switchman in the yards at Cedar Rapids, and who had charge of the switch crew in making up trains, and under whose supervision the train in question was made up, that he discovered that there was no follow-plate on the back part of the draw-bar, and that the draw-bar would shove back until its rim would strike the deadwood. He further testified that, upon making the discovery, he went to a switch shanty in the yards, in which there was a telephone used for the purpose of communicating with the general office and shops, and he called the general office, and stated to some one who answered his call that the car was in bad order, and the person answering his call inquired, "In what way?" and the witness told him that the back plate was gone, and received the reply, "If she will hold together, send her off." It is claimed that the testimony as to the communication by telephone should have been excluded, because it was with some unknown person, and ought not to bind the defendant. It appears that the telephone was placed in the yards for the very purpose of communicating with the office. It was the means of communication provided by the defendant; and in the absence of any

showing that some officious intruder had taken up quarters in the office, and assumed to transact the business of the company, it ought to be presumed that the communication was made with one having authority to give directions as to the matter inquired about; and if Montgomery, who had charge of making up the trains, did not have the authority to set out the car without orders from the office, it was his business to ascertain to a certainty that the orders he received came from a proper source.

2. It is insisted that the fourth instruction given by the court to the jury is erroneous, because the same does not direct the jury that notice must be brought to the defendant of the defective condition of the car before there can be any liability for using it. We do not deem it necessary to set out this instruction. It is enough to say that, as the evidence was abundant to sustain the finding that the car was out of repair as claimed, and no verdict could have been found for the plaintiff without finding that fact, the knowledge of the defendant as to its condition was not a debatable question in the case. Montgomery, the very person of all others whose business it was to see that the train was properly and safely made up, knew that the car was in bad order, and notice to him was notice to the defendant. Several other witnesses testified to the same fact. Indeed, we do not think it would have been error if the court had stated to the jury that, if they believed the witnesses who testified that the car was in bad order, they should find that the defendant had notice of that fact. The jury should be required to determine the facts about which there is dispute, and these only.

3. It appears from the evidence that when the plaintiff went between the car and the tender to make the coupling, he had no knowledge of the defect of which he now complains. He was not present when the engine was attached to the car at Cedar Rapids. He gave the signal to the engineer to back up, and stepped in to make the coupling. He raised the link with his hand, and the engine came against the draw-bar of the box-car, and shoved it under the car until the pin caught the deadwood. The engine and car came so close together that he was caught and held fast until the engine started ahead.

The defendant introduced in evidence a rule prescribed by the company for the guidance of brakemen in making couplings. It is in these words: "Brakemen should not go between cars to make couplings unless the draw-bars and draught tim-

bers are in good condition. The hand should never be used to guide the link in making couplings. Sticks should be used for that purpose. They will be found at headquarters."

It is claimed that the plaintiff in using his hand to guide the link, instead of a stick, was guilty of a plain violation of the rule, which contributed to produce the injury of which he complains. If this proposition is correct, that is, if the violation of the rule contributed approximately to the injury, the plaintiff cannot recover; but if the violation of the rule in no manner entered into or became a part of the cause of the injury, there is neither reason nor authority for holding that the plaintiff was chargeable with contributory negligence. The court below was of this opinion, and charged the jury that "there was no testimony having a tendency to show that such violation of such rule proximately tended to produce the injuries to plaintiff, and such violation of such rule would not constitute a bar to plaintiff's recovery."

Our examination of the evidence in the case leads us to the conclusion that this instruction is correct. The head brakeman, who was with the train at the time of the accident, was a witness for the defendant, and testified as follows, with reference to the use of a stick in making a coupling: "In making a coupling without the use of a stick, brakemen set the pin so it will fall itself; and if it don't fall when the draw-bars come together, they put the pin down with the hand. In using a stick they raise the link with it, and after they get the link entered they put the pin down with the hand. I mean to say that the usual way of making a coupling with a stick is to raise the link with the stick, and enter it, and then take the other hand and put the pin down. A brakeman must go just as far between the cars to make the coupling when he uses a stick as when he uses his hands alone. In coupling he would have to go so far whether he used a stick or not."

There is no evidence in the case in any manner conflicting with this. It is perfectly manifest that if the plaintiff had raised the link with a stick, he would have been exposed to the same danger as he was by raising it with his hand. The stick would have been no protection against the draw-bar shoving back, and the cars closing upon him. The danger was precisely the same in one case as the other. We infer from this testimony that the rule prescribing the use of a stick is to protect the hands from the danger of being caught between the ends of the draw-bars. Our conclusion is, that

the court did not err in rulings upon the evidence, nor in the instructions given, nor in the refusal to give instructions requested by the defendant, and we think the judgment must be affirmed.

SEEVERS, J., dissented from the first point in this opinion.

NOTICE TO AGENT WHEN NOTICE TO PRINCIPAL: See *Conger v. Chicago etc. Ry Co.*, 1 Am. Rep. 164; *Blumenthal v. Brainerd*, 91 Am. Dec. 350, note 363, where other cases in that series are collected.

RULE RELEASING DEFENDANT FROM RESPONSIBILITY BECAUSE OF PLAINTIFF'S NEGLIGENCE is limited to cases where the act of the plaintiff was the proximate cause of the injury: See *Kline v. Central Pacific R. R. Co.*, 99 Am. Dec. 282, note 289, where other cases are collected.

SCHLEISSMAN v. KALLENBERG.

[72 IOWA, 333.]

IF ONE WHO INDORSES NOTE AFTER PAYEE PAYS JUDGMENT RENDERED THEREON against the maker and him, and takes an assignment thereof to himself, he is subrogated to the rights of the judgment creditor, and may enforce the judgment against the property of the maker.

MERE SUGGESTION OF POSSIBLE EQUITIES BETWEEN INDORSER OF NOTE AND MAKER CANNOT PREVENT RECOVERY by such indorser in an action to recover land bought in by him at a sale under a judgment rendered against him and the maker, which was paid, and an assignment thereof taken by him, where no such equities are pleaded in the action.

FORCIBLE entry and detainer. Judgment was rendered for the plaintiff, and the defendant appealed.

George R. Cloud, for the appellant.

George W. Paine, for the appellee.

By Court, BECK, J. 1. The plaintiff seeks to recover possession of the land under a sheriff's deed to him. The answer alleges that the judgment under which the sheriff's sale and deed were had was rendered against plaintiff in this action and two other defendants; that plaintiff paid the judgment, caused it to be assigned to him, and the property in controversy to be sold upon an execution issued thereon, and became the purchaser, the sheriff's deed being executed to him; and that by reason of these facts the sheriff's sale and deed are void. The reply to the answer denies its allegations, and pleads a decision in another case as an estoppel, which, however, in the view we take of the case, need not be further no-

ticed. The facts relied upon by defendant to defeat the deed are these: Plaintiff was the indorser of the promissory note upon which the judgment was rendered, whereon the sheriff's sale and deed were had. The judgment was assigned to him by the plaintiffs therein. It is insisted that plaintiff's payment for the assignment of the judgment operated as a satisfaction thereof.

2. It is a familiar rule that when the indorser of a promissory note makes payment thereof to the holder, he becomes entitled to its possession, and may pursue his remedy thereon against the maker. This rule is for the protection of the indorser, to the end that he may recover against the maker,—the party primarily liable. The reasons and demands of justice upon which the rule is based require it to be extended and applied to a judgment rendered upon the note. The maker, in law and conscience, is required to pay the note, and protect the indorser. He can urge no reason why the indorser should not have his remedy upon the judgment, and be put to the expense and delay of prosecuting another suit. If the indorser holds the right, as against the maker, to take an assignment of the judgment, and enforce it, no one claiming under the maker can object thereto: See Freeman on Judgments, sec. 471; *Eno v. Crooke*, 10 N. Y. 60; *Corey v. White*, 3 Barb. 12; *Cuyler v. Ensworth*, 6 Paige, 32; *Clason v. Morris*, 10 Johns. 524; *New York State Bank v. Fletcher*, 5 Wend. 85; *Harger v. McCollough*, 2 Denio, 119.

3. The conclusion we reach in the case is not in conflict with the rulings of this court in *Bones v. Aiken*, 35 Iowa, 534, *Drefahl v. Tuttle*, 42 Id. 177, and *Johnston v. Belden*, 49 Id. 301, wherein it was held that sureties, upon paying judgments rendered upon the contracts whereon they are bound, are not entitled to take assignments of the judgments, and enforce them by execution, without an action against the principals. The distinction between those cases and this is obvious. The persons seeking to enforce the judgments in those cases were mere sureties. The obligation of the principal to reimburse the surety for money paid in satisfaction of the debt rests upon an implied contract of the principal to repay the surety money advanced in discharge of the debt, which the law regards as having been paid for the benefit, and upon the request, of the principal. He is not liable to the surety upon the note or other evidence of the debt. His liability, as we have just said, rests upon an implied contract. But in the case of an indorser,

the liability of the maker, or other prior indorser, rests upon the note itself, and the indorsements thereon, which were the foundation of the action wherein the judgment in question in this case was rendered.

The liability of both maker and indorser in this case was adjudicated by the judgment in question. The maker and indorser, being found liable on the note, the maker's liability to the indorser follows as a matter of law. It would be vain to require the indorser to bring an action against the maker, when his liability has already been adjudicated in the action against himself and the indorser. The courts will not require actions to determine rights already adjudicated. They will not require another judgment to be rendered, when the indorser's rights may be enforced under the existing judgment.

It will be understood that we use the term "indorser" to indicate one who indorsed the note after the payee. As between the maker and payee, the last named is not the indorser. Their relations and rights are different from those existing between a subsequent indorser and the maker. A payee indorsing the note is an indorser as to subsequent parties; as to the maker, he is the payee, and cannot be called an indorser when the rights of the maker or himself are involved.

4. It has been suggested that some equity might exist as between the indorser and maker, which would relieve the maker of liability to the indorser, and require him to satisfy the judgment. That is true, and if such an equity should exist, the maker must enforce it in chancery, or by pleading an equitable defense to an action at law. He must enforce it by some proceeding recognized by the rules of equity or by statute. But who ever heard of arresting proceedings in an action at law upon the mere suggestion of imaginary equities which possibly exist between the parties, when no such equities are pleaded or alleged in the action?

This is an action at law to recover land under a title based upon a judgment. Surely the judgment cannot be pronounced void, for the reason that it may be imagined that an equity could possibly exist between the parties to this suit; and if such an equity should be assumed to exist, it cannot defeat the rights of plaintiff in the collateral proceedings without having been pleaded in any action whatever.

Other questions discussed by counsel need not be considered. The judgment of the circuit court is affirmed.

REED and SEEVERS, JJ., dissented.

SUBROGATION, WHO ENTITLED TO: See *Neely v. Jones*, 37 Am. Rep. 794; *Orem v. Wrightson*, 34 Id. 286; *Crisman v. Harman*, 26 Id. 387; *Mosier's Appeal*, 93 Am. Dec. 783, note 783, where other cases in that series are collected.

WIMMER v. EATON.

[72 Iowa, 374.]

PERFECT BALLOT IS EXCLUSIVE EVIDENCE OF VOTER'S INTENT, and extrinsic evidence is inadmissible to show a contrary intent; but where the ballot imperfectly expresses his intent, as when it does not certainly identify the person intended to be voted for, extrinsic evidence is admissible in aid of such imperfection; and the circumstances surrounding the election and the facts of a general public nature connected with it may be considered in connection with the ballot in determining what was the intention of the voter.

WHERE NAME F. WIMMER IS PRINTED ON SOME BALLOTS CAST AT ELECTION, evidence is admissible to show that E. Wimmer was the candidate of his party for the office; that there was no person named F. Wimmer eligible to the office; that that name was printed on the ballots in the belief that it was E. Wimmer's name; and that the electors who cast the ballots bearing the name F. Wimmer supposed at the time that it was the name of E. Wimmer; and those facts being proved, the ballots should be counted for E. Wimmer.

ACTION to test the defendant's right to the office of township trustee. There was a judgment for the plaintiff, and the defendant appealed. Other facts are stated in the opinion.

H. H. Stilwell, for the appellant.

M. B. Hendricks, for the appellee.

By Court, REED, J. At a general election in the township in which the parties reside, 510 ballots were cast for the office of township trustee. Of that number 249 were cast for defendant, 170 bore the name of E. Wimmer, and 91 that of F. Wimmer. Plaintiff's name is Edward Wimmer, and he claimed that all of the ballots bearing those names should be counted for him. The canvassers, however, counted for him only those ballots which bore the name of E. Wimmer, and they issued to defendant the certificate of election. The evidence given on the trial shows that plaintiff was nominated as a candidate for the office by a convention of the political party to which he belongs, and that the ballots which bore the name of F. Wimmer, as well as those which bore the name of E. Wimmer, were cast by members of that party; also that the ballots were printed by a person who knew that plaintiff was

a candidate for the office, but understood at the time that his name was F. Wimmer; also that it was discovered after the election had been in progress for some time that this mistake had been made in printing his name, and that the ballots subsequently cast were corrected by writing thereon the letter E. as the initial letter of his christian name. It was also proven that no person by the name of F. Wimmer, who was eligible to the office, resided in the township. A number of the electors were examined as witnesses, and against defendant's objection were permitted to testify that the ballots cast by them bore the name of F. Wimmer, and that they supposed at the time that that was plaintiff's name, and that it was their intention to vote for him.

The first question which arises on the record is, whether resort may be had to other evidence than the ballot cast by the elector in ascertaining his intention. If the ballot is found to be perfect, that is, if it expresses a certain intent by the elector, it must be accepted as the exclusive evidence of his intent. Thus if it bears the name of a person who is eligible to the office voted for, it affords the most satisfactory evidence that it was the elector's intention to vote for that person; and it would be contrary to all the analogies of the law to permit proof by extrinsic evidence of a contrary intent. But when it is apparent that the intent of the elector is imperfectly expressed by the ballot, as when the person intended to be voted for is not certainly identified by it, the true rule is, we think, to admit extrinsic evidence in aid of such imperfection. It often happens that the elector is ignorant or mistaken as to the christian name of the person for whom he wishes to cast his ballot. In such cases the christian name is either omitted entirely from the ballot, or wrongly written thereon. Now, if no evidence except the ballot could be resorted to in such cases in determining the intent of the elector, it is manifest that the privilege of the elective franchise would be defeated by the rule. But the right to vote is one of the highest privileges of the citizen, and it ought not to be defeated by a technicality. Hence the courts have quite generally held that resort might be had in such cases to the circumstances surrounding the election, and the facts of a general public nature connected with it, and that these might be considered, in connection with the ballot, in determining what was the intention of the elector. The question is elaborately discussed in *Attorney-General v. Ely*, 4 Wis. 438, and what we think is the

true rule is there laid down: See also Cooley on Constitutional Limitations, 611.

We think, therefore, that the facts that plaintiff was the candidate of his party for the office, that there was no person of the name of F. Wimmer who was eligible to the office, and that that name was printed on the ballots in the belief that it was plaintiff's name, and that the electors who cast the ballots bearing that name supposed at the time that it was his name, may properly be considered in determining whether the ninety-one ballots bearing that name were intended for him; and when those facts are considered, there can be no question as to what the intent of the electors was.

The only other question in the case is, whether an elector who has cast a defective ballot can be permitted to testify directly as to his intent. The numerical weight of authority seems to be against the right to examine the elector on that subject. But we have no occasion to go into the question in this case; for if it should be held that the district court ought to have excluded the evidence, the final result would not be affected; for we hold that, upon the facts proven by the competent evidence in the case, the ballots in question should have been counted for plaintiff. The judgment will therefore be affirmed.

INITIALS ON BALLOT: See *People v. Cicott*, 97 Am. Dec. 141, note 158, where other cases in that series are collected.

VOTER'S INTENTION, HOW TO BE ASCERTAINED: See *People v. Saxton*, 78 Am. Dec. 191, note 192, where other cases in that series are collected.

STATE v. CALHOUN.

[72 IOWA, 432.]

TO CONSTITUTE ROBBERY, PROPERTY TAKEN NEED NOT BE ATTACHED TO PERSON of the individual robbed, or in his immediate presence. If a party binds a person in one room, and by violence extorts from him information of the place where his property is in another room, which he then enters, and from which he takes the property, while his victim remains bound in the adjoining room, this is a sufficient taking from the person, within the meaning of the statute, to constitute the crime of robbery.

WHETHER CORD USED BY ROBBER TO BIND HIS VICTIM, while he was engaged in robbing the house, is a dangerous weapon or not, is a proper question to submit to the jury.

INDICTMENT for robbery. The defendant was convicted, and appealed. The other facts are stated in the opinion.

Gesman and Prouty, for the appellant.

A. J. Baker, attorney-general, for the state.

By Court, BECK, J. 1. We will consider and dispose of the objections urged to the judgment of the district court in the order of their discussion in counsel's argument. The court below gave to the jury the following instructions:—

"2. It is provided by our statutes that 'if any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery.'

"3. Under this statutory provision, it is not essential that the stealing and taking, if any, was literally from the person; or in other words, that the property, if any, was on, or attached to, or touching, the literal, physical person of the party alleged to have been robbed; but it is sufficient if the stealing and taking, if any, was done in the immediate presence of such party, and while the property was under the control and in the custody of such party.

"4. If, therefore, you find from the evidence, beyond a reasonable doubt, that the defendant, in this county and state, at a time within three years next preceding the finding of the indictment in this case, did steal and take from the immediate presence of the Nellie Baldwin named in the indictment the property named in the indictment, or some part of it, and that the stealing and taking, if any, was accomplished with force or violence toward said Nellie Baldwin, or by putting her in fear; and you further so find that the property, if any, thus stolen was at the time owned by, or in the possession of, said Nellie Baldwin, and was of value,—then and in such case you should return a verdict of guilty of robbery. But if you do not so find as to these several matters, you cannot find defendant guilty of robbery.

"5. It is not necessary, in order to constitute a stealing and carrying away 'in the immediate presence of said Nellie Baldwin,' that it should have been done (if done) in her immediate view, or where she could see it done. And if you find from the evidence, beyond a reasonable doubt, that the defendant made a violent assault upon said Nellie Baldwin, by choking her and causing her to fall upon the floor of one of the rooms or apartments of her house, and then tied her

hands and feet, for the purpose and with the intention of stealing some money or property in the house; and you further so find that she, through fear of personal violence, told defendant where her money or watch was in an adjoining room or rooms; and you further so find that thereupon defendant passed through a door or doors into such room or rooms, and did there, within hearing of said Nellie Baldwin, take and carry away from said room or rooms the property described in the indictment, or some part thereof; and you further so find that such property was under her immediate control, and that such taking, if any, was against the will of the said Nellie Baldwin, and was without any right, or claim of right, of defendant in said property, and with the intent to permanently deprive her thereof, — then and in such case there would be a sufficient stealing and taking from the 'immediate presence' of the said Nellie Baldwin within the meaning of the law."

"8. It is charged in the indictment that, at the time of the alleged robbery, the defendant was armed with a dangerous weapon, with intent, if resisted, to kill or maim the said Nellie Baldwin, and being so armed, did wound said Nellie Baldwin. If you find the defendant guilty of robbery, you will determine whether this charge in the indictment is sustained. The only evidence relied upon by the state as tending to show that defendant was armed with a dangerous weapon is the evidence tending to show that, at the time of the alleged robbery, defendant had with him the piece of cord or rope introduced in evidence. It is for you to say, from the evidence, whether he did have and use such rope or cord; and if he did, whether the same was a dangerous weapon; and if it was, whether he intended by the use of it (if he did use it), if resisted, to kill or maim said Nellie Baldwin therewith, or did wound her.

"9. A dangerous weapon is one which, from the use made of it at the time, is likely to produce death, or do great bodily harm; and unless you find that said cord or rope was of such a character, you cannot find that defendant was armed with a dangerous weapon. If it was only calculated to produce, from the use made of it (if used), a slight injury upon the person of said Baldwin, then it would not be a dangerous weapon within the meaning of the law."

There was evidence submitted to the jury to which these instructions were applicable.

2. It is insisted that the third, fourth, and fifth instructions are erroneous, in that they hold the crime of robbery may be committed by taking goods not upon the person or in the immediate presence of the individual robbed; the thought of counsel being that though "with force or violence, or by putting in fear," the goods were obtained by the accused from the possession and custody of the prosecuting witness, yet the crime is not robbery, for the reason that the goods taken were found by defendant in a room of the house other than the one in which the violence was used towards the witness for the purpose of extorting from her information of the place where the money and valuables in her possession could be found. The statute defining robbery, which is correctly quoted in the second instruction given to the jury, contemplates the taking of property "from the person" of another. Counsel interpret this language to mean that the property, in order to constitute the crime, must be upon or in some way attached to the person of the individual robbed, or in his immediate presence. The preposition "from" does not convey the idea of contact or propinquity of the person and property. It does not imply that the property is in the presence of the person. The thought of the statute, as expressed in the language, is, that the property must be so in the possession or under the control of the individual robbed that violence or putting in fear was the means used by the robber to take it. If it be away from the owner, yet under his control, in another room of the house, as in this case, it is nevertheless in his personal possession, and if he is deprived thereof, it may well be said it is taken from his person. Goods are called personal property in the law, and presumed to accompany the person. If taken from the owner, this relation of owner and property is surrendered, and the goods are separated from the person. In the case before us, defendant, by violence, bound the prosecuting witness and thereby put her in fear. By this violence, he extorted from her information of the place where she kept her money and watch in another room of the house. Leaving her bound, he went into that room and took the property. We are clearly of the opinion that it was taken from her person in the sense of the words as used in the statute. In support of this conclusion, see the following authorities cited thereon: 2 Bishop's Criminal Law, sec. 975; Wharton's Criminal Law, sec. 1696.

3. Counsel insists that the eighth and ninth instructions are erroneous, in that they submit to the jury the question

whether the cord with which the prosecuting witness was bound is a dangerous weapon. One of the definitions of the word "weapon" is "anything used or intended to be used in destroying or annoying the enemy." A cord is often used as an instrument by robbers to kill or disable their victim; when so used it is properly called a weapon. The instructions correctly submitted to the jury the question whether the cord used by defendant was a dangerous weapon.

4. Counsel insist that the motion for a new trial should have been sustained, on the ground that the attorney for the state, in his argument to the jury, referred to the fact that defendant did not testify in his own behalf. The record fails to support the allegation upon which the motion is based.

5. Another ground upon which the motion for a new trial was based is, that the state's attorney, in the argument of the case, used inflammatory and extravagant language. We think the remarks of the state attorney complained of in this connection are not of such a character as to raise the presumption that defendant was prejudiced in any degree.

We have not all the evidence before us, and no claim is therefore made that the verdict lacks the support of proof. Having considered all objections to the judgment presented in argument by counsel, we discover no ground for disturbing the judgment.

Affirmed.

ROBBERY, WHAT CONSTITUTES: See *Bussey v. State*, 51 Am. Rep. 256; *Hope v. People*, 38 Id. 460; *Stégar v. State*, 99 Am. Dec. 472; *State v. McJannet*, 70 Id. 176, note 178 et seq., where this subject is discussed at length.

HICKMAN v. CRUISE.

[72 IOWA, 523.]

PERSON WHO EARNS HIS LIVING BY FARMING IS FARMER, within the meaning of the exemption laws, although he does not own a farm nor have one leased, and is not doing any specific thing as a farmer on the particular day on which an execution is levied upon his property.

VERDICT SHOULD NOT BE DIRECTED FOR DEFENDANT WHEN THERE IS EVIDENCE tending to sustain the plaintiff's cause of action.

ACTION to recover specific personal property levied upon and taken by the defendant, as sheriff, under an attachment. The facts are stated in the opinion.

Welch and Welch, for the appellant.

Herrick and Dozace, for the appellee.

By Court, SEEVERS, J. At the conclusion of the plaintiff's evidence the defendant moved the court to "direct a verdict for the defendant, for the reason that plaintiff bases his ground of recovery upon the allegation that he was at the time a farmer, earning his living, and that he used the implements or property that is sought to be recovered for the purpose of supporting his family; and the uncontradicted evidence shows that the plaintiff was not at the time a farmer, nor engaged in farming, and that his intention was not to carry on farming, in a reasonable period, within the state of Iowa." This motion was sustained, and the jury returned a verdict accordingly.

As we understand the motion and the ruling of the court, the question whether the plaintiff had started to leave the state was eliminated from the case. The motion is based alone on the thought that the plaintiff was not a farmer. The levy was made on the sixteenth day of March, and the plaintiff testified that he had been engaged in farming, as we understand, the preceding year, but that his lease had expired on the 1st of March, and he had not leased another farm when the levy was made. The plaintiff also testified: "I reside in Hopkinton, Delaware County. Have resided all my life in the state. Am the head of a family. My business is farming, and was at the time of the levy, and prior thereto, and always has been, farming. . . . I used the property in farming, for the support of my family." Now, while it is true the plaintiff was not at the time of the levy engaged in farming, that was his business or vocation by which he earned his living; and although it is true he did not own a farm, nor had he leased one, still he was a farmer. A man may be a farmer, although he is not, on the particular day an execution may be levied on property, doing any specific thing as a farmer, if such is his vocation or business. It may be conceded as true that plaintiff gave other evidence which tended to show that he was not a farmer; still, if the case had been submitted to the jury, and it had been found that he was a farmer, in our opinion the court would not have been justified in setting aside the verdict, and therefore the court erred in instructing the jury as it did.

Reversed.

WHERE PERSON WHO HAD BEEN MERCHANT QUIT BUSINESS, and engaged in settling up his old business, and in doing some farming, it was held that a horse and wagon used by him in both pursuits were exempt: *Kempson v. Baker*, 97 Am. Dec. 158.

INSTRUCTION THAT PLAINTIFF CANNOT RECOVER IS JUSTIFIED only where there is a total failure of evidence: *Claffin v. Rosenberg*, 97 Am. Dec. 336. But if there is no evidence to support the issue, it is the duty of the court to so instruct the jury: *Alexander v. Harrison*, 90 Id. 431, note 438, where other cases in that series are collected.

INDEPENDENCE MILLS CO. v. BURLINGTON, CEDAR RAPIDS, AND NORTHERN R'Y CO., AND MINNEAPOLIS AND ST. LOUIS R'Y CO.

[72 IOWA, 535.]

WHERE COURT INSTRUCTS JURY THAT IF RAILROAD CAR WAS PUT IN PROPER PLACE FOR UNLOADING, the railroad company was not liable on any ground, either as carrier or warehouseman, the company cannot complain of the failure of the court to submit to the jury the question as to its liability as a warehouseman.

LIABILITY OF RAILROAD COMPANY AS CARRIER OF WHEAT IN BULK does not cease until it has placed the car containing it in such a position at the place of destination that it can with safety and a reasonable degree of convenience be unloaded by the consignee. And if the car containing the wheat be left in a position where it cannot be conveniently unloaded, and while there is destroyed by fire, the company will be liable for the loss, although as a physical fact the car could have been unloaded in such position.

TWO RAILROAD COMPANIES ARE JOINTLY LIABLE FOR LOSS OF WHEAT DESTROYED BY FIRE while in transit over the line of one of them, although the contract for its transportation was made with the other company which agreed to carry it over its line and that of another company, different from the one over which it was actually carried.

PETITION IN ACTION AGAINST CARRIER FOR WHEAT DESTROYED WHILE IN TRANSIT, which avers a demand for the wheat, or payment for the same, the number of bushels destroyed, and that the claim is the property of the plaintiff and justly due, demanding judgment for a certain sum, is, in the absence of a motion for a more specific statement, sufficient to support a verdict and judgment for the plaintiff, although it does not in terms aver the value of the wheat.

ACTION to recover the value of a car-load of wheat. The facts are stated in the opinion.

S. K. Tracy, for the appellant, the Burlington etc. Railway Company.

C. E. Ransier, for the appellant, the Minneapolis etc. Railway Company.

Lake and Harmon, and Woodward and Cook, for the appellee.

By Court, ROTHOCK, J. 1. On the twenty-ninth day of August, 1885, Peavy & Co., of Minneapolis, Minnesota, shipped from that place to plaintiff, at Independence, Iowa, a car-load of wheat in bulk. The wheat was ordered by the plaintiff to be shipped by way of the Minnesota and Northwestern railroad, in care of the Illinois Central railway, and the bill of lading issued by the Minneapolis and St. Louis Railway Company provided for a shipment by that route. The Minneapolis and St. Louis Railway Company did not follow such directions, but transported the car to Albert Lea, Minnesota, and there turned it over to the Burlington, Cedar Rapids, and Northern Railway Company, to be hauled by it to Independence. The grain arrived at Independence on the eighth day of September, 1885, and the car was not moved to the Illinois Central depot, where it would have been placed if the shipping order and the provisions of the bill of lading had been observed, but it was placed upon a side-track of the Burlington, Cedar Rapids, and Northern company, and remained there for a time, and was hauled to another place near an elevator, and on the night of September 10, 1885, it was destroyed by the burning of the elevator, over which neither company had any control, and the burning of which was without the fault of either defendant.

Thus far there is no dispute in the facts of the case. The petition seeks to recover of the defendants for negligence as common carriers, and not as warehousemen. It recites the facts as to the requirement that the shipment should be by the Minnesota and Northwestern and Illinois Central roads, and that the wheat was not delivered at the depot of the Illinois Central road at Independence according to the contract of shipment. It appears, however, that the plaintiff had notice of the arrival of the car at the depot of the Burlington, Cedar Rapids, and Northern Railroad Company at Independence, and as nearly all of the evidence in the case was directed to the question whether the car was placed in such a position that it could be conveniently and safely unloaded by the plaintiff, the court in its instructions to the jury held, in effect, that all questions were out of the case excepting one, which was, whether, under the evidence, the responsibility of a common carrier had ceased, and that of a warehouseman begun, before the wheat was destroyed. The jury were advised, in effect, that if the car was put in a suitable place to be unloaded, and the transportation of it was completed when

it was destroyed by fire, the defendants were not liable. The instructions referred to are as follows:—

"5. You are instructed that it was the duty of the railroad companies, defendants, as common carriers, to place the car at Independence where it could be unloaded without a greater expense or risk than is usually incident to the unloading of cars containing like freight at said place, or to place said car at Independence in a position where a reasonable and prudent man, knowing the custom and rules governing the handling of freight at said station, and diligent in removing his property from the railroad, would not decline to receive it; and if you find that at any time after the car of wheat reached Independence on September 8, 1885, it was placed so that the defendants complied with the rule of law laid down in this instruction, then the defendants are not liable in this action. and you will so find.

"6. The evidence tends to show that when the car of wheat first arrived, the drayman, Marquette, who usually hauled like freight for the plaintiffs, complained of the position in which the company had left the car, and that the car containing the wheat was subsequently moved from the position complained of to another position. Now, if you find that subsequent to the first complaint and removal, the plaintiffs, or their agents or employees, did not complain previous to the fire to the agents of the defendants, that the car was in a position where it could not be unloaded without unusual expense, then the agents of the company were justified in assuming that no fault was found with the position of the car, and the defendants would not be liable, and you should so find.

"7. The burden of proof is on the defendants to show, by a fair preponderance of credible evidence, that the car of wheat was placed at Independence, after its arrival and before the fire, in a place where cars containing like freight are usually placed; or that it was placed, after its said arrival and before the fire, in a position where a reasonable and prudent man, in the exercise of due diligence in removing his property from its exposed condition, and knowing the rules and custom of handling and delivering like freight at said station, would not decline to remove it. But if you find that the agents or employees of the plaintiff did not complain a second time, as stated in the last instruction, subsequent to the removal after the first complaint, you are instructed that the law presumes that the plaintiff waived any objections it might have had to

the second or any subsequent position to which the car was removed after the first complaint.

"8. You will not consider any issue made by the pleadings in this action not submitted to you by these instructions. The other issues in the case are withdrawn from your consideration."

It will thus be seen that the court eliminated all questions from the case, excepting that of liability of common carriers.

The defendants complain because the court held them to the strict liability of common carriers, and did not submit to the jury the question as to liability as warehousemen. We think there was no error in this, because the court plainly instructed the jury that if the car was put in a proper place for unloading, there was no liability on any ground, either as carrier or warehouseman.

2. We come now to what we regard as the main question in the case. It is this: Was the jury warranted in finding, from the evidence, that the transportation of the wheat was ended when it was destroyed by fire?

It has been held by this court, and must be regarded as the settled law of this state, that the liability of a railway company as a common carrier of freight terminates, and its responsibility as a warehouseman commences, upon the arrival of the goods at the point of destination, and depositing them in the warehouse of the company to await the convenience of the consignee: *Francis v. Dubuque etc. R'y Co.*, 25 Iowa, 61; 95 Am. Dec. 769; *Mohr v. Chicago etc. R'y Co.*, 40 Iowa, 579. The principle upon which these cases were determined is that, when a common carrier has transported the property to its destination, and done all of the acts pertaining to the carriage of the goods, his liability as such carrier ceases. There can, however, be no uniform rule as to what acts are necessary to be done to fulfill the carrier's contract. His duties must vary according to the nature of the consignment. In the cited cases, the property was such that it could be removed from the cars and placed in an ordinary depot warehouse. But in the case at bar the grain was in bulk. It was not expected by the parties that it would be removed from the car by the railroad company and carried into its warehouse. It was its duty to place it in such a position on its track that it could be safely, and with a reasonable degree of convenience, unloaded by the plaintiff; and it was the right of the plaintiff to refuse to unload the car until it was so placed; and as long as the defend-

ant, in obedience to its obligation as a common carrier, was required to move the car upon the track, its liability as such common carrier did not cease.

The jury were fully warranted in finding that when the car arrived at Independence it was placed upon a track where it was unsafe and inconvenient to unload, and that, when requested to move it elsewhere, a removal was made, and the car was placed upon scales adjoining the elevator which was burned, so that it could not be unloaded on one side because of the elevator, and could with difficulty have been unloaded from the other side because of the scale-beam and its attachments, and that plaintiff's servants again complained of the location of the car.

The defendants' counsel claim that the jury found specially that the car was on the side-track at a convenient point for unloading into wagons long before the fire. The following, among other special interrogatories, were submitted to the jury: "1. Was the car of wheat in question placed where it could be safely unloaded, on the day it arrived at Independence station? Answer, No. 2. Was it placed where it could be got at to unload it when the car was moved from the place where it was first left? A. Yes. 3. Did the scale-frame interfere with the unloading of the car? A. Yes." The claim of counsel is based upon the answer to the second interrogatory. But that answer must be taken in connection with the answer to the third interrogatory, and when taken together, the jury answered, in effect, that as a physical fact the car could have been unloaded, but that the scale-frame would have interfered with the work of unloading.

3. It is claimed that the plaintiff ought not to have been allowed to recover, because the right of recovery as set forth in the petition is based upon the violation of the contract to make the shipment by way of the Illinois Central railroad. We think that, as the petition avers that the wheat was lost or destroyed while in the possession of the Burlington, Cedar Rapids, and Northern Railroad Company, and before delivery, the averments thereof are sufficient to support the action; and we are of the opinion that the evidence was sufficient to authorize a finding that the defendants were jointly interested in the contract of shipment sued upon.

4. Lastly, it is claimed that no recovery ought to have been had because the petition neither alleges that plaintiff was damaged in any sum, nor that the wheat was of any value.

The petition claims of the defendants six hundred dollars as justly due from them to the plaintiff. It gives the number of bushels of wheat which were destroyed, and avers a demand for the wheat, or payment for the same; avers that the claim is the property of the plaintiff, and demands judgment for six hundred dollars, interest and costs. It is true, the petition did not aver in terms the value of the wheat, but in the absence of a motion for a more specific statement, we think it was sufficient.

Affirmed.

DELIVERY OF GOODS, WHAT SUFFICIENT TO TERMINATE LIABILITY OF CARRIER: See *South etc. Ry Co. v. Wood*, 46 Am. Rep. 309; 41 Id. 749; *McMasters v. Pennsylvania R. R. Co.*, 8 Id. 264; *Graves v. Hurstford etc. S. B. Co.*, 9 Id. 360, note 375; *Shenk v. Philadelphia S. P. Co.*, 100 Am. Dec. 541, note 545, where other cases in that series are collected; *Branbow v. North Carolina R. R. Co.*, 98 Id. 76.

CONNECTING CARRIERS, LIABILITY OF FOR LOSS OF GOODS: See *Packard v. Taylor*, 37 Am. Rep. 37; *Lowenbury v. Jones*, 31 Id. 379; *Nashua Lock Co. v. Worcester etc. R. R. Co.*, 2 Id. 242; *Burroughs v. Norwich etc. R. R. Co.*, 1 Id. 78; *Candee v. Pennsylvania R. R. Co.*, 94 Am. Dec. 568, note 570, where other cases in that series are collected.

WARFIELD, HOWELL, & Co. v. MARSHALL COUNTY CANNING COMPANY

[73 IOWA, 666.]

CORPORATION MAY PREFER ONE CREDITOR TO ANOTHER, and the fact that the preference is exercised in favor of directors or share-holders of the corporation is immaterial, although such directors and share-holders, and all of them, may have voted for their own preference, and for the execution of the mortgage given to secure the indebtedness to themselves.

CORPORATION MAY SELL ITS PROPERTY TO ANOTHER CORPORATION, and if the consideration for the sale is the assumption and payment by the corporation purchasing of mortgage debts of the corporation making the sale, to the full value of all the property conveyed, such sale will not be set aside in favor of other unsecured creditors of the corporation that made the sale; nor will they have any lien on the property for which full value has been paid in good faith.

MORTGAGE BY CORPORATION TO SECURE DEBT IN EXCESS OF LIMIT allowed by its articles of incorporation is not for that reason invalid, although given to the directors and share-holders as preferred creditors.

STOCKHOLDER OF CORPORATION IS LIABLE TO ITS CREDITORS ONLY TO EXTENT OF HIS UNPAID SUBSCRIPTION to the capital stock.

OFFICERS AND SHARE-HOLDERS OF CORPORATION, WHO ARE PREFERRED CREDITORS, ARE NOT ESTOPPED, as against unsecured creditors thereof, to deny that the capital of the corporation was a certain sum, from the

fact that the manager of the company used letter-heads on which were printed the word "capital," followed by that sum, where it is not shown that such creditors relied on and extended credit to the corporation on the faith of the representation.

ACTION in equity. The mortgage referred to in the opinion was alleged in the petition to have been executed to the officers, directors, and principal stockholders of the company. The Gilman Canning Company, mentioned in the opinion, was organized by the mortgagees and others. The relief asked was, that the mortgage and deed referred to in the opinion be declared null and void, and that the plaintiffs' judgment be declared a lien on the property of the Marshall County Canning Company, superior to the claim or lien of the defendants. The court below dismissed the petition, and the plaintiffs appealed. Other facts are stated in the opinion.

C. C. and C. L. Nourse, for the appellant.

Caswell and Meeker, for the appellees.

By Court, **SEEVERS, J.** Substantially, there is no dispute as to the facts. The authorized capital of the Marshall company was twenty-five thousand dollars, but the paid-up stock was six thousand dollars, and it was practically all absorbed in purchasing the required real estate, the erection of buildings, and procuring machinery and other property for the prosecuting of the business of the Marshall company. Money was required to prosecute such business. The corporation had neither money nor credit, but money was borrowed upon the notes or indorsements of the individual stockholders, and used by the corporation. The latter never paid the money so procured, and such indebtedness continued to exist from the time the money was first procured, for a less or greater amount, until the execution of the mortgage. The business of the corporation was not profitable, nor was the paid-up capital sufficient to purchase the required machinery or appliances.

1. Counsel for the appellant contends that the "organization of the company by the stockholders of the old corporation was for the purpose of transferring the property of the old organization in fraud of creditors." It is not alleged in the petition that such sale and conveyance was made with the intent and for the purpose of defrauding creditors, but that what was done amounted to an unlawful preference. In other words, we understand the claim to be that what was

done amounts to a legal fraud, as distinguished from an actual fraudulent intent. If wrong in this, we find from the evidence that the defendants did not intend to defraud any one. Such was not their purpose, but they honestly believed they had the legal right to procure the mortgage, and thus secure themselves, although other creditors of the corporation were not secured or paid; and whether they had this right is the important question in this case. The evidence satisfies us that the Marshall County company was indebted to the mortgagees in the sum of ten thousand dollars at the time the mortgage was executed, and that such indebtedness was contracted in good faith. The mortgagees, it is true, were officers and stockholders of the corporation; but notwithstanding this fact, they had the right to procure the corporation to execute the mortgage, although other creditors of the corporation are unable to obtain payment of their indebtedness. Corporations can make contracts and transfer property, possessing the same powers, in such respects, as private individuals: Code, sec. 1059. Such is the rule in the absence of a statute, and therefore it has the right to prefer one creditor to another: 2 Morawetz on Private Corporations, sec. 802. The fact that the preference is exercised in favor of directors or share-holders of the corporation is immaterial, although the director or share-holder may have voted for the proposition, and the security given was to secure an indebtedness to himself: *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461. It is insisted that this case is distinguished from those cited, because of the fact that all of the officers, directors, and share-holders voted in favor of the creation of the indebtedness and the execution of the mortgage. We do not believe this can or should make any difference. The material question is one of right and power; and if this exists, it is immaterial whether this power is exercised by all or a part of the persons in whom the power is vested.

Our attention is directed to the case of *Hibernia Insurance Co. v. St. L. & N. O. Transportation Co.*, 13 Fed. Rep. 516, as being an authority in favor of the plaintiff; but in that case the old corporation transferred to the new all of its property. Such is not true in the case at bar. When the mortgage was executed, the Marshall County company owned a large amount of property which was not included in the mortgage, and which was afterwards converted into money, and applied in payment

of legitimate indebtedness. Besides this, it fairly appears in the cited case that the new corporation did not pay indebtedness of the old corporation equal to the value of the property transferred.

We find the fact to be that the Gilman company assumed and agreed to pay the debts of the Marshall County company to the full value of all property conveyed. Unless restrained by statute, a corporation may sell and dispose of its property, and one corporation may purchase the property of another corporation, both possessing, in this respect, the same power as individuals: Morawetz on Private Corporations, secs. 335, 420. This being so, and no fraudulent intent being shown, it is difficult to see why the sale in the present case should be set aside, or that the plaintiff should have a lien on the property of the Gilman company for which it paid full value. Especially is this true when at least a fair proportion of the stock of that company was contributed by persons who had no connection with the Marshall County company, and who became such share-holders in good faith. While it is true that the share-holders in the Marshall company are share-holders in the Gilman company, they did not become so because of their being share-holders in the former; but they paid money for the stock in the latter company. It is true, there seems to have been an understanding or expectation that they might have stock in the Gilman company for a portion or all of their stock in the Marshall company, depending upon a settlement of the business of the latter; that if there was anything left after the payment of the debts of the latter belonging to share-holders, which came into possession of the Gilman company, such share-holders should have stock *pro rata* for the value of the stock in the latter company. We do not understand that there is any such property; therefore the Gilman company obtained no property from the Marshall company except what it paid full value for. We cannot see, therefore, upon what principle it can be held that the Gilman company should pay the debts of the Marshall company. It may be conceded that, if it appeared that the mortgagees received stock in the Gilman company, in consideration for property conveyed to it, which was in excess of the indebtedness assumed, the plaintiff would be entitled to relief to the extent or value of such excess.

2. The proposition is stated by counsel, but it is not, we think, insisted upon, that the mortgage is *ultra vires*, because the articles of incorporation provide "that it shall be compe-

tent to mortgage the property of the company to the amount of not exceeding one half of the capital stock actually paid in." This question was determined adversely to appellant in *Garrett v. Plow Co.*, before cited: Morawetz on Private Corporations, secs. 696-718.

Counsel for appellant insist that the defendants are estopped from setting up the claim that the Marshall company was indebted to them in the amount for which the mortgage was executed, upon the ground that the share-holders who subscribed and paid for the six thousand dollars of paid-up stock agreed, as to creditors, to stand an assessment, whenever it became necessary for the extension of their works, so as to increase their capital to twenty-five thousand dollars. The manager of the corporation, when writing to its correspondents, used letter-heads on which it was stated, "Marshall County Canning Company. Capital, \$25,000"; and this is urged as a further ground of the claimed estoppel. A conclusive answer to the first ground, it seems to us, is that the share-holders fully paid for all stock subscribed for by them. Their contract, therefore, was fully performed. A stockholder in a corporation can be made liable to the creditors of the corporation only to the extent of his unpaid subscription to the capital stock. The conclusive answer to the second ground is, that it is not alleged in the petition that the plaintiff relied on and extended credit to the corporation on the faith of the representation, or that it was believed to be true; nor can such conclusion be drawn from or based on the evidence. Several authorities have been cited by counsel to which no reference has been made, but they all have been read and considered.

The judgment of the district court is affirmed.

CORPORATION MAY PREFER ONE CREDITOR TO ANOTHER: See *Lexington etc. Co. v. Page*, 66 Am. Dec. 165, note 183, where other cases in that series are collected. It may make an assignment for the benefit of all its creditors: *McCallie v. Walton*, 95 Id. 369, note 370. And it is not necessarily dissolved by the making of such an assignment: *Germantown P. Ry Co. v. Filer*, 100 Id. 546.

SALE BY CORPORATION OF ALL ITS ASSETS, EFFECT OF: See *Miners' Ditch Co. v. Zellerbach*, 99 Am. Dec. 300, note 333-338, where this subject is considered at length; *Martin v. Zellerbach*, 99 Id. 365.

MORTGAGE OF CORPORATION GIVEN TO DIRECTORS AND SHARE-HOLDERS, AS PREFERRED CREDITORS: See *Garrett v. Burlington Plow Co.*, 59 Am. Rep. 461, note 466-471.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

NIMOOKS v. WOODY.

[97 NORTH CAROLINA, 1.]

ACCEPTANCE. — **LETTER TO DRAWER WITHIN REASONABLE TIME** before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the party who subsequently takes the bill on the credit of the letter, a virtual acceptance, binding on the person who makes the promise, though he has none of the drawer's funds, if the bill is payable at a fixed time, and not at or after sight.

ASSIGNMENT OF FUND IN DRAWER'S HANDS IS EFFECTED by a sight draft for the whole thereof, of which the drawee has notice while the funds remain in his hands, whether he accepts the draft or not.

ACTION against Woody and Currie, and C. M. Byrd, on the following instruments: —

"WILMINGTON, March 29, 1885.

"C. M. BYRD, Esq., Bunn's Level, N. C.

"*Dear Sir,* — Inclosed find account sales raft timber. We got all we could for your timber, and concluded it was not worth while to hold any longer. If you have not drawn a \$50 draft, you can draw for the net proceeds, \$223.03, at sight. If you have drawn \$50, draw on us for \$173.03. Timber still dull and low, \$2 to \$10.

"Yours, etc.

"WOODY AND CURRIE."

Upon the receipt of this letter the following draft was executed: —

"\$172.53.

FAYETTEVILLE, N. C., April 4, 1885.

"At eight, pay to the order of R. M. Nimocks, \$172.53, balance on timber sales, value received, and charge the same to account of

C. M. BYRD.

"To MESSRS. WOODY AND CURRIE, Wilmington, N. C."

Plaintiff was shown the letter a day or two before the execution of the draft, and a draft drawn by and on the parties for \$50.50, and the one in suit for the residue, named in the letter, was taken by plaintiff upon the faith of such letter. Plaintiff indorsed this draft to the Fayetteville National Bank, who presented it, when it was protested for non-acceptance. Plaintiff then took it up and brought suit May 25, 1885. After dishonor, the drawee paid plaintiff \$72.03, but refused to pay the balance, stating that a mistake of \$100 had been made in Byrd's account when the letter was written. Byrd made no defense, nor was any evidence offered by the other defendants, who moved to dismiss the case on grounds which appear from the opinion.

E. R. Stamps, for the defendants.

By Court, SMITH, C. J. 1. The jurisdiction was in the justice, for the action is founded upon contract, and is not in tort, as misconceived by the appellants.

2. The objection that the appellants are not parties to the draft, nor the plaintiff to the letter, and that its admission as evidence was an erroneous ruling, is in all these aspects untenable, as will be seen in the inquiry into the defendants' liability to the plaintiff.

3. The interval between the date of the letter and the date of the draft, it not appearing that any harm has occurred to the drawees by the delay, is not unreasonable under the circumstances, so as to work their exoneration.

The main question, then, is, whether the appellants incurred responsibility to the plaintiff, who accepted the draft of Byrd upon the assurance contained in the letter shown him, and on which he relied, of prompt payment on its presentation, there being money then in their hands upon their own representation sufficient for the purpose.

It must be admitted that there is some diversity in the rulings in England and in this country, as to whether a promise made in writing to accept and pay a draft for a specified amount, yet to be drawn, and communicated to one who upon the faith of such promise becomes the payee of it, when drawn

for value, is an acceptance in law, so that an action upon it can be maintained by the latter. In the case of *Bank of Ireland v. Archer*, 11 Mees. & W. 383, it is decided that such a result does not follow, and there are decisions in some of the state courts to the same effect. But in the well-considered and elaborate opinion of Chief Justice Marshall in *Coolidge v. Payson*, 2 Wheat. 63-75, speaking in reference to the distinction between the cases of a bill drawn upon and a bill drawn after such promise, it is said: "The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterwards." The general rule is then declared in these words: "Upon a review of the cases which are reported, the court is of opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

The same doctrine is laid down in *Towneley v. Sumrall*, 2 Pet. 170-185, by Justice Story, and it is said to prevail when there are no funds of the drawer in the drawee's hands, and the action may be brought, says Nelson, J., in *Cassell v. Daws*, 1 Blatchf. 835, by any one who makes advances on the bill upon such assurance of payment. To the same effect is 1 Daniel on Negotiable Instruments, secs. 559-561; and 1 Edwards on Bills, sec. 567, and following; *Plummer v. Lyman*, 49 Me. 229; *Steman v. Harrison*, 42 Pa. St. 49.

We are referred, however, to section 562 in Mr. Daniel's first volume, who says: "It seems applicale [the rule] to the cases of bills payable on demand, or at a fixed time after date, and not to bills payable at or after sight; for in order to constitute acceptance in the latter, a presentment is indispensable, since the time the bill is to run cannot otherwise be ascertained."

This may be true in a strict sense, and actual presentment and acceptance being necessary to determine the time of payment, as in a sight draft, days of grace are allowed; but the presentation in this case has been made, and not only acceptance refused, but liability denied altogether. The present draft is in precise accord with the direction in the letter, and the plaintiff has advanced his money upon the assurance of

its being met, and the governing general rule is, that the drawee thereby undertakes the obligations of the acceptor, and we see no reason why it should not be so in any form of a draft made in pursuance of the terms of the promise, though in the exceptional cases an actual presentation may be necessary to fix the time of payment and authorize the action upon it as an acceptance.

But if a recovery be obstructed upon this ground, it may be effected upon the basis of an assignment of the fund in the drawee's hands. It is a transfer of the whole, not of a part, made known to the appellants before any other disposition is made of it, or any change taken place unfavorable to their liability. The point is expressly decided in *Wheatly v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522, the opinion being delivered by Justice Field, now of the supreme court of the United States, in which he says: "The order, though not available against Strobe for want of acceptance, operated as an equitable assignment of the demand of Wheatly to Howell. It was given for an antecedent debt, and for the full amount of the demand against Strobe. The consideration was valuable, and there was no splitting of the amount due into different and distinct causes of action; and in such cases, it is well settled that an order, whether accepted or not, operates as an assignment of the debt or fund against which it is drawn."

Following this ruling, Mr. Daniel says that "it seems to be settled by the authorities, that if drawn for the whole amount, it [the draft] operates as an equitable assignment, which will take precedence of any subsequent lien or charge upon them; and that after notice to the drawee will bind him": Daniel on Negotiable Instruments, sec. 431.

As an equitable assignee, then, the action can be maintained upon an implied contract to pay.

There is no error. Judgment affirmed.

ACCEPTANCE OF BILL MAY BE MADE BY LETTER before or after the bill is drawn though the holder was not induced by such letter to take the bill: *Read v. Bush*, 41 Am. Dec. 253, note 256.

PORTER v. WESTERN NORTH CAROLINA R. R. Co

[97 NORTH CAROLINA, 68.]

WHEN ISSUES OF FACT NOT RAISED BY PLEADINGS are submitted to the jury without objection, the presumption is that they were submitted by consent; and though such submission is irregular, objection cannot be raised for the first time in the appellate court.

VERDICT IS GENERAL WHEN JURY RESPONDS affirmatively or negatively to the issues submitted, and it is special when it finds the facts, and leaves the court to apply the law to them.

VERDICT, WHEN MAY BE GENERAL AND WHEN SPECIAL. — In actions for recovery of money only or specific real property, the jury may render a general or special verdict, in their discretion. But in all other cases they may be directed to find a special verdict in writing upon any or all of the issues; and in all cases the court may instruct them, if they find a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon, — this, under section 409, code of North Carolina.

SERVANT KNOWING HIS FELLOW-SERVANT TO BE NEGLIGENT, and unfit for the common service, who continues in such service, will be held, in the absence of anything to the contrary, to have assumed the extra hazard as to his fellow-servant to be guilty of contributory negligence, and to have waived his right to redress against the master in case of injury arising to him from that servant's reckless act.

IF FINDINGS ARE CONTRADICTORY, no judgment can be rendered on the verdict; and if one is entered, a new trial must be ordered.

ACTION for damages. The complaint charged that D. Donavin, plaintiff's intestate, was in the employ and service of the defendant company; that while employed, defendant carelessly, negligently, and recklessly managed and ran one of its engines over the body of said intestate, and thereby instantly killed him. Defendant admitted the employment of Donavin, but claimed that he came to his death through his own negligence, or through the negligence of the engineer running the engine, who was his fellow-servant, or from some unknown cause or accident for which defendant is not liable. The issues submitted to the jury, and the responses thereto, are as follows: "1. Was the plaintiff's intestate injured by the unskillful, careless, and negligent management of one of the defendant's engines by the defendant? Answer. Yes. 2. Did plaintiff's intestate contribute to his own injury by his negligence? Answer. No. 3. Was the death of plaintiff's intestate caused by the negligence of Jack Edwards, an engineer and fellow-servant of plaintiff's intestate? Answer. Yes. 4. Did the defendant company retain the said Edwards in its service after the defendant company had knowledge, or by reasonable diligence might have ascertained, that said Edwards was

incompetent, inefficient, or reckless in running his engine? Answer. Yes. 5. Did the plaintiff's intestate know that said Jack Edwards was incompetent, inefficient, or careless in running an engine, and with such knowledge, remain in the service of the defendant till he was killed? Answer. Yes. 6. What is plaintiff's damage? Answer. Nine thousand five hundred dollars." The other facts are stated in the opinion.

John Devereux and J. H. Merrimon, for the plaintiff.

Charles M. Dabee, and Schenck and Price, for the defendant.

By Court, MERRIMON, J. It is true, as contended by the counsel of the appellant on the argument here, that the pleadings did not raise the fourth and fifth issues submitted to the jury in this case. It was therefore irregular to submit them, but it does not appear in the record that the appellant objected to them at the trial, or at all, in the court below, nor is error assigned as to them, nor can error in such respect be assigned in this court, as has been decided in many cases.

The verdict, in response to these issues, must be accepted and acted upon for any proper purpose in connection with the judgment given, or that ought to have been given, by the court. Improper issues should be objected to in apt time, and if it should turn out that submitting them resulted in prejudice to the party complaining, this would be ground for a new trial. Issues arise upon the pleadings, and the court has not authority to submit others that do not so arise, in its discretion. It is a mistaken notion that seems to be entertained by some of the profession, that the statute confers such power. Generally, however, when issues of fact not raised by the pleadings are submitted to the jury without objection, the presumption is that they were submitted by consent of parties: *Henry v. Rich*, 64 N. C. 379; *Miller v. Miller*, 89 Id. 209; *Waddell v. Swann*, 91 Id. 108; *Wright v. Cain*, 93 Id. 296; *Willis v. Branch*, 94 Id. 142; *Patton v. Railroad*, 96 Id. 455; *Smith v. McGregor*, 96 Id. 101.

The counsel for the appellee, conceding that these issues were not raised by the pleadings, insisted that the statute (Code, sec. 409) authorized the court, in its discretion, to submit them, and that although the finding of facts in response to the fifth issue is inconsistent with the general verdict in response to the second issue, the former must prevail, as provided by the statute (Code, sec. 410), and therefore the court properly gave judgment for the defendant.

This argument, it seems to us, is based upon a misapprehension of the nature, extent, and effect of the findings of the jury in response to the several issues submitted, and particularly the second and fifth.

The statute (Code, sec. 408) prescribes that "a general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court." This implies that the verdict is general, when the jury, under appropriate instructions from the court as to the law applicable, simply respond affirmatively or negatively to the issues submitted,—that it is special when it finds the facts in evidence pertinent to and bearing upon the issues submitted,—when it states the facts, and leaves the court to apply the law pertinent and arising upon them: *Morrison v. Watson*, 95 N. C. 479.

Ordinarily, the verdict of the jury is general, upon the issues submitted to them, but this is not necessarily so. The statute (Code, sec. 409) prescribes that, "in every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues; and in all cases, may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes."

It thus appears that in certain specified classes of cases, the jury may, in their discretion, render a special verdict. In all other cases, the court may direct them to find a special verdict in writing upon all or any one or more of the issues; and it may instruct them, if they render a general verdict, "to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." The purpose of this provision is to settle some important, leading question of fact, arising in the case, that is not made an issuable fact in the pleadings, but is one which the court deems material to a just determination of the case. In such case, the fact is found, and the court will determine its legal bearing and effect.

In the present case, six issues were submitted to the jury. Their verdict upon each was general,—a simple affirmative

or negative response. The jury did not purport to render, nor did they in effect render, a special verdict. Nor did the court instruct them to find a special verdict in writing upon all or any of the issues; nor did it instruct them to "find upon particular questions of fact," stated in writing; nor did they make such findings.

All the issues submitted are supposed to have arisen upon the pleadings, and the verdict as to each is general, and must be so accepted by the court.

The statute (Code, sec. 410), which provides that "where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly," does not apply, because, as we have seen, there is no special finding upon a question or questions of fact, as contemplated by it. The findings are all upon issues, and not questions of fact.

If the court intended, as allowed by the statute, to instruct the jury to find upon "particular questions of fact," embraced by the third, fourth, and fifth issues, it should have stated the questions in writing; and the jury should have found the facts, many or few, as in case of a special verdict, so that the court could have determined their legal effect and application, and moreover, so that, if error had been assigned in such respect, this court could, upon appeal, have corrected any error that might have appeared.

Then, treating the verdict as to all the issues as general, did it warrant the judgment the court gave in favor of the defendant? We think it did not. Manifestly, the findings upon the first, second, and sixth issues, without regard to the findings upon the other issues, entitled the plaintiff to judgment. It appears from these that the defendant carelessly, negligently, and tortiously injured the intestate of the plaintiff, as alleged, and that the intestate did not contribute to his own injury by his negligence, and the damages are ascertained.

But the findings upon the third, fourth, and fifth issues are inconsistent with the findings just referred to, and thus the verdict upon all the issues, as a whole, is rendered not only inconsistent and contradictory, but unintelligible, and no judgment ought to be rendered upon it.

It is first found broadly and without qualification that there was no contributory negligence on the part of the intestate of the plaintiff, and in response to the fifth issue, in legal effect,

that there was such negligence. For if the intestate and engine-man were fellow-servants, as the jury found they were, and the latter was negligent and unfit for the common service, and dangerous in doing such service to his fellow-servants, and the intestate well and clearly knew these facts, and with such knowledge continued in the service of the defendant while the engine-man did likewise, he was thus negligent himself, and when he encountered the injury complained of, occasioned by the negligence of the engine-man, nothing else appearing, by such negligence on his part he contributed to his own injury: *Crutchfield v. Railroad Company*, 78 N. C. 300; *Johnson v. Railroad Company*, 81 Id. 453; *Pleasants v. Railroad Company*, 95 Id. 195; *Wood on Master and Servant*, secs. 385, 422, 423; 3 *Wood on Railway Law*, secs. 394, 396, *Whitaker's Smith on Negligence*, note on page 397.

The fifth issue, and the finding of the jury upon it, is indefinite and unsatisfactory as an ascertainment of contributory negligence. At what time the intestate first knew of the incompetency and dangerous carelessness of the engine-man, the extent of his knowledge in these respects, and how long he had such knowledge before he suffered the injury complained of, do not appear. And the evidence upon which this finding is based is quite as indefinite and unsatisfactory. Nevertheless, as the issue and the finding of the jury upon it were treated as sufficient, and there was no objection, the verdict must be deemed a finding that there was contributory negligence. So that there are two contradictory findings. Which is the true one? Which shall the court accept as true? Why shall it accept one and not the other? Such findings leave the issues of fact undetermined, and it is not the province of the court, unless by consent, to determine them. The material facts are contradictory, and no judgment can be rendered. In such a case, the court will direct a new trial: *Bank v. Alexander*, 84 N. C. 30; *Mitchell v. Brown*, 88 Id. 156; *Hilliard v. Outlaw*, 92 Id. 266; *Turrentine v. Railroad Company*, 92 Id. 638; *Morrison v. Watson*, 95 Id. 479.

The learned counsel for the appellee insisted, on the argument, that the facts ascertained by the verdict upon the fifth issue, did not, in legal effect, constitute contributory negligence, but was, in effect, a finding that the intestate of the plaintiff, "agreed with the defendant company to risk the consequences of this dangerous contact and association" with the engine-man.

We cannot accept this view as correct. The law implies that the servant agrees to accept the ordinary risks incident to the business or service which he engages to do, but it does not imply that he shall or will take upon himself extraordinary hazard, and especially such danger as the employer is bound to prevent and avert by the exercise of reasonable diligence on his part. Generally and ordinarily, the master and servant, in the contract of employment between them, do not contemplate extra hazards and unusual dangers arising in the course of the service to be done, and hence the law does not imply, in the absence of express stipulation to that effect, that the contract embraced such hazards. So far as appears, the contract of employment between the intestate of the plaintiff and the defendant was the ordinary one in such cases. The parties did not contemplate extra and unusual hazards, nor such dangers arising from the rash and dangerous acts of the unfit engine-man, nor does the contract embrace them by implication.

The most that can be said in this respect is, that the intestate, by remaining in the defendant's service after he had certain knowledge of the unfitness of his fellow-servant engine-man, — the defendant having the like knowledge, — assumed the extra hazard as to his fellow-servant, and thereby waived his right to redress against the defendant in case of injury arising to him from that servant's reckless act. But by thus remaining in the defendant's service, he was negligent as to his own safety, and by such negligence contributed to his own injury, in the absence of anything to the contrary, just as certainly as if he had used, in the course of his employment, a defective and dangerous locomotive, or other defective implement, knowing the same to be dangerous, and had suffered injury from the same by reason of such defects.

It was the intestate's duty to avoid such hazard; he was negligent in failing to do so, and thus unfortunately contributed to the loss of his life.

The verdict and judgment must be set aside, and a new trial had according to law.

To that end let this opinion be certified to the superior court. It is so ordered.

SMITH, C. J., concurred in the opinion that judgment upon the verdict was properly rendered in favor of defendant, but dissented from that part of the judgment setting aside the verdict as self-contradictory, and thought it necessary to state his reasons therefor, as he did not consider the issues numbered

2 and 5 to be in conflict. He says: "The finding upon the first three issues, as explained in the third, presents the case in which one servant is injured—in the present instance loses his life—by the negligence and want of due care of another, fellow-servants of the same master, for the consequences of which the authorities are uniform in holding that the common principal is not liable. Such hazards incident to the same are voluntarily assumed in entering the service under an implied, involved in the actual, contract. Contributory negligence on the part of the injured is not a material element in the exoneration, for if not present, and the injury proceeds from the sole carelessness of the employee, the result is the same. To remove these obstacles to a recovery, and to bring home to the defendant its own negligence, the fourth and fifth issues were framed and passed on, from which it appears that the engine-man had before shown his unfitness for the place,—indeed, a recklessness in conducting his engine; and this was alike known to the deceased and to the company, and yet the former remained in the service, without complaint made to the employing company." He then stated that corporations employing servants in the different branches of its business must provide safe and suitable machinery, and employ only fit and competent employees to discharge the duties required of each for the security of all, and that this necessarily included just reparation, and the discharge of servants whose unfitness is apparent from their subsequent conduct. Continuing, he says: "As the employer acts alone in these matters, his duty to those whom he employs imperatively demands the exercise of proper care in these particulars for the safety of the others, and not less the protection of his own interests. So, too, the servants who detect any defects in the machinery, or incompetency in those with whom they associate in the common undertaking, should communicate the fact to the employer, that he may provide a remedy. If, with this information, and without making it known to the employer, any one remains without complaint in the service, it is assumed that he adds the risk from this new source of danger to those which he took upon himself when he entered into the service."

To show the law governing employer and employed in relation to accidents caused by defective machinery or known incompetency of co-employees, he quotes from Wharton on Negligence, section 221, as follows: "In this country the exception has been still further extended, and we have gone so far as to hold that a servant does not, by remaining in his master's employ, with knowledge of defects in machinery he is obliged to use, assume the risks attendant on the use of such machinery, if he has notified the employer of such defects, or protested against them in such a way as to induce a confidence that they will be remedied. The only ground on which this exception can be justified is, that, in the ordinary course of events, the employee, supposing that the employer would right matters, would remain in the employer's service, and that it would be reasonable to expect such continuance. But this does not apply to cases where the employee sees that the defect has not been remedied, and yet continues to expose himself to it. In such case, on the principles heretofore announced, the employee's liability in this form of action ceases." He then quotes from Wood on Master and Servant, section 379, as follows: "The fact that an employee has complained of a defect, and believes, or has reason to believe, that the defect will be remedied, unless a promise to repair is made, does not of itself entitle him to recover for an injury received from such defect. The real question is, whether the plaintiff was guilty of negligence in performing the service, after knowledge of the defect,—no promise to repair it being given,—does not operate to relieve him

of the imputation of negligence, but may have directly the opposite effect. It is wholly a question of care or negligence, and if the servant knew, or ought to have known, the danger, and a person of ordinary prudence would have regarded it dangerous to remain, he cannot recover, even though he has complained of the defect." His honor stated that the law relating to the use of defective machinery and the employment of incompetent servants, and their retention after their incompetency was known, is substantially the same as that given *supra*.

To show that the decisions in North Carolina are in accord with the principles above stated, the learned judge quotes from *Crutchfield v. Richmond etc. R. R. Co.*, 78 N. C. 300-302, where Bynum, J., says: "If the servant remains in the master's employ, with knowledge of defects in machinery he is obliged to deal with in the course of his regular employment, he assumes the risks attendant upon the use of the machinery, unless he has notified the employer of the defects, so that they may be remedied in a reasonable time. But if he sees that the defects have not been remedied, yet continues to expose himself to the danger, the employer's liability ceases." And again, in *Johnson v. Richmond etc. R. R. Co.*, 81 Id. 453-458, where it is said that "if the servant knows of defects in the machinery, and remains in the service, he cannot recover for injuries caused by such defects, unless he has informed his superior, and the latter fails to remove them." In *Cowles v. Richmond etc. R. R. Co.*, 84 Id. 309-311, the plaintiff was a workman under the conductor, who was also engineer of the train, and the former was injured while obeying an order of the latter to apply the brake on one of the cars. Ruffin, J., said: "In entering the service of the defendant, the plaintiff might be and is presumed to understand and take upon himself every risk naturally pertaining to such service, and amongst others, that which may proceed from the possible carelessness of such fellow-servants as he must know, from the very nature of the employment, he may be required to associate with in the performance of his duties. But no such presumption is or should be raised of his willingness to assume the risk growing out of the possible negligence of one who, while a servant to their common master, stands to himself in the light of a superior, whose commands and directions he is bound to obey." But his honor said that as plaintiff's intestate was not employed on a running train, controlled by the engineer, but in a different service, the qualification to the general rule above stated has no application here; that the company had knowledge of the unfitness of the engineer, or by inquiry might have obtained it, so that deceased need not necessarily have given the information; that it was not for such purpose that he should have complained, but to show that he was unwilling to expose himself to the recklessness of the officer's conduct, and that the danger might be removed; that his failure to make complaint, and remaining in the employment after he knew of the unfitness of the officer, amounted to an assumption of the new risk, as well as those incidental to the employment; for though the employee might be unfit in some respects, still he might possess other qualifications rendering his retention important to the principal and fellow-servants, so that the master by retaining him, and the servants by assenting thereto, assume the extra risks, leaving the parties in an unchanged condition in respect to accidents arising from this cause. In support of this rule, he quotes from Beach's *Contributory Negligence*, section 140, where the author says: "If the servant, when the defect or danger is brought to his knowledge,—when he discovers that the machinery, buildings, premises, tools, or any other instrumentalities of his labor are unsafe or unfit, or that

a fellow-servant is careless or incompetent, — continues in the employment without protest or complaint, he is deemed to assume the risks of such danger, and to waive any claim upon his master for damages in case of injury. . . . Failure to speak promptly is such contributory negligence as will bar a recovery from the master in case he is injured by the defect in the machinery, or the unfitness of the servant. . . . But if, when the master is notified of the defect in the machinery, or of the incompetence in the servant, he promises to remedy it within a reasonable time, the servant will not be presumed to have consented to it, or to have waived his rights, by remaining for such reasonable time in the service."

His honor, summing up the facts, states that they show that the intestate knew that the engineer was reckless, that he communicated this to his wife, and that he apprehended danger from such engineer while in the tunnel; knowing these facts, he accepted the situation, and continued in the service until he lost his life. The learned judge was of opinion that the finding that the intestate was not guilty of contributory negligence, nor directly at fault in bringing about the injury to himself, was not in conflict with the finding that with knowledge of the engineer's unfitness he remained in the master's service, thus waiving any right to damage resulting from such incompetency. Though the servant, by continuing in the employment after discovering his fellow-employee's unfitness, might be guilty of contributory negligence, even if he exercised every care and attention towards himself at the time of receiving the injury, still the true ground for the non-liability of the master is the employee's voluntary exposure of himself to the new risk, and his assumption of it.

In conclusion he says: "In a remote degree, negligence may be imputed to the servant in not quitting the service when he knows of the retention of an incompetent fellow-servant or associate; but it is not easy to see how this can be deemed contributory to an accident brought about by no agency of his own, and wholly the fault of another. Such is the sense in which the jury must be understood in finding that there was no contributory negligence on the part of the intestate. I think, therefore, the judgment ought to be affirmed."

SERVANT KNOWING HIS CO-SERVANT TO BE UNFIT for the common employment, but remaining in the service, cannot recover: *Framier v. Pennsylvania R. R. Co.*, 80 Am. Dec. 467, and note 470; see also *Thrope v. Missouri R'y Co.*, 58 Am. Rep. 120, note 125.

FOR INJURY OF SERVANT, CAUSED BY HIS OWN NEGLIGENCE, he cannot recover from his master: *Wormell v. Maine C. R. R. Co.*, 1 Am. St. Rep. 321; nor is the master answerable to the servant for those dangers which are the result of common knowledge, or which may be readily seen by common observation: *Smith v. Peninsular Car Works*, 1 Id. 542; *Fisk v. C. P. R. R.*, 1 Id. 22.

VERDICT MUST FIND WITH CERTAINTY for or against every party to the suit: *Wood v. McGuire*, 63 Am. Dec. 246.

PAGE v. BRANCH.

[97 NORTH CAROLINA, 97.]

WIDOW WHO REMAINS ON HER HUSBAND'S LAND does not hold adversely to the heirs.

POSSESSION OF ONE CO-TENANT is the possession of all.

TENANT IN COMMON CANNOT MAKE HIS POSSESSION ADVERSE to his co-tenant except by actual ouster; or in the absence of that, it takes twenty years' adverse possession to bar the co-tenant's right of entry.

DEED BY CO-TENANT TO STRANGER, though it purports to convey the entire estate, has no other effect than to invest the vendee with the rights of the vendor, and does not change the relation of co-tenant which has subsisted between the vendor and his co-tenant. This rule extends to the purchaser of the interest of a co-tenant at execution sale, and to the vendee of such purchaser.

PARTITION. Plaintiffs claimed to be tenants in common with defendants of the land in dispute, while defendants claimed to be sole seised. The jury found plaintiffs entitled to four fifths of one sixth of the property, and that defendants were not sole seised. Plaintiffs introduced a deed from one McClure and wife, dated March 19, 1847. The evidence showed that Dennis Branch entered under this deed, and died in 1847, leaving his widow in possession until 1866, when she conveyed to A. B. Branch, son of Dennis, and he conveyed to defendants, who were also sons of Dennis Branch. It was also shown that D. Branch's widow paid a debt against the land, and claimed it adversely until she conveyed it, and that no dower was assigned to her. It was also shown that A. B. Branch and defendants, his vendees, claimed the land adversely from 1866 until July, 1883. The plaintiffs produced deeds to show that they had succeeded to the interest of heirs of Dennis Branch to the extent of the interest claimed by them. The other facts appear from the opinion.

W. B. Rodman and W. B. Rodman, Jr., for the plaintiffs.

By Court, DAVIS, J. The only question for our consideration is: Did the court err in refusing to instruct the jury that seven years' adverse possession under the deed of 1866 would be sufficient to bar the plaintiffs' title, even if Rebecca Branch had not claimed adversely to the heirs at law or their grantees?

The charge of his honor and the finding of the jury render it unnecessary for us to consider the character of Rebecca Branch's possession,—it was not adverse: *Grandy v. Bailey*, 13 Ired. 221.

In 1866, the plaintiffs and defendants were tenants in com-

mon, and they continued so to be, unless the possession of the defendants under the deed of Rebecca Branch barred the plaintiffs. "The possession of one tenant in common is, in law, the possession of all his co-tenants, because they claim by one common right. When, however, that possession has been continued for a great number of years, without any claim from another who has a right and is under no disability to assert it, it will be considered as evidence of title to such sole possession; and where it has so continued for twenty years, the law raises a presumption that it is rightful and will protect it. . . . At any time, then, during the twenty years, the tenant out of possession had a right, and might have enforced it by an action": *Black v. Lindsay*, Busb. 468.

One tenant in common cannot make his possession adverse to his co-tenant. He is presumed to hold by his rightful title, and it will take twenty years' adverse possession to bar the co-tenant, and a deed by a co-tenant to a stranger, though it purport to convey the entire estate, has no other effect than to invest the vendee with the rights of the vendor, and does not change the relation of co-tenant, which had subsisted between the vendor and the co-tenant. This rule extends to the purchaser of the interest of a tenant in common at execution sale, and to the vendee of such purchaser, as was decided in *Ward v. Farmer*, 92 N. C. 93. In that case, the interest of W. W. Ward, one of the co-tenants, had been purchased at execution sale by one Day, and Day, by deed professing to convey the whole of the land, sold to the defendants, Farmer and Southerland, who entered into possession on the 1st of January, 1873, and occupied and used the same to November, 1883, claiming it as their own, under their deed from Day, no one else being in possession, clearing and otherwise improving it, occupying it by marked and visible lines publicly, and paying the taxes.

The court below instructed the jury that no possession short of twenty years, except after an actual ouster, would be adverse as against tenants in common, and this was sustained. Ashe, J., in the opinion in *Ward v. Farmer*, 92 N. C. 93, in referring to *Day v. Howard*, 73 Id. 4, in which the same principle is held, calls attention to the fact that Chief Justice Pearson, who delivered the opinion in *Day v. Howard*, *supra*, fixed the time at ten years, instead of twenty, and says: "It will be observed that this was a mere *obiter dictum*, and the learned chief justice only says he is inclined to the opinion,

and expresses none, because that state of facts is not presented." And Bynum, J., in *Covington v. Stewart*, 77 Id. 151, says: "It has never been held in North Carolina that a less period than twenty years' adverse possession by one tenant in common will raise the presumption of ouster and sole seisin; and this, whether the possession was held by the tenant in common himself, or by him a part of the time, and until his death, and then continued by his heirs for the residue of the twenty years"; and referring to *Day v. Howard*, *supra*, adds that his honor who tried the case of *Covington v. Stewart*, *supra*, in the superior court, "was probably thrown from his guard by a suggestion made by the chief justice in delivering the opinion in the latter case, that where a tenant in common conveys to a third person, an adverse possession of ten years by the purchaser would probably give him a good title, by the presumption of an actual ouster. The point did not rise in that case. . . . But the possession of twenty years, which raises a presumption of title, as the law has been heretofore administered, has now the force and effect of an actual title"; and refers to the statute.

Assuming that the period of ten years, in the case of *Day v. Howard*, 73 N. C. 4, was inadvertently fixed, as is indicated by Justice Bynum and Justice Ashe, it may be stated as well settled in this state that no possession for a period less than twenty years will amount to an ouster of one co-tenant by another co-tenant, or by any one deriving title under another co-tenant. There must be something more than mere possession for a less period than twenty years to constitute an ouster. In *Thomas v. Garvan*, 4 Dev. 223, 25 Am. Dec. 708, Gaston, J., says: "When the law prescribes no specific bar from length of time, twenty years have been regarded in this country as constituting a legal presumption of such facts as will sanction the possession and protect the possessor"; and this has been followed uniformly, unless *Day v. Howard*, *supra*, constitutes an exception: *Cloud v. Webb*, 4 Dev. 290; 25 Am. Dec. 711; *Meredith v. Andres*, 7 Ired. 5; 45 Am. Dec. 504; *Black v. Lindsay*, Busb. 467; *Halford v. Tetherow*, 2 Jones, 393; *Linker v. Benson*, 67 N. C. 150; *Covington v. Stewart*, 77 Id. 151; *Caldwell v. Neely*, 81 Id. 114.

The length of time necessary to raise the presumption of ouster was not the point in *Day v. Howard*, *supra*, and the principle enunciated, and the reasoning of the chief justice in that case, are in harmony with these decisions.

The case of *Baird v. Baird*, 1 Dev. & B. Eq. 524, 31 Am. Dec. 399, though seemingly in conflict with the position here taken, will be found, upon a close examination of the elaborate and exhaustive opinion of Chief Justice Ruffin, to have rested upon a state of facts that amounted to an actual ouster and disseisin, and not upon the simple fact of seven years' adverse possession under color of title, but upon the character of the possession which in that case was attended by circumstances that constitute an actual ouster.

There is no error. The judgment of the court below is affirmed.

POSSESSION OF ONE CO-TENANT IS POSSESSION OF ALL: *Bernecker v. Miller*, 93 Am. Dec. 309, and note 311; until the contrary is proved: *Warfield v. Linnell*, 90 Id. 443; *Holley v. Hawley*, 94 Id. 350; *Israel v. Israel*, 96 Id. 571; *Berthold v. Fox*, 97 Id. 243.

DEED BY CO-TENANT OF ENTIRE ESTATE does not constitute an actual ouster of his co-tenant, nor lay the foundation for an adverse holding: *Holley v. Hawley*, 94 Am. Dec. 350, and note 358. Such deed cannot operate to the prejudice of the co-tenant, and the purchaser only acquires the interest of his grantor: *Gates v. Salmon*, 95 Id. 139, and note; *Ballou v. Hale*, 93 Id. 433, note 443; *Holley v. Hawley*, 94 Id. 350. The same rule applies to the sale of the interest of one co-tenant under execution: *Campau v. Godfrey*, 100 Id. 133.

POSSESSION BY ONE CO-TENANT for twenty-six years does not constitute an ouster of his co-tenant: *Warfield v. Linnell*, 77 Am. Dec. 614.

OUSTER AND ADVERSE POSSESSION as between tenants in common, what constitutes: *Warfield v. Linnell*, 77 Am. Dec. 614, and note 623; *Gossom v. Donaldson*, 68 Id. 723; *Israel v. Bodine*, 69 Id. 595, and note.

POSSESSION OF ONE CO-TENANT is presumptively the possession of all; nor is it made adverse by entering under a tax deed, and exercising such acts of ownership as tracing and running lines, paying taxes, and permitting wild grass and timber to be cut from year to year: *Hudson v. Coe*, 1 Am. St. Rep. 288.

STATE EX REL. COLLINS v. GOOCH.

[97 NORTH CAROLINA, 186.]

RECEIVER GENERALLY IS RESPONSIBLE only for the consequences of his own neglect, and is protected when he acts in entire good faith in the management of the estate committed to him; yet when he is appointed and acts as a guardian, and is required to keep the money of his wards safely invested and bearing interest, he is held to the same accountability as an ordinary guardian.

RECEIVER ACTING AS GUARDIAN IS DERELICT IN HIS DUTY when he invests the estate of his ward by deposit in a bank in another state, without security, however solvent the bank may be at the time; and if it afterwards fails, he is liable for the loss.

RECEIVER ACTING AS GUARDIAN MUST RENDER HIS ANNUAL ACCOUNT and report to the court of the manner and nature of such investment as he may have made of the ward's estate, that the court may sanction his acts; and if he fails in this respect, he is liable for any loss arising through such dereliction of duty.

J. T. GREGORY, as receiver, was appointed guardian, without bonds, of two minors, and permitted to expend the income of such minors in their maintenance and education, and required to report his transactions annually to the court, to be passed upon and audited. He received money belonging to his wards, placed it on deposit, drawing interest, in a bank in another state, and received a certificate of deposit therefor, but took no security. The bank failed while the money was so on deposit. The guardian filed annual reports in court, which were approved; but he failed to state in them what investments he had made, or what security he took therefor.

R. O. Burton, for the plaintiff.

W. H. Day, and Mullen and Daniel, for the defendant.

By Court, SMITH, C. J. It is manifest that, there being no guardian, the receiver was appointed to act substantially as such in taking care of and disbursing the fund. He is allowed to expend the income in the maintenance and education of the infants during the succeeding twelve months, and required to make annual returns, "to be passed upon and audited" by the judge presiding. While a receiver generally, as a trustee, is responsible only for the consequences of his own neglect, and is protected when he acts in entire good faith in the management of the estate committed to him, yet the measure of duty and responsibility is to be found in the capacity in which he acts. In this case, he is a *quasi* guardian, required to keep the money safely invested, and bearing interest, which he may expend as income for the infants; so that we may find in the similarity of functions some aid in determining the liability of his office in ascertaining that of guardians.

Now, we think a guardian would be deemed derelict who should thus invest the estate of his wards by deposit in another state, and without security. However solvent may be the person or persons to whom, as principals, money is loaned, it is his duty to require further security: *Boyet v. Hurst*, 1 Jones Eq. 166.

While this is a positive obligation, imposed by statute, it is

a recognition of a safe rule for the preservation of the property, whose whole management is intrusted to the control and discretion of the trustee. Moreover, it was an improvident disposition to place the fund, not only in a bank in another state, but also far from his personal oversight and observation, which were due in order to its preservation.

Furthermore, it is made the duty of the guardian to render his annual account, and report the manner and nature of such investment as he may have made of the trust estate (Code, sec. 1617; *Moore v. Askew*, 85 N. C. 199), to the end that the sanction or direction of the court may be had for every act which could affect the ward or his estate. Is not this duty implied, and as much needed, when the receiver, as a *quasi* guardian, is managing the trust fund? Had he reported the deposit, and been sustained by the judge, he would have had ample protection. It was at his own risk that he neglected to secure this sanction. We do not impute to the receiver any intentional dereliction in the premises, for the unusual order dispensing with bond and securities shows the confidence both of the court and counsel in his personal integrity and fitness for the place, and we have no doubt that it was well merited; but we are indicating and enforcing a statutory rule of fiduciary obligation necessary for the security of fiduciary interests. We are aware of cases — indeed, they are numerous — where a receiver is held justified in using banks as depositaries and disbursing agents, as affording facilities in the settlement of estates, and in transmitting money by bill to distant residents entitled, as in *Knight v. Lord Plymouth*, 3 Atk. 480; *Rowth v. Howell*, 3 Ves. 565. To like effect is the ruling in *Atlantic etc. R. R. v. Cowles*, 69 N. C. 59.

These, however, are acts done in discharge of a duty, to which such agencies furnish great facilities, and are strictly proper. But the present case is different. The receiver insists and takes a security in the form of an assignable certificate, designating, it is true, the character of the fund, as in other cases of making a loan. He leaves the fund for a considerable period, without asking the advice, or making known what he has done to the judge, whose officer he is, and under whose authority he acts. Under the circumstances, we think there has not been that circumspection and vigilance due from the trustee, and that he ought to make good the loss.

Judgment reversed, and judgment for the whole amount. The residue of the judgment will not be disturbed.

GUARDIANS, DUTIES AND LIABILITIES of, in general: *Coffin v. Bramlett*, 97 Am. Dec. 449, and note; *Smith v. Dibrell*, 98 Id. 526, and note.

RECEIVER OF INFANT'S ESTATE: Note to *Cortleyou v. Hathaway*, 64 Am. Dec. 490.

REEVES v. WINN.

[97 NORTH CAROLINA, 246.]

SLANDER. — EVIDENCE OF PECUNIARY CONDITION OF DEFENDANT is admissible in action for slander, if the evidence warrants the imposition of vindictive damages.

SLANDER. — EVIDENCE OF PECUNIARY CONDITION OF PLAINTIFF is admissible in action for slander for the purpose of showing his actual damages, but not for the purpose of awarding him punitive damages.

EVIDENCE OF NATURE OF PLAINTIFF'S BUSINESS, AND VALUE OF HIS PERSONAL SERVICES, is admissible in an action to recover for a personal injury entailing loss of time, as when he has suffered from assault and battery, negligence, or the like, for which defendant is answerable.

ACTION for damages resulting from slander.

E. R. Stamps and C. B. Aycock, for the plaintiff.

W. R. Allen, for the defendant.

By Court, DAVIS, J. We think there was error in admitting testimony as to the pecuniary condition of the plaintiff for the purpose of showing vindictive damages.

In a certain class of cases, slander among them, when the offense is marked by malice, oppression, or gross and willful wrong, the jury may give damages, not simply to compensate the party injured, but vindictive damages to punish the wrongdoer, and to that end it may be competent to show the pecuniary condition of the defendant, as was held in *Adcock v. Marsh*, 8 Ired. 360. If the purpose is to punish the defendant, it will at once occur to every intelligent mind that his pecuniary condition is a matter properly to be considered by the jury in determining the punishment. A verdict for a large sum, rendered against a man of large wealth, would be a less punishment than a verdict for a small sum against a poor man; but we are unable to see how the punishment of the defendant can be determined by the pecuniary condition of the plaintiff. The plaintiff is entitled to a verdict for all the actual damages sustained by him, without reference to the pecuniary condition of himself or of the defendant, and if the conduct of the defendant has been such as to warrant vindictive damages, the jury may add to the actual damages

by giving such additional sum by way of punishment to the defendant as they may deem just; and for the purpose of ascertaining this, there is good reason why they should know the pecuniary condition of the defendant, but none why they should know or consider the pecuniary condition of the plaintiff, unless it can be made to appear that an equal amount of damages, if paid to one man, would be a greater or less punishment than if paid to another. There was a time when the slander of the great and rich was held to be a more aggravated offense and meriting greater punishment than the slander of the humble and the poor, but in this day and country there is no such thing as *scandalum magnatum* on the one side, nor is there on the other any law that discriminates in favor of or against the poor man simply because he is poor. In meting out punishment, whether in imposing fines and penalties on the criminal side of the docket, or giving punitive and exemplary damages for malicious wrongs to individuals in civil actions, it is necessary to know the pecuniary circumstances of the defendant, because a small fine or slight damages might be heavier punishment to a man of small means than a heavy fine or damages would be to a man of wealth; but whether the fine or damages go to a poor man or to a rich man, the punishment is the same to the party who has it to pay. Odgers on Libel and Slander, 292, says: "In fact, although in theory it is the duty of the jury to give such damages as will fairly compensate the plaintiff for the injury he has sustained, yet in justice juries frequently, especially when the defendant has acted with clear and express malice, give vindictive damages, which are clearly meant, not so much as a compensation to the plaintiff for his loss, as a punishment to the defendant for his misconduct." The question is discussed at great length in the notes to the case of *Rome v. Moses*, 67 Am. Dec. 560, cited by counsel for plaintiff; and while the decisions are both ways, it seems pretty well settled by the weight of authority and by reason that in proper cases for vindictive damages the pecuniary condition of the defendant may be given in evidence; but it is there said: "The pecuniary circumstances of the plaintiff are admitted in evidence much less often than those of the defendant"; and the cases relied on are nearly, if not all, for injuries to persons, and it is said that the evidence "is usually admitted, if at all, on the ground that the pecuniary circumstances of the plaintiff are directly involved in estimating the damages caused by the tortious act, the poverty of the

plaintiff making the injury the greater"; as, for instance, where, by an assault or battery, or the gross negligence of the defendant, the plaintiff has been so crippled and disabled as to be unable to work, and in such cases he may show the nature of his business and the value of his personal services, the loss of which may be more disastrous to a poor man than to one of wealth, and these may properly come under the head of actual or special damages, and nearly all the cases cited by the counsel for the plaintiff, and which are referred to in *Rome v. Moses*, *supra*, are of this class.

In *Ware v. Cartledge*, 60 Am. Dec. 489, the pecuniary circumstances of the plaintiff were held to be inadmissible in an action for slander; while in *Clements v. Maloney*, 55 Mo. 352, and *Shute v. Barrett*, 7 Pick. 82, referred to in note to *Rome v. Moses*, *supra*, it was held differently.

The question, so far as our researches go, is an open one in this state, for the pecuniary condition of the defendant, not the plaintiff, was the point decided in *Adcock v. Marsh*, *supra*, and we think the better reason would exclude evidence as to his pecuniary condition, where the only purpose of it is to increase vindictive damages, as in this case. We say only purpose, because there may be cases in which it may be proper in determining his actual damages. There was error in admitting testimony as to the pecuniary condition of the plaintiff, and the defendant is entitled to a new trial.

This renders it unnecessary for us to consider the other exception presented in the record.

There is error. Let this be certified.

PUNITIVE DAMAGES, WHEN MAY BE AWARDED IN SLANDER: *Hosley v. Brooks*, 71 Am. Dec. 252, and note 256; note to *Terwilliger v. Wands*, 72 Id. 426 et seq.; *Snyder v. Fulton*, 6 Am. Rep. 729.

EVIDENCE OF DEFENDANT'S PECUNIARY CONDITION is admissible in slander when plaintiff is entitled to punitive damages: *Hayner v. Cowden*, 28 Am. Rep. 803; *Wilms v. White*, 90 Am. Dec. 118; *Hosley v. Brooks*, 71 Id. 252, and note 256.

DAMAGES.—"Exemplary," "punitive," "vindictive," "compensatory," and "added" damages explained: *Ross v. Leggett*, 1 Am. St. Rep. 608.

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STATE EX REL. SETZER v. SETZER.

[97 NORTH CAROLINA, 322.]

DE FACTO MARRIAGE MAY BE DECLARED VOID AB INITIO, by our courts, for want of mental capacity on the part of one of the contracting parties; but a judgment declaring such marriage void does not render the issue of the marriage illegitimate.

QUESTION AS TO WHETHER DE FACTO MARRIAGE IS VOID AB INITIO for want of mental capacity in the husband must be tried directly, and cannot be raised in a collateral proceeding to render illegitimate the issue of such marriage, claiming as heirs or next of kin to the parties to it.

M. L. McCorkle, for the defendants.

By Court, SMITH, C. J. In the month of August, 1859, Reuben Setzer was married to Sophronia Morcus by a justice of the peace, upon a due observance of all the formalities prescribed by law for entering into that relation. They lived together as husband and wife until the spring of 1862, when, having entered the military service of the Confederate States, the said Reuben lost his life at the battle of New Berne, in this state. The only offspring of the union was the plaintiff, who brings this action as relator upon the bond executed by the defendant, Daniel Setzer, who administered on the estate of the deceased, and the other defendant, one of his sureties, to recover his distributive share of the personal estate in the hands of the administrator. The action was begun by suing out a summons on the thirteenth day of August, 1883.

The answer sets up as a defense (and this is the only matter necessary to be considered), that the intestate was of imbecile mind from his youth up, and had not capacity to understand and enter into the marriage contract, and that, this being absolutely void, the plaintiff, their only child, was not born in lawful wedlock, and could not claim any part of the estate.

The only issue passed on by the jury was as to the intestate's mental capacity to make an effectual marriage contract at the time of its solemnization, and the response was, that he did not have such capacity.

We do not propose to examine the exceptions to the evidence offered, among which was an inquisition taken in 1855, finding the intestate to be a lunatic, and an order appointing a guardian, since the appeal must be disposed of upon the single finding of the intestate's mental incompetency, and its effect upon the relator's right as a distributee.

In *Johnson v. Kincade*, 2 Ired. Eq. 470, a bill in equity was

filed, upon facts very much like those before us, to have declared a nullity a marriage entered into by the plaintiff, on the ground of his idiocy, and it was suggested that as the marriage was void *ab initio*, it was so to be considered whenever the question came up, and the present suit could not be maintained. Ruffin, C. J., asserted the jurisdiction, not only because the courts of equity in this country had succeeded to the functions of the ecclesiastical courts of England, in which this jurisdiction was exercised, but because it was expressly conferred upon the superior courts of law and the courts of equity by law: R. S., c. 39. "The act," he remarks, "creates and confers a jurisdiction over all matrimonial causes, and includes, necessarily, we think, the jurisdiction to pronounce the nullity of a marriage *de facto* for want of capacity." The court thereupon, in this suit between the parties, proceeded to pronounce the marriage "in law null and void for the want, at the time of solemnizing the same, of mental capacity on the part of said Reese, sufficient to understand the nature of and assent to such a contract, and that the said Reese ought to be, and is, set free and divorced from the said Ann."

The same doctrine is reaffirmed in *Crump v. Morgan*, 3 Ired. Eq. 91, 40 Am. Dec. 447, by the same eminent judge in a similar case.

In *Williamson v. Williams*, 3 Jones Eq. 446, a bill was filed for an account against the guardian of the plaintiff, and the answer set up the plaintiff's marriage with one Cashion as a defense. The plaintiff, anticipating the objection, alleged the marriage to be void, because of the *feme's* youth (she was thirteen years of age), the practice of fraud and artifice, with the use of some force in bringing it about, and her want of sufficient understanding to enter into the contract.

The court declined to try the issue thus made, and retained the cause "for further directions, to the end that the plaintiff, if so advised, may institute proceedings in the proper court to obtain a decree of nullity of marriage, after which they will be at liberty to move in this cause."

Delivering the opinion, Pearson, J., after quoting and approving the language used in *Johnson v. Kincade*, *supra*, that it was "convenient and fit in respect to the decent order of society, the condition of parties, and the succession of estates, that the validity of such a marriage should be directly the subject of judicial sentence," says: "And as the legislature has

conferred sole original jurisdiction in all applications for divorce upon the superior courts of law and courts of equity (Rev. Code, c. 39, sec. 1), and pointed out the mode of proceeding, and the rules and regulations to be observed (section 5), and required that the material facts charged in the bill or libel shall be submitted to a jury, upon whose verdict, and *not otherwise*, the court shall decree (section 6), and authorize a decree from the bonds of matrimony, or that the *marriage is null and void* [the Italics in the above are in the opinion], and after a sentence nullifying or dissolving the marriage, all and every the duties, etc., in virtue of such marriage, shall cease and determine, with a proviso as to the legitimacy of the children (section 11).—we do not feel at liberty to decide a question of such grave importance, as a thing collateral or incidental to an ordinary bill for an account, where the trial will be made, without the intervention of a jury, upon depositions which are usually taken in a defective and unsatisfactory manner.” He adds: “The propriety of requiring that fact to be established by the judgment or sentence of a tribunal having sole original jurisdiction is too manifest to require any further observation.” See *Brooks v. Brooks*, 3 Ired. 389.

Now, it is expressly provided in the Revised Statutes, chapter 39, section 9, where it is decreed that “the marriage is null and void,” or for cause not affecting its original validity, as follows: “That nothing herein contained shall be construed to extend to, affect, or render illegitimate, any child or children born of the body of the wife during the coverture.”

A proviso in words essentially the same is found in the Revised Code, chapter 39, section 11, and again in Battle’s Revised Statutes, chapter 37, section 15.

Now, if it is conceded that the validity of a marriage can be questioned in the collateral manner attempted, and when neither of the parties to it is before the court so that it is not a judgment changing their *status*, it can have no greater effect upon the right of offspring than such a judicial sentence, rendered in a direct proceeding, and as those rights are protected in the one case, so must they be in the other.

The present law is more explicit and clear, and as we have had occasion to inquire into its operation in the recent case of *Baity v. Cranfill*, 91 N. C. 293, 49 Am. Rep. 641, we will pursue the subject no further, and content ourselves by declaring the result to be, that the present verdict cannot take from the re-

lator any of his rights, as a son of the intestate, to a share in the latter's estate, nor render his birth illegitimate. The issue was therefore immaterial, and we should direct judgment for an account, but that another defense set up in the answer, to wit, a compromise agreed upon in a former suit by the relator and his mother, has not gone before the jury, the judge deciding that upon the finding as to the marriage the relator could not recover.

There is error, and there must be a new trial involving the other matters of defense, and to that end this must be certified.

VOID MARRIAGES.—This subject is treated fully in the note to *Gathings v. Williams*, 44 Am. Dec. 54, where the rule is laid down that when a marriage is void from any cause its invalidity may be maintained in any court, in any proceedings, between any parties, either in the lifetime or after the death of the parties, and either directly or collaterally. This rule has been followed in the late cases of *Unity v. Inhabitants of Belgrave*, 76 Me. 419, *Bell v. Bennett*, 73 Ga. 784, and *Powell v. Powell*, 18 Kan. 371, 28 Am. Rep. 774, where it is held that when marriages are void for insanity in one of the parties, no special proceedings are necessary to annul them, but that the supposed marriage may be attacked collaterally, either in the lifetime or after the death of the parties. This is undoubtedly the rule when the incapacity of one of the parties to contract results from being married at the time of entering into a second marriage: *Cartwright v. McGowan*, ante, p. 105.

HUMPHREYS v. FINCH.

[97 NORTH CAROLINA, 308.]

WHERE ONLY ISSUE IN CASE is as to the presence of a seal opposite the name of defendant on a note when he signed it, evidence to prove the insertion in the space left open for the purpose of a sum double that agreed upon is not competent. Such evidence is admissible only under a general denial of the execution of the note.

AGENCY TO BIND PRINCIPAL BY INSTRUMENT UNDER SEAL must be created by writing under seal; and a sealed instrument is not binding on the principal when changed by an agent possessing written or oral authority only to act.

PRINCIPAL WHO VERBALLY AUTHORIZES AGENT to fill up a blank in a bond with a specific sum of money, left open and in his hands for that purpose, and then deliver it when completed, is estopped, when this is done and the money is obtained from another acting in good faith and without knowledge, from denying his obligation, and thus perpetrating a fraud upon the holder. Even if the bond is void, still the act of borrowing creates a liability which the principal cannot deny.

WHENEVER ACT IS DONE OR STATEMENT MADE BY PARTY which cannot be contradicted without fraud on his part, and injury to others, whose conduct has been influenced by such act or admission, an estoppel will attach to what otherwise would be mere matter of evidence.

SUIT on note signed by C. L. Heitman and J. W. Finch, the defendant, for three hundred dollars, and introduced in evidence by plaintiff, who had advanced the money on it innocently, and without knowledge of any irregularities or defects in it. Defendant proposed to prove that when he signed the note the amount did not appear therein, and claimed for that reason that he was not liable for the payment of the sum named, and that the note was void as to him; and he also wanted to prove that he had agreed with Heitman to sign a note in blank for him for \$150, and that Heitman filled in the blank for the sum sued for. This testimony was excluded, against the exception of defendant. Defendant denied that the seal opposite his name was affixed by him, or written on the note when he signed it.

Frank Robbins, for the plaintiff.

M. H. Pinnix, for the defendant.

By Court, SMITH, C. J. While the only specific issue submitted to the jury was as to the presence of the seal opposite the name of the defendant when his signature was affixed, and this is found against him, he was not allowed to prove the insertion, in the space left open for the purpose, of a sum double that agreed upon between them. This evidence was not pertinent to the inquiry drawn up, and could only be competent upon a general denial of the execution of the paper. Except for this latter purpose, it was properly excluded, and this may have been the ground of the ruling of the court. But we are willing to consider the question of the effect of such proof, if fully establishing the fact, upon the defendant's liability.

The general proposition is not controvertible that an agency to bind a principal by an instrument under seal (and this includes every essential part of it) must be created, and the authority conferred by a writing, under seal; and this, in actions at law, has been repeatedly ruled, as the cases to which we have been referred abundantly show: *McKee v. Hicks*, 2 Dev. 379; *Davenport v. Sleight*, 2 Dev. & B. 381; 31 Am. Dec. 420; *Graham v. Holt*, 3 Ired. 300; 40 Am. Dec. 408; *Marsh v. Brooks*, 11 Ired. 409; *Bland v. O'Hagan*, 64 N. C. 471.

But while the instrument has no legal force as a covenant of the principal, when changed by an agent possessing written or oral authority only to act, a question arises whether one

who verbally authorizes an agent to fill up a blank with a specific sum of money, left open and in his hands for the purpose, and then deliver it in its completed form, shall be at liberty, when this is done, and money obtained from another acting in good faith, and with no knowledge of the fact, to disavow his obligation, and consummate the fraud upon the holder. In a blended system of law and equity, shall the party who puts the means in the hands of his agent to get money upon a false assurance of his own liability, and with nothing to excite suspicion as to the integrity of the transaction upon the paper or otherwise, be allowed, when the money has been thus obtained upon his credit, to set up the defense, and escape responsibility?

In *Mason v. Williams*, 66 N. C. 565, it is decided that one who has title and knows he has, who is present at a sale of the property as belonging to another, and is silent when it is publicly announced in his hearing, before the bidding begins, that all persons claiming the same are requested to make known their claims, is not at liberty to deny the title acquired by an innocent purchaser at such sale. This was upon a sale of a steam-engine.

In *Saunderson v. Ballance*, 2 Jones Eq. 322, 67 Am. Dec. 218, the same doctrine was in a measure applied to a sale of land, except that the purchaser was required to repay the party estopped the money he paid for the land.

If by such conduct persons are not allowed to set up title to property and cause the loss of the money paid by an innocent purchaser, why should the defendant be permitted to avail himself of the want of sufficient legal authority in the agent to supply the blank in the bond, where, by his own act, he virtually declares to all who may take the paper that such authority has been conferred?

It has accordingly been held, where a defense to an action upon a bond was set up by some of the obligors, sureties, that it was not to be delivered until executed by another surety, of which no indication was seen in the paper or otherwise given, that it could not be available to the sureties: *Dair v. United States*, 16 Wall. 1.

Delivering the opinion, Justice Davis thus declares the law: "Sound policy requires that the person who proceeds on the faith of acts or admissions of this character should be protected, by estopping the party who has brought about this state of things from alleging anything in opposition to the

natural consequences of his own course of action. It is accordingly established doctrine that whenever an act is done or statement made by a party, which cannot be contradicted without fraud on his part, and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence."

To this he adds that "in the execution of the bond, the sureties declared to all persons interested to know that they were parties to the covenant, and bound by it."

This ruling is affirmed in *Butler v. United States*, 21 Wall. 272, and extended to embrace a case where every blank was left in the form of the writing to be filled, and was filled, this being done by the principal, "in the scope of his apparent authority."

But if the bond be a nullity, and no obligation imposed by it upon the defendant, it is not the less true that authority was given to borrow the money upon the face of the paper, not limited, and we see no reason why the act of borrowing does not itself create the liability, even if the attempt to give it in the shape of a covenant proves ineffectual, and this is hardly a departure from the form of the demand in the action.

Its essence is the recovery of the unpaid residue of the money loaned, due on the bond or on the antecedent agreement expressed in it. The invalidity of the bond cannot invalidate the act of borrowing upon the credit of both whose names are subscribed to it, nor remove the liability thus incurred to repay. But it is unnecessary to pursue the inquiry further.

There is no error, and the judgment must be affirmed.

RATIFICATION BY PRINCIPAL OF AGENT'S unauthorized act must be by sealed instrument, if the act of the agent is under seal, in the name of the principal: *Reese v. Medlock*, 84 Am. Dec. 611, and note 614.

PRINCIPAL'S ACTS OPERATING AS ESTOPPEL *in pais* are sufficient to ratify an agent's act under seal, without authority, in the name of the principal: *Reese v. Medlock*, 84 Am. Dec. 611, and note 614.

ESTOPPEL IN PAIS, WHAT ACTS AND DECLARATIONS sufficient to constitute: *Martin v. Zellerbach*, 99 Am. Dec. 365, and note 384; *Simpson v. Pearson*, 94 Id. 577, and note 582; *New York Rubber Co. v. Rothery*, 1 Am. St. Rep. 822; *Piper v. Hould*, 1 Id. 789.

SIMPSON v. HOUSTON.

[97 NORTH CAROLINA, 344.]

LAND ASSIGNED TO BANKRUPT AS HOMESTEAD is exempt from execution for a definite period, against the subsisting and unsatisfied portion of a fiduciary debt which has shared in the distribution of the estate, and the same immunity follows the land into the hands of a mortgagee of the homestead owner, whether his wife joined in the transfer or not.

CIVIL action. The land in dispute was allotted to Simpson in bankruptcy proceedings as a homestead, and afterwards conveyed by himself and wife to one Wittkouski by mortgage, with power of sale. The latter conveyed it to another party, and by mesne conveyances it was transferred to the wife of Simpson. The land was afterwards sold and conveyed by the sheriff, under execution, to Houston.

W. P. Bynum, for the plaintiffs.

D. A. Covington, for the defendant.

By Court, SMITH, C. J. The facts stated in the case in the present appeal are essentially the same as those before the court in *Hasty v. Simpson*, 84 N. C. 590, and the rehearsal is entirely unnecessary to an understanding of the matter in controversy. Then the application was to set aside the execution under which the land allotted as a homestead to the bankrupt had been sold, and it was refused. The present action, as suggested in that opinion, is to test the validity of the title acquired by the purchaser at the sale, and is instituted by the plaintiff Simpson and his wife, the latter claiming under a conveyance of her husband to one Wittkouski, and thence by successive deeds to herself.

The deeds were all executed before the sale under execution, which took place in July, 1869.

The lien created by the rendition of judgment at fall term, 1880, of Union superior court, it is insisted for the defendant, overreaches alike the deeds and the adjudication in bankruptcy in June, 1873, and warrants the sale.

We have no hesitation in holding that the land assigned the bankrupt as a homestead is as effectually and fully protected from execution against the still subsisting and unsatisfied portion of the fiduciary debt, which has shared in the distribution of the estate, as against any other.

This remains in force, but not to disturb the effect of the action in the bankrupt court, and expose exempt property to

sale under final process. Can there be any reasonable doubt entertained of the application of the rule to the exempt personal estate? and is this any more protected from creditors than the exempt real estate?

Suppose the bankrupt were to fail to obtain his final discharge, so that all his unsatisfied debts remain in force, can the creditors, after participating in the surrendered estate left, and assenting to the exemptions allotted, seize upon and appropriate that assigned and set apart as exempt to the further payment of their demands? This would be to defeat the operation of the law, and to annul what had been done under it. The creditor, having a fiduciary debt, stands in no better position in this respect than any other creditor when the discharge is refused. The effect in each case is to leave the debts in force, to be made out of any future acquisitions of the bankrupt, and to forbid any access to that which is exempt.

Some doubt was expressed in the opinion in the former case as to the effect of the bankrupt's alienation of the land, and whether the same immunity followed it into the hands of the mortgagee, or ceased at the transfer. This doubt is now to be resolved, and the inquiry answered.

The land itself, as we said in *Markham v. Hicks*, 90 N. C. 204, is set apart to the debtor, protected from the pressure of the claims of creditors for a definite period. Invested with this immunity, and yet capable of alienation by the debtor, the estate passes under the mortgage in the plight and condition in which it was held by the debtor, to be enjoyed unmolested for the specified term. While the primary object of the exemption is to preserve a home for the insolvent and his family, there is nothing in the enactments of this state, or of the United States, in which ours is incorporated, to indicate that the interdict put upon the creditor is to cease by the debtor's transfer, and leave the property at once exposed to sale under execution. If such was intended, why was it not said that the protection should cease when the debtor parted with his property? And this, in effect, would be practically to render it unalienable, for what of value would be obtained by the purchaser when the property could be at once taken and disposed of by a creditor? The value of what is assigned consists in the right to possess and enjoy it, as the assignor could for the same term, and under the same securities. It seems to us that these consequences result from the right of the debtor to dispose of, free from creditors, that which he

thus himself enjoys: *Lamb v. Chamness*, 84 N. C. 379; *Murphy v. McNeil*, 82 Id. 221.

But the present action is in the name of husband and wife, and if the successive deeds were insufficient to divest his rights, the case not showing as did the other that his wife joined in making the mortgage, the *status* of the land as a homestead would be unaltered, and so in neither view could the purchaser, at the attempted sale under execution, get a right of possession to defeat the action.

We are not unadvised of the difficulties that may grow out of this decision should other homestead exemptions be allowed, while perhaps but one is in contemplation of the statutes, but we cannot deny to the insolvent debtor the right to exchange the one homestead for another, and thus better his condition, which would be the practical result of subjecting the alienated exempt land at once to the process of the creditor. Our ruling not only conforms to the letter of the enactment, but best subserves its generous purposes as a relief to the debtor.

There is error, and judgment must be entered for the plaintiffs.

HOMESTEAD. — In the majority of the states a judgment or execution lien does not attach to a homestead; and the homestead may therefore be conveyed or encumbered by a conveyance or mortgage duly executed, and the grantee or mortgagee holds his interest as free from judgment, attachment, or execution liens as it was held by the homestead claimants: *Freeman on Executions*, 2d ed., sec. 218.

STATE v. KELLY.

[97 NORTH CAROLINA, 404.]

PRISONER IN CAPITAL CASES HAS RIGHT TO BE, AND MUST BE, personally present at all times in the course of his trial, when anything is said or done affecting him as to the charge against him, in any material respect.

PRISONER, IN FELONIES LESS THAN CAPITAL, HAS RIGHT to be present at all times during the course of his trial, but it is not essential to conviction that he must be so present at all events.

IN FELONIES LESS THAN CAPITAL, prisoner may waive the right to be present at his trial, but his counsel cannot waive the right for him.

GENERALLY, IF NOT IN ALL CASES, PRISONER'S PRESENCE is required when judgment is entered, especially when the punishment to be inflicted requires it.

PRISONER, IN FELONIES LESS THAN CAPITAL, who is under recognizance for his appearance, and is present when his trial begins, but flees the court while it is pending, waives his right to be present during the remainder of the trial, and is not entitled to be discharged, or to have a new trial, on account of his absence.

INDICTMENT for larceny.

Theodore F. Davidson, attorney-general, for the state.

By Court, MERRIMON, J. That the prisoner in capital felonies has the right to be, and must be, personally present at all times in the course of his trial, when anything is done or said affecting him as to the charge against him on the trial, in any material respect, is not questioned. Indeed, it is conceded that he has such right, and that he must be so present: *State v. Craton*, 6 Ired. 164; *State v. Blackwelder*, Phill. (N. C.) 38; *State v. Bray*, 67 N. C. 283; *State v. Jenkins*, 84 Id. 812; 37 Am. Rep. 943.

As to felonies less than capital, the prisoner has precisely the same right to be present, but it is not essential that he must be at all events.

In the case last cited, Mr. Justice Ruffin said, in reference to the prisoner's right to be present: "Whether the right can be waived in such cases is a point about which the authorities seem to be still divided,—some holding his actual presence to be necessary during the entire trial, and others, that, being a right personal to the accused, and established for his benefit, it might be waived by him."

The rule that he must be so present in capital felonies is *in favorem vitæ*. It is founded in the tenderness and care of the law for human life, and not in fundamental right,—certainly not in this state, as seems to be supposed by some persons. The constitution (art. 1, secs. 11-13) provides, in respect to persons charged with crime, that "in all criminal prosecutions, every man has the right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony, and to have counsel for his defense"; that he shall be put to answer for a criminal charge only "by indictment, presentment, or impeachment," except in cases of petty misdemeanors, and that he shall not be "convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court." These embrace all the provisions of the constitution bearing upon the subject, and surely they cannot be reasonably interpreted to imply that it is essential that the party "put to answer any criminal charge" shall—must—be continuously present at his trial at all events. They do not have such meaning, in terms or effect. The just and reasonable implication is, that the party accused of crime shall have fair opportunity to defend himself in all respects

as allowed and secured by the principles of law, procedure, and statutory provisions applicable to and regulating criminal trials.

While it is settled in this state that the prisoner has the right to be so present during his trial upon a charge for a felonious offense, not capital, there is neither principle nor statute, nor judicial precedent, that makes it essential that he shall be; nor, in our judgment, is there any common principle of justice essential to the security of personal right, safety, and liberty, that so requires. Unquestionably, a party "put to answer any criminal charge may plead guilty, or *nolo contendere*. In such case, he waives a trial altogether. The law allows him to do so, presuming that he has capacity and intelligence to know and be advised as to his rights, and that he will not voluntarily refuse to make defense if innocent. The law in such cases will not compel him to make defense for himself, nor will it make defense for him,—it will only afford him just opportunity to do so for himself; he could not reasonably expect or ask more, nor is there anything in the nature of personal safety or liberty that requires more.

If the prisoner may thus waive his right to a trial altogether, why may he not waive his right to be present at his trial, if he shall for any cause see fit to do so? We can conceive of no just reason why he may not, especially when he is represented by counsel, as he has the right to be, who, it is presumed, is fully advised by him, and can generally take care of his rights better than he could do himself. He may deem it of advantage to him not to be present, or it may be inconvenient for him to be. He may choose to rely upon the skill and judgment of his counsel, and expect that the court will see that the trial is conducted according to law, as it will always do. He may do this, but the waiver should appear to the satisfaction of the court, either expressly or by reasonable implication from what he says, or by his conduct. His counsel cannot waive his right for him: *State v. Epps*, 76 N. C. 55; *State v. Paylor*, 89 Id. 539; *State v. Sheets*, 89 Id. 543; *Price v. State*, 36 Miss. 531; 72 Am. Dec. 195; *Fight v. State*, 7 Ohio, pt. 1, 180; 28 Am. Dec. 626, and numerous cases there cited.

Generally, if not in all cases, the state will require the prisoner's presence when the judgment is entered, especially when the punishment to be imposed requires it.

The court will always require the presence of the prisoner

in court during the trial, as already indicated, if he be in close custody of the law, unless in case the prisoner expressly himself, and not by counsel, waives his right to be present, but the court may require it, if it shall deem it advisable to do so. When, however, the prisoner is not in close custody, but is only under recognizance for his appearance, the court will not begin a trial in his absence, unless he expressly waives his right to be present. If, however, he be under recognizance for his appearance, is present when the trial begins, and afterwards, pending it, he voluntarily and on purpose absents himself,—as when he flees the court,—he must be deemed to have waived his right to be present during the remainder of the trial, while he is so absent, and will not be entitled to be discharged, or to have a new trial, because he was so absent. In such case, he has fair opportunity to be present, and might, and ought, as matter of duty, to be; if he is not, by the strongest if not conclusive implication, he consents to be, and is voluntarily absent, and waives his right. He has no right to flee,—he is bound not to do so,—he flees at his peril, and is justly held to take the consequences of his unlawful conduct. It would savor of absurdity and positive injustice, when a party charged with crime thus flees, to allow him to take advantage of his own wrong, and obtain his discharge or a new trial! A party charged with a felony less than capital has the right to give bail and be at large, unless at the trial the court shall order him into close custody. In such cases, if the defendant fly, pending the trial, the court is not bound to stop the trial and discharge the jury, and thus give the defendant a new trial. To do so would compromise the dignity of the court, trifle with the administration of justice, and encourage guilty parties to escape. The defendant has no right, fundamental or otherwise, that renders such absurd practice and procedure necessary.

It appears that the defendant in this case was not in close custody,—that he was under recognizance for his appearance, and present when his trial began.

In the course of the trial, when the jury were going into court to render their verdict, he fled the court, and was not present when it was received and entered by the court. The court properly held that this was not ground for a new trial. In such a case, it might, however, in its discretion, grant a new trial for just cause, as when the defendant is ignorant

and frightened, and was prompted by fear to fly, if it appear that he might have suffered prejudice by such flight.

There is no error. Let this opinion be certified to the criminal court according to law. It is so ordered.

SMITH, C. J., dissented.

NECESSITY AND RIGHT OF ACCUSED to be personally present during the whole of his trial: *Younger v. State*, 98 Am. Dec. 791, note 798; *Cook v. State*, 31 Am. Rep. 31. Waiver of such right: *Price v. State*, 72 Am. Dec. 195, note 201; *State v. Jenkins*, 37 Am. Rep. 643.

STATE v. PEARSON.

[97 NORTH CAROLINA, 484.]

DECISION OF OFFICERS OF ELECTION in favor of the right of a party to vote, in the absence of fraud and collusion, secures the voter immunity from criminal liability for illegal voting, even if it should appear afterward that he was not entitled to vote.

INDICTMENT for illegal voting.

Theodore F. Davidson, attorney-general, for the state.

By Court, MERRIMON, J. The findings of the facts by the special verdict in some respects are not as definite and satisfactory as they should be; but we think that it sufficiently appears that there was no question of the defendant's right to vote, except upon the ground that he had been convicted of the crime of manslaughter. As to that, he had been pardoned by the governor. His right to vote had been challenged. He at once appeared before the registrar and judges of the election, at the time and place as required by law, and frankly submitted to them the question of his right to vote, saying, as he did so, if he "had the right to vote, he wanted to vote, but if they decided he had not a right to vote, he would not vote, as they were the ones to decide." It was the duty of the registrar and judges to hear and decide the question thus submitted. It does not appear affirmatively that they did deliver any formal decision, and enter the same in a book or on paper. This was not necessary. It was sufficient if they decided. Their proceedings were summary and informal. The presumption is, they did decide. The registrar did not erase his name from the books, as he was required to do if the challenge was sustained. The defendant was afterwards allowed

to vote without question or further challenge, the same judges receiving his vote, and the registrar being present. It was their duty to challenge his vote on the day of election, if they had reason to believe or suspect that he was not qualified.

So that we think it sufficiently appears that the registrar and judges of election did decide that he had the right to vote.

This decision, however erroneous, if honestly made, and so acted upon by the defendant, gave him the right to vote in contemplation of the statute making it criminal to vote illegally, although the rightfulness of his vote might afterwards be questioned in any proper civil action or proceeding. While the decisions of the registrar and judges of election in respect to the qualifications of electors are very important, and should be made upon vigilant inquiry, care, scrutiny, and deliberation, they are not final and conclusive. They are intended to facilitate the right of the elector entitled to vote, and secure an honest and just election, subject to the authority of any proper jurisdiction to inquire into and decide upon the lawfulness of any vote or any number of votes given. But their decision in favor of the right of a party to vote, in the absence of fraud and collusion, must have the effect of securing the voter immunity from criminal liability, if it should afterwards appear that he did not have the right to vote. It would be unjust and monstrous to establish a tribunal, charged with jurisdictional functions, to decide questions that might arise as to the right of one claiming the right to vote at an election, and in case of a decision in his favor, and he voted, to make him amenable criminally, and subject to prosecution! The statute does not so provide.

It is not alleged or suggested that the registrar and judges of election and the defendant acted in bad faith in this case, and the former having decided that the defendant had the right to vote as he did, he was not guilty of the offense charged against him.

This renders it unnecessary for us to decide upon the legal effect of the pardon mentioned in respect to the defendant's eligibility as an elector, and we express no opinion in that respect.

This case is unlike the cases of *State v. Boyett*, 10 Ired. 336, and *State v. Hart*, 6 Jones, 389. In these cases, the judges of election did not decide in favor of the right of the parties respectively to vote, or at all,—they voted in the absence of any

decision. The learned judges who delivered the opinions of the court in them said, however, that if there had been a decision in favor of the right to vote, the defendants would not have been guilty. There is no error.

OFFICERS OF ELECTION exercise ministerial functions, and their decisions are for most purposes not conclusive of the rights of the parties: *People v. Love*, 63 Barb. 545; *People v. Van Cleave*, 53 Am. Dec. 60.

STATE v. YOPP.

[97 NORTH CAROLINA, 477.]

OWNER OF PROPERTY HOLDS IT subject to the implied obligation that he will so use it as not to prevent others from having their property, and enjoying the just use and benefit of it, and so as not to destroy, abridge, or injure the rights of the public.

LEGISLATURE MAY, SUBJECT TO CONSTITUTIONAL LIMITATIONS, prescribe just and reasonable regulations and restraints upon the use which an owner makes of his property, so as to protect the rights of the public, and of others, to use their property.

LEGISLATURE HAS COMPLETE POWER to provide proper and reasonable police regulations in respect to highways, persons going upon and over them with vehicles, horses, and other motive power, to protect the roads, and the safety and comfort of passengers going over them.

OWNER OF PARTICULAR KIND OF VEHICLE, as a bicycle, which, from its peculiar form or appearance, or from the unusual manner of its use, frightens horses, or otherwise imperils passengers over a road, or their property, has no right to use such vehicle on the road, and the legislature may regulate the use of it.

STATUTE FORBIDDING USE OF ANY BICYCLE, tricycle, or other non-horse vehicle upon a road, without the express permission of the superintendent of such road, is not unconstitutional, as tending to destroy property, or deprive the owner of the proper and reasonable use of it.

COURTS CANNOT DECLARE STATUTES REGULATING USE OF HIGHWAYS VOID, or interfere with their operation, unless they are so manifestly unjust and unreasonable as to destroy the lawful use of property.

WHERE USE OF PROPERTY CONSTITUTES NUISANCE, the legislature may destroy it.

NO MAN CAN SO USE HIS PROPERTY as to create a nuisance, or have property which is a nuisance where it is situated.

STATUTE REQUIRING PARTICULAR THING TO BE OR NOT TO BE DONE, and leaving its exercise to the judgment and discretion of a designated agent, does not vest an arbitrary discretion in him; it only vests a lawful discretion, which must be exercised in a lawful manner, as he is amenable to the statute for abusing the discretion placed in him.

Attorney-general, and Stedman and Weill, for the state.

Russell and Ricaud, for the defendant.

By Court, MERRIMON, J. The power of government,—commonly called the police power,—to regulate the conduct of individuals in the exercise of their personal rights, and the use of property, with the view to secure the just enjoyment of right, of whatever nature, of every individual, to promote the public convenience, safety, and common good, is essential, and, as well, very great and comprehensive in its nature and extent. It is founded very largely in the maxim, *Sic utere tuo ut alienum non lædas*, and also, to some extent, that other maxim of public policy, *Salus populi, suprema lex*, and it is of almost universal application in regulating the interests of society within the jurisdiction of the state. It is too well settled to admit of serious question, that every person is subject to it in his person and property. And however absolute his rights to and ownership of property may be, he holds it subject to the implied obligation that he will use it in such way as not to prevent others from having their property, and enjoying the just use and benefit of it, and as will not destroy, abridge, or injure the rights of the public. The legislature in the exercise of this power may, subject to any constitutional limitations, prescribe just and reasonable regulations and restraints, in order to secure such important ends, and enforce them by such proper penalties and other means as it may deem expedient and wise.

The extent of this power has not been defined with precision. Indeed, it seems to be practically impossible to do so, because of the vast variety of conditions and circumstances governing its application. We are not, however, embarrassed by any question in this respect here. It is clear that the legislature has complete power to provide proper and reasonable police regulations, and to amend or alter them from time to time, in respect to the highways of the state, and persons going upon and over them with their vehicles, horses, and other motive power, with a view to protect the roads, and the safety and comfort of passengers going over them. The power is constantly exercised, and it is prudent and necessary to do so, as common experience everywhere proves. Many persons are more or less selfish, and seek their own advantage, and consult their own convenience, fancy, or pleasure, without proper regard for the like rights of others,—sometimes at their expense; and hence legal restraints and regulations are necessary.

As we have seen, no man has the right, in the use of his own

property, of whatever nature, to use it so as to injure another in the just use of his, or the exercise of his personal rights. Hence there is no reason why the owner of a particular kind of vehicle, which, because of its peculiar form or appearance, or from the unusual manner of its use, frightens horses, or otherwise imperils passengers over the road, or their property, shall be allowed to use such vehicle on the road. He has no right to use it to the prejudice or injury of others who are lawfully exercising their rights in the use of their property.

If it be said, when shall one person be restrained in doing as he will with his own property?—from going, for example, on the highway with his own vehicle of whatever kind?—the answer is, whenever in the ordinary lawful course of things in that connection he would, by the use of his property,—his vehicle in the case suggested,—interfere materially in any respect with another in the ordinary, lawful use of his property or rights. He might be restrained in one place, and not in another; he might go upon one highway, and not upon another; he might go upon one highway at one time, and not at another; he might be restrained under one class of circumstances, and not under another,—in all such cases the restraint depending on the different attendant circumstances, as perhaps the numbers and kinds of persons passing over the highway, the kinds of roads, the character and purposes of the highway, its use at one time as different from the same at another, and the like considerations. The person thus restrained might be affected adversely in the use of his property,—disappointed in his cherished wishes, in the indulgence of his fancy, in taking pleasure or recreation, perhaps as to his substantial interests,—but these must all give way to the extent necessary to allow others to have and enjoy their lawful rights, however these may arise, to the exercise of the power of government to prescribe such regulations and restraints.

In the case before us, the statute (Pr. Acts, 1885, c. 14) forbids every person "to use upon the road of said company a bicycle, or tricycle, or other non-horse vehicle, without the express permission of the superintendent of said road," etc. The purpose of this statutory provision is not to destroy the defendant's property,—his bicycle,—or to deprive him of the use of it, in a way not injurious to others, but to prevent him from using it on a particular road,—that mentioned,—at a particular time or season, when it would, by reason of its peculiar shape, and the unusual manner of using it as a means of loco-

motion, prove injurious to others,—particularly women and children, constantly passing and repassing in great numbers over the particular road mentioned, in carriages and other ordinary vehicles drawn by horses.

The evidence tended strongly to show that the use of the bicycle on the road materially interfered with the exercise of the rights and safety of others in the lawful use of their carriages and horses in passing over the road. In repeated instances, the horses became frightened at them, and carriages were thrown into the ditches along the side of the road. It was not uncommon for horses to become frightened at them, and become unruly, if the evidence is to be believed.

The statute did not deprive the defendant of the use of his property,—he might have gone another way, he might have gone at an opportune time, with the express permission of the superintendent of the road. In any case, he had no right to go, using his bicycle, at the peril of other people, he giving rise to such peril. The statute did not therefore, in any just sense, destroy his property, as contended, or deprive him of the proper and reasonable use of it; nor was such its purpose. Its purpose was lawful, and in our judgment it does not provide an unreasonable police regulation,—certainly not one so unreasonable as to warrant us in declaring it void. Such statutes are valid, unless the purpose or necessary effect is not to regulate the use of property, but to destroy it.

As we have said, it is the province of the legislature to decide upon the wisdom and expediency of such regulations and restraints, and the courts cannot declare them void, or interfere with their operation, unless they are so manifestly unjust and unreasonable as to destroy the lawful use of property, and hence are not within the proper exercise of the police power of the government. Courts cannot regulate the exercise of this power: they can only declare the invalidity of statutes that transcend its limits. The exercise of this power does not extend to the destruction of property, under the form of regulating the use of it, unless in cases where the property, or the use of it, constitutes a nuisance. In such cases, if the owner of the property suffers injury, it is such as happens in the illegal use of it, or because the property itself, in its nature or application, is unlawful, and it is *damnum absque injuria*. No man has a right to use his property so as to produce a nuisance, or to have property which is a nuisance where it may be situated.

It is further objected that the statute leaves it to the arbitrary discretion of the superintendent of the road named to allow or disallow persons to use "a bicycle or tricycle, or other non-horse vehicle," on it. This is a misapprehension of the true import of the provision cited. The discretion vested in the superintendent is not arbitrary. He is made the agent of the law, as well as superintendent, and he is bound to exercise the discretion vested in him honestly, fairly, reasonably, and without prejudice or partiality, for the just purpose of effectuating the intention of the statute. If there be times or seasons or occasions when persons wishing to use bicycles or other like vehicles embraced by the prohibitory clause of the statute in question, it is his plain duty to allow them to do so at such times. The authority is not his; he is simply made the agent of the law for a lawful purpose, and he is amenable as such for any prostitution of the power so vested in him, and the creation of the discretion implies that there may be occasions or times or seasons when bicycles may be used on the road.

It not infrequently happens that statutes require particular things to be done, or not to be done, that must be made to depend upon the judgment—discretion—of a designated agent or commissioner or officer, and the discretion in such cases is not arbitrary: it is lawful, and must be lawfully exercised.

The learned counsel for the appellant directed our attention to the case of *Yick Wo v. Hopkins*, 118 U. S. 356. That case, in our judgment, has no application here. The court declared a city ordinance void, upon the ground that its manifest purpose was not a just and reasonable regulation, but unlawful, and the discretionary powers conferred upon certain authorities of the city were purely arbitrary,—intentionally so,—and therefore unlawful and void. And the same may be said of *Mayor etc. of Baltimore v. Radecke*, 49 Md. 217, cited in the case above mentioned. In our case, the purpose of the statute is obviously a lawful one,—a proper regulation of the use of property,—and the designation of the agent, and the discretionary power conferred upon him, is for the lawful purpose of effectuating the just intent of the statute, and he is amenable, as we have indicated above.

There is no error. Let this opinion be certified to the criminal court of the county of New Hanover according to law. It is so ordered.

PARTY MUST SO USE HIS OWN PROPERTY as not to injure another: *Fish v. Dodge*, 47 Am. Dec. 254.

NO ONE CAN MAINTAIN NUISANCE on his own land: *Norris v. City of Peoria*, 89 Am. Dec. 392.

LEGISLATURE MAY DESTROY PROPERTY TO ABATE NUISANCE: *Thellus v. Porter*, 52 Am. Rep. 173.

LAW OF ROAD—RIGHT TO ITS USE BY PERSONS: *Note to O'Malley v. Dorn*, 73 Am. Dec. 404-410.

STATE v. WALTERS.

[97 NORTH CAROLINA, 492.]

UNDER PENAL STATUTE PRESCRIBING PUNISHMENT for crime by fine or imprisonment, the prisoner cannot be both fined and imprisoned.

"OR" IN CRIMINAL STATUTE cannot be interpreted to mean "and," when the effect is to aggravate the offense or increase the punishment.

WHERE PRISONER HAS LOST HIS APPEAL through a failure to perfect it, but has been granted a writ of *certiorari* as a substitute, the effect of granting the writ is to stay the execution and entitle the prisoner to bail.

Theodore F. Davidson, attorney-general, for the state.

G. V. Strong, *E. R. Stamps*, and *R. T. Gray*, for the defendant.

By Court, MERRIMON, J. The defendant was convicted of the offense of slandering an innocent woman, in violation of the statute (Code, sec. 1113), which prescribes that "every person so offending shall be guilty of a misdemeanor, and fined or imprisoned, in the discretion of the court." The court gave judgment that the defendant be imprisoned for the term of twelve months, and fined the sum of one thousand dollars.

It is insisted that this judgment is erroneous, and we are clearly of that opinion. The statute in plain and positive terms prescribes that the punishment in such cases shall be a fine or imprisonment,—either, but not both. There is nothing in its terms or phraseology, as it appears in the code or in it as originally enacted (Acts 1879, c. 156), that affords ground for interpretation, and we suppose that the learned judge who gave the judgment inadvertently failed to notice that the terms of the statute prescribing the punishment are only in the alternative. Moreover, it may be added that the word "or" in criminal statutes cannot be interpreted to mean "and," when the effect is to aggravate the offense or increase the punishment. If there be reasonable doubt, the

accused party is entitled to the benefit of the doubt. This is the rule of justice as well as mercy: *State v. Kearney*, 1 Hawks, 53; *State v. Mitchell*, 5 Ired. 350.

There is therefore error, and the judgment must be reversed, and judgment entered against the defendant according to law.

It appears that the defendant took an appeal from the judgment mentioned and referred to above, but he failed to perfect the same, and hence it failed. At the present term, he applied for the writ of *certiorari* as a substitute for the appeal lost, and it was allowed, and thus the case is in this court. As the appeal was not perfected, the defendant was committed to jail in execution of the judgment, and is now in prison. His counsel insists that as the writ of *certiorari* has been so allowed, he is not now in jail in execution of the judgment, and he has the right, as he is charged with a bailable offense, to give bail and be at large, pending the case in this court.

The statute (Acts 1887, c. 191, sec. 1) above cited, while providing that an appeal in criminal actions shall not have the effect of vacating the judgment appealed from, further provides that upon perfecting the appeal as now required by law, either by giving bond or in *forma pauperis*, "there shall be a stay of execution during the pendency of the appeal." So that if the appeal taken had been perfected, the defendant would have been entitled to have bail during its pendency. The writ of *certiorari* is in lieu of and a substitute for the appeal, and only serves that purpose. The appeal having been lost, the case could have been before this court for the correction of errors only by and through the writ of *certiorari*, employed as such substitute: Code, secs. 544, 1234; *State v. Lawrence*, 81 N. C. 522; *State v. Swepson*, 82 Id. 541. It must, therefore, be treated as having the effect of an appeal as to the stay of execution, — certainly from the time it was granted.

The obvious intent of the statute is, that the execution shall be stayed until opportunity shall be afforded according to law to have alleged errors corrected by this court. In cases like this, the writ of *certiorari* would poorly serve the purpose of a substitute for an appeal, if it failed to so operate as to stay the execution. Indeed, in some cases it would prove utterly futile, because, pending the case in this court, the judgment might be completely executed. The law does not contemplate or allow such an unjust and unreasonable state of things to come about in the course of procedure. The execution is

stayed as indicated, and the defendant is entitled to give bail, if he can do so, according to law, for his appearance at the next term of the superior court of the county of Columbus, to the end that that court may enter such judgment against him in this action as the law allows.

Let this opinion be certified to the superior court, according to law. It is so ordered.

INTERPRETATION OF "OR" AND "AND" IN STATUTE: Note to *Janney v. Sprigg*, 48 Am. Dec. 573, 574.

HUSSEY v. NORFOLK SOUTHERN R. R. Co. AND KING.

[98 NORTH CAROLINA, 34.]

CORPORATION IS LIABLE FOR TORTS AND WRONGS COMMITTED ULTRA VIRES, outside and beyond the purpose of its creation and not within the scope of its granted powers and authority.

WHETHER SERVANT DID TORTIOUS ACT WITH VIEW TO HIS MASTER'S SERVICE, or to serve a purpose of his own, is a question of fact for the jury.

CORPORATION IS LIABLE FOR ACTS OF ITS SERVANTS while engaged in its business, in the same manner and to the same extent that individuals are liable under like circumstances.

CORPORATION IS LIABLE FOR MALICIOUS PROSECUTION CONDUCTED BY ITS AGENT, and the corporation and its servant may be joined in an action of tort for the injury.

ACTION for malicious prosecution and false arrest and imprisonment, brought by the plaintiff against the defendant railroad company, a duly chartered corporation, and M. K. King, the general manager of its business. The complaint alleged that the defendants falsely, maliciously, wantonly, and without any reasonable or probable cause, charged the plaintiff before a justice of the peace with having withdrawn himself from the service of the defendant company, carrying with him certain sums of money belonging to said company, with a felonious intent to steal the same and defraud said company, and further charged him with having embezzled said money while he was in the employment of said company; that the defendants, well knowing at the time that the charge was false and untrue, procured said justice to issue a warrant of arrest, under which plaintiff was arrested and imprisoned until he gave bail, and that on the trial the justice fully acquitted him of the charge, which the defendants had failed to further prosecute; and that by reason of said wanton, malicious, and false charge and malicious prosecution, the plain-

tiff had suffered damage in the sum of five thousand dollars. For a second cause of action the complaint alleged the wrongful and unlawful arrest and imprisonment of the plaintiff, and claimed damages therefor in the sum of five thousand dollars. For a further cause of action the complaint alleged that the defendants, intending to slander and scandalize the plaintiff, falsely charged him before said justice, and procured his arrest and imprisonment, as alleged in the first count. The defendant railroad company demurred on the grounds that the complaint did not state facts sufficient to constitute a cause of action, and that there was a misjoinder of parties defendant, specifying under the first ground that the complaint did not allege that the acts complained of, which were done by King, were done by him within the scope of his authority or duty as agent, or in the service or by the authority of the company. Other facts appear from the opinion.

E. F. Aydlott, for the plaintiff.

L. D. Starke, for the defendant.

By Court, DAVIS, J. The question presented by the appeal is: Was there error in sustaining the demurrer of the defendant company, as set out in paragraphs a, b, and c of the first cause of demurrer?

The code, section 233, requires that the complaint shall contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition."

The facts should be so stated as to leave the defendant in no doubt as to the alleged cause of action against him, so that he may know how to answer, and what defense to make. The demurrer admits the facts contained in this complaint. Do they constitute a cause of action? The defendant company says no.

It is true that the defendant King is the general manager of the co-defendant company's business, and that the defendants King and the Norfolk Southern Railroad Company did the acts complained of; and the charge upon which the alleged malicious prosecution was instituted, and the false arrest and imprisonment made, was the alleged embezzlement of the money of the defendant company, and the warrant was sued out by the defendants, upon the written affidavit of the defendant King, general manager of the defendant company; but, says the defendant company, the plaintiff fails to allege

that these acts were done by King "in the scope of his authority or duty as agent," etc., and therefore he cannot recover.

It is admitted (the demurrer admits) that the acts were done by the defendant; if so, does it matter how? Is it necessary to allege that the agent was authorized to do them, and that he was acting within the scope of his authority and duty?

It must be necessary to prove any material fact necessary to be alleged, unless admitted.

If corporations, as we shall presently see, are liable for torts and wrongs committed *ultra vires*, outside and beyond the purpose of their creation, and not within the scope of their granted powers and authority, it would seem a logical absurdity to say that any tort or wrong so committed was committed or could be committed by an agent or servant within the scope of the authority of such agent or servant. If the acts were *ultra vires*, they could not be within the scope of the power or authority of the company, or of its agent or servant, and the allegation, if necessary to be made, could not be proved, and the plaintiffs must fail. This cannot be so.

It was long thought that as the corporation has no mouth with which to utter slander, or hand with which to write libels or commit batteries, or mind to suggest malicious prosecutions or other wrongs,—as it was an artificial person, and could speak and act only through and by the agency of others,—it was therefore not liable for any torts except such as resulted from some act of commission or omission of its agents or servants, while acting within the scope of granted powers, or wrongfully omitting or neglecting some duty imposed by its charter or by-laws; and consequently it was necessary to allege that the act committed was while acting within the scope of the power and authority of the company, or that the act omitted was required to be performed. Whether it was wise to depart from this rule, that exempted corporations from liability for the acts of agents in cases where the character of the act depended upon motive or intent, seems no longer an open question.

The old idea, that because a corporation had no "soul" it could not commit torts, or be the subject of punishment for tortious acts, may now be regarded as obsolete.

The rights, the powers, and the duties of corporate bodies have been so enlarged in modern times, and these "artificial persons" have become so numerous, and entered so largely into the every-day transactions of life, that it has become the

policy of the law to subject them, as far as practicable, to the same civil liability for wrongful acts as attach to natural persons, and this liability is not restricted to acts committed within the scope of granted power, but a corporation may be liable for an action "for false imprisonment, malicious prosecution, and libel": *Pierce on Railroads*, 273. "The doctrine which once obtained, that the master is not liable for the willful wrong of his servant, is now understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders. . . . Whether the servant did the act with a view to the master's service, or to serve a purpose of his own, is a question for the jury": *Id.* 279. Whether the corporation authorized or participated in the tort is matter for proof, and the defense of *ultra vires* is not admitted: *Id.* 520.

It is true that it was held in *Orr v. Bank of the United States*, 1 Ohio, 36, 13 Am. Dec. 588, that a corporation could not be sued in an action for assault and battery, nor could it be joined in such an action with other defendants; and in *Gillett v. Missouri Valley R. R. Co.*, 55 Mo. 315, 17 Am. Rep. 658, it was held by a divided court that a railroad corporation was not liable for a malicious prosecution in the name of the state for alleged embezzlement of its funds; but a different doctrine seems now well established.

"Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel": *National Bank v. Graham*, 100 U. S. 699, and many authorities there cited; *Merchants' Bank v. State Bank*, 10 Wall. 645; Angell and Ames on Corporations, sec. 388.

"It is no defense to legal proceedings in tort that the torts were *ultra vires*": *Gruber v. Railroad Co.*, 92 N. C. 1. *Philadelphia etc. R. R. v. Quigley*, 21 How. 202, was an action against the defendants (plaintiffs in error) for libel. It was insisted that the railroad being a "corporation with defined

and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter, that being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; and the action should have been instituted against the natural persons concerned in the publication of the libel." But a different view was taken by the court, and it was held that a corporation could be held liable *ex delicto*, as well as *ex contractu*, and that this view was in consonance with the legislation and jurisprudence of the states of the Union relative to "these artificial persons."

The subject is discussed at length in *Williams v. Planters' Ins. Co.*, 57 Miss. 759, and the note to the case as reported in 34 Am. Rep. 494, in which the authorities are collated, from which the conclusion is fully warranted that a corporation is liable for malicious prosecution conducted by one of its agents.

In the still more recent case of *Denver etc. R. R. Co. v. Harris*, 122 U. S. 597, in an elaborate opinion, in which many authorities are cited, it is said: "If a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. . . . The result of the modern cases is, that a corporation is liable *civiliter* for torts committed by its servants or agents, precisely as a natural person; and it is liable as a natural person for the acts of its agents, done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act."

"The corporation, and its servant, by whose act the injury was done, may be joined in an action of tort in the nature of trespass": *Pierce on Railroads*, 292.

In the case before us, the "statement" contained in the complaint is sufficiently "plain" to enable the defendant company to understand clearly and without mistake the nature of the tort with which it is charged, and it is thus enabled to answer and prepare intelligently for its defense.

There is error. The demurrer is overruled, and the defendant may take such action below as he is advised.

LIABILITY OF CORPORATIONS FOR TORTS: See *Wheeler and Wilson Mfg. Co. v. Boyce*, 59 Am. Rep. 571; *Central Railroad & B. Co. v. Smith*, 52 Id. 353, note 358; *Jordan v. Alabama G. S. R. R. Co.*, 49 Id. 800; *Evening Journal Ass'n v. McDermott*, 43 Id. 392; *Southern Ex. Co. v. Finner*, 42 Id. 379; *Boegher v. Life Association of America*, 42 Id. 413; *Reed v. Home S. Bank*, 39 Id. 463; *McDermott v. Evening Journal Ass'n*, 39 Id. 606; *Williams v. Planters' Ins. Co.*, 34 Id. 494, note 495; *Wheless v. Second Nat. Bank*, 25 Id. 783; *Peebles v. Putapoco Guano Co.*, 24 Id. 447; *Häsdorf v. City of St. Louis*, 100 Am. Dec. 332; *Maynard v. Fireman's F. I. Co.*, 91 Id. 672, note 680, where other cases in that series are collected.

LIABILITY OF MASTER FOR TORTIOUS ACT OF SERVANT IN COURSE OF EMPLOYMENT: See *Firk v. Chicago & N. W. R'y Co.*, 60 Am. Rep. 878, note 880, where other cases in that series are collected; *Mali v. Lord*, 100 Am. Dec. 443, note 452; *Baker v. Kinsey*, 99 Id. 433, note 441; *Corrigan v. Union Sugar Factory*, 96 Id. 665; *Zutkes v. Wing*, 91 Id. 425, note 428, where other cases in that series are collected.

LIABILITY OF CORPORATION FOR TORTS COMMITTED ULTRA VIRES: See *Central R. R. & B. Co. v. Smith*, 52 Am. Rep. 353, note 358; *Gillett v. Missouri V. R. R. Co.*, 17 Id. 653.

BANK OF NEW HANOVER v. BRIDGERS.

[98 NORTH CAROLINA, 67.]

MARRIED WOMAN BY SIGNING NOTE WITH HER HUSBAND INCURS NO OBLIGATION which can be legally enforced against her, where the consideration therefor did not inure to the benefit of her separate estate. But if, after her disability of coverture ceases, she executes a new note in renewal of one signed by her and her husband, whereby an extension of the time of payment is obtained, such extension is a sufficient consideration to render her liable.

NEGOTIABLE INSTRUMENT, GIVEN IN RENEWAL OF PREVIOUS ONE, SUSPENDS RIGHT OF ACTION on the debt, during its currency, or until it is dishonored by non-acceptance or non-payment.

CONSIDERATION TO SUPPORT PROMISE NEED NOT INVOLVE BENEFIT TO PROMISOR, but is equally sufficient when it consists in a detriment to the person to whom it is made.

MERE ABSENCE OR WANT OF CONSIDERATION WILL NOT AVAIL AGAINST INDORSEE for value, before maturity and without notice thereof. It is only in cases where it is shown that the note was made under duress, or a strong suspicion of fraud is raised, that the plaintiff is required to show under what circumstances and for what value he became the holder.

SUCCESSIVE NOTES FOR SAME DEBT, WHEN NOT DIFFERING IN LEGAL EFFECT, may be deemed cumulative securities for the debt, and the creditor may sue on any preceding one, provided he has the latter in his possession at the trial to surrender. But this rule does not apply where the new and substituted note varies essentially in its terms and protracts the period of payment.

ACTION to recover the balance due upon two promissory notes executed by Mary E. Bridgers and John L. Bridgers to

Robert R. Bridgers, and indorsed before coming due to the plaintiff. Mary E. Bridgers, in her answer, admitted that she signed both notes, and that they came to the plaintiff by the payee for value, but denied her liability upon either, alleging in support of her defense that she, while the wife of her husband, since deceased, with him and the defendant John I. Bridgers, made two other promissory notes to the same payee, by whom they were indorsed to and became the property of the plaintiff; that the notes described in the complaint, executed after the death of her husband, were in renewal of and for the balance due on said former notes, without further consideration as to her; and that by reason of her coverture when she signed the first notes, and the absence of any consideration for the renewal, she incurred no obligation in the premises. The other defendants admitted the facts alleged in the complaint, but averred that they were sureties only. The jury, upon issues submitted to them, found that the notes set out in the complaint were given by Mary E. Bridgers and the other defendants in renewal of the notes mentioned in her answer, which latter notes were executed by her with her late husband and the other defendants, and the jury also found that the money for which said original notes were given was not borrowed for the benefit of her separate estate, and that the trustee did not assent to the execution thereof. Judgment was rendered against all the defendants, and Mary E. Bridgers appealed.

George Davis, for the plaintiff.

Thomas N. Hill and Thomas W. Strange, for the defendants.

By Court, SMITH, C. J. There can be no question upon the findings by the jury that the appellant incurred, in signing the note with her husband, no obligation which could have been legally enforced against her; and it is argued that she is not bound by that given in renewal, because there was no existing liability, and no further consideration to sustain the contract.

It is to be observed that the notes now sued on differ from the two former ones, in that the principal and deceased debtor is not a party to them, and in the extension of the time of payment for more than nine months, so that the new and superseding contracts have a consideration more than a mere naked promise to pay a subsisting debt, which as such would

be inoperative in creating a new obligation. The taking of the new security thus suspends the remedy upon the old, at least as to those who united in executing it.

"There is no doubt that a negotiable bill or note," says Mr. Daniel, "given for or on account of a contemporaneous or pre-existing debt, and whether or not it be in renewal of a previous bill or note, suspends all right of action on such debt during its currency, — that is, until it is dishonored by non-acceptance or non-payment": 2 Daniel on Negotiable Instruments, sec. 1272. "Where a man who has a judgment debt," is the language of the court in *Baker v. Walker*, 14 Ex. 371, "takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period, and if so, that is a good consideration for the giving of the note." To the same effect are *Putnam v. Lewis*, 8 Johns. 389; *Frisbie v. Larned*, 21 Wend. 450.

And so this court held that where one indebted by note gives a mortgage to the creditor for his security, upon the terms of an indulgence, there is an implied promise in accepting the mortgage to suspend action on the note: *Harshaw v. McKesson*, 65 N. C. 688; and it was also decided that the mortgage could not be foreclosed until the termination of the last credit: *Harshaw v. McKesson*, 66 Id. 266.

A consideration to support a promise need not involve a benefit to the person promising; it is equally sufficient when it consists in a detriment to the person to whom it is made.

Again, the appellant is not in a more favorable condition to contest her liability by reason of executing the notes under the disability of coverture than she would be if she had had no connection with them; and can it admit of question that she, when *sui juris*, and with restored capacity to act and bind herself like any other person, may contract to pay a debt due from others on a stipulated forbearance for a fixed time, given to those who are liable?

The case relied on by her counsel (*Felton v. Reid*, 7 Jones, 269) is not applicable, for there was no new consideration to sustain a promise for which the *feme* was not liable, and this is true of any other person whose contract is founded on no consideration.

Beyond and outside of this aspect of the case, the present plaintiff is an indorsee for value, taking, so far as the case discloses, without notice of the infirmity imputed to the in-

strument as emanating from the appellant. In such case, as a consideration is implied, the want of it cannot follow and defeat the notes, when the fact was unknown to the purchaser for value, or any indication sufficient to put him on inquiry, the note not having matured.

"In an action by the indorsee against an original party to a bill,"—the words are those of Mr. Greenleaf, in volume 2, section 172, of his work on evidence,—“if it be shown on the part of the defendant that the bill was made under duress, or that he was defrauded of it, or if a strong suspicion of fraud be raised, the plaintiff will then be required to show under what circumstances and for what value he became the holder. It is, however, only in such cases that this proof will be demanded of the holder. It will not be required when the defendant shows nothing more than a mere absence or want of consideration on his part”: 1 Daniel on Negotiable Instruments, secs. 814, 815; Parsons on Bills, pp. 218, 219; *French v. Barney*, 1 Ired. 219.

In the last case cited, Daniel, J., says: “He being the holder, the law implies, until something be shown to the contrary, that he gave value for it, or rather, came fairly and legally by it.”

More recently, the same proposition is ruled in *Tredwell v. Blount*, 86 N. C. 33.

It is true that the giving successive notes for the same debt, when not differing in legal effect, may be deemed cumulative securities for that debt, and the creditor may sue on a preceding one; provided, if the latter be a negotiable note or bill, he has it in his possession at the trial, to surrender, as held in *Spear v. Atkinson*, 1 Ired. 262. But the rule does not extend to cases like the present, where the new and substituted note varies essentially in its terms, and protracts the period of payment. This becomes the contract until it is broken, and then the plaintiff is at liberty to fall back upon his former security. In no aspect of the case do we see how the appellant can claim exoneration from a liability assumed voluntarily, and when she had full legal capacity.

We must therefore affirm the judgment, and it is so ordered.

NOTE OF MARRIED WOMAN: See *Hubbard v. Bugbee*, 45 Am. Rep. 637; *Haywood v. Barker*, 36 Id. 762; *Williams v. Urmston*, 35 Id. 611, note 617; *Wright v. Remington*, 32 Id. 180; *Hicks v. Randolph*, 27 Id. 760; *McVey v. Cantrell*, 26 Id. 605; *Taddiken v. Cantrell*, 25 Id. 253; *Davis v. First National*

Bank of Cheyenne, 25 Id. 484; *Williams v. Hugunin*, 18 Id. 607; *Heburn v. Warner*, 17 Id. 86; *Davis v. Statts*, 13 Id. 382; *Bank of Louisiana v. Williams*, 13 Id. 319; *Porterfield v. Butler*, 13 Id. 329; *Deering v. Boyle*, 13 Id. 480; *Phillips v. Graves*, 5 Id. 675; *Kinn v. Weippert*, 2 Id. 541; *Corn Exchange Ins. Co. v. Babcock*, 1 Id. 601; note to *Yale v. Dealerer*, 78 Am. Dec. 227; *Baker v. Gregory*, 65 Id. 366; *Hollis v. Francols*, 51 Id. 760, note 768.

WANT OF CONSIDERATION NO DEFENSE AGAINST BONA FIDE INDORSEES: See *Fleuertemalte v. Morris*, 54 Am. Rep. 657; *Goodrich v. Reynolds*, 83 Am. Dec. 240; *Hascall v. Whitmore*, 36 Id. 738; *Mulford v. Shepard*, 33 Id. 432.

EFFECT OF RENEWAL OF NOTE: See *Lowry v. Fisher*, 92 Am. Dec. 475, note 480, where other cases in that series are collected.

CONSIDERATION, WHEN SUFFICIENT: See *Doyle v. Dixon*, 93 Am. Dec. 80, note 85, where other cases in that series are collected.

KNOTT v. RALEIGH AND GASTON R. R. Co.

[96 NORTH CAROLINA, 72.]

CONNECTING RAILROAD IS LIABLE ONLY AS FORWARDING AGENT, and is not responsible for loss of or damage to goods occurring beyond its terminus, in the absence of a special contract, or proof of an association or partnership between it and other connecting lines, by which each of such lines becomes liable for the contracts of the others.

EVIDENCE OF CUSTOM OF AGENT OF RECEIVING RAILROAD NOT TO RECEIVE FREIGHT UNLESS IN GOOD CONDITION, and to check it "all right," if in good condition, is admissible to prove that goods were in good condition when received by him.

RECORD OF STATE OF WEATHER, MADE BY PERSON APPOINTED BY CHIEF OF SIGNAL SERVICE BUREAU of the United States, in the course of his public duty, is in itself evidence of the condition of the weather at a particular period embraced in it.

ACTION to recover damages for injury to certain tobacco shipped by the plaintiff from Oxford to Richmond. The tobacco was received and receipted for as in apparent good order by the Oxford and Henderson railroad, to be sent to Richmond. The receipt given by this company stipulated that the company to which the tobacco should be delivered by it for transportation beyond its terminus should be regarded exclusively as the agent of the owner. The Oxford and Henderson, the Raleigh and Gaston, the Petersburg and Weldon, and the Richmond and Petersburg were connecting roads in the line between Oxford and Richmond; but the first-named road was distinct from the others, and not under the same management. It was in evidence that the plaintiff's tobacco was received from the Oxford and Henderson road, and forwarded by the defendant company about eleven

o'clock A. M. on February 19, 1884, to Weldon. The defendant's agent, at Henderson testified that the roads above mentioned were connecting lines, but not under the same management; that the Raleigh and Gaston and the Petersburg and Weldon roads divided freights; and that it was the defendant's custom to run freights to Richmond, and collect when they got to Weldon. At six o'clock P. M. on February 19th, the cars containing plaintiff's tobacco were turned over to the Petersburg and Weldon road. Tilgman, the defendant's agent at Weldon, testified that, to the best of his knowledge, the tobacco was in good condition when received in Weldon. Upon being asked upon what he founded that knowledge, he answered: "Upon the custom that exists between the roads at Weldon, that if the agent of the Petersburg and Weldon company, after examination, found that anything was wrong, he would not have received them, and when he checked them, meaning they were all right." The witness Clark, who stated that in February, 1884, he kept a meteorological record at Weldon, by appointment from the chief signal-officer of the United States, at Washington, testified that the record produced was in his own handwriting, and that it was made contemporaneously with the matters of which it purported to speak. The defendant then introduced, over plaintiff's objection, the record, which showed that in Weldon, February 19, 1884, at two o'clock P. M. it was fair, at seven o'clock P. M. it was clear, and that no rain fell before 9:45 P. M. The court charged the jury that if they believed that the tobacco was not damaged while it was in the custody of the defendant, but that the same was delivered in good condition to the Petersburg and Weldon road, the plaintiff is not entitled to recover. There was a verdict and judgment for the defendant, and plaintiff appealed.

A. W. Allen and R. W. Winston, for the plaintiff.

E. C. Smith, for the defendant.

By Court, DAVIS, J. The plaintiff insists that the Raleigh and Gaston road was the first of the continuing connecting lines of roads to Richmond, and that it was liable for damages sustained on any one line of the continuous roads; that if the damage did not occur on the Oxford and Henderson road, then the defendant was responsible for the safe delivery in Richmond, and for this he cites *Phillips v. R. R. Co.*, 78 N. C.

298. The cases are unlike. In that case, the North Carolina Railroad Company received from the plaintiff a bale of goods to be shipped from Raleigh, North Carolina, to Monroe, Louisiana.

The bale was delivered at the terminus of the North Carolina road at Charlotte, to the Charlotte and Columbia road, was lost between Charlotte and Monroe, and the plaintiff sought to hold the North Carolina road responsible, alleging a special contract.

The issues submitted were: 1. Did the defendant make a special contract with plaintiff to transport the goods to Monroe? 2. Was the bale lost on the route?

It was held that the receipt given by the defendant, and the assurance given by its agent to the shipper, that the goods would reach Monroe in a few days, in good condition, and that he (the shipper) could pay the freight at Monroe when the bale reached that place, was no evidence of a special contract on the part of the North Carolina Railroad Company that the goods should be safely delivered at Monroe, and its liability was discharged when it delivered the goods to the next connecting road, and the jury having found upon such evidence that there was a contract, it was declared to be erroneous, and a new trial was awarded. In the case before us, there was no evidence of any contract, except that contained in the receipt given by the Oxford and Henderson road, and that could in no way bind the Raleigh and Gaston road; and the manifest given by the agent of the defendant at Henderson does not bind the company to do more than deliver the goods, as a forwarding agent, to the next succeeding line, in the absence of any contract, express or implied.

There was evidence tending to show that the Raleigh and Gaston and the Petersburg and Weldon roads belonged to a line of associated railroads, and that these roads divided the freight charges, but there was no evidence of such a division with the Richmond and Petersburg road. Undoubtedly a connecting line of carriers may form an association or co-partnership by which each may become liable for the others; but assuming that there was in fact such an association, there was no allegation of it in the complaint, or that by any contract or agreement the Raleigh and Gaston road was to be liable for any carrier beyond its own terminus, and in the absence of any allegation or proof of such an agreement, its liability ceased when, as a forwarding agent (and in the absence of proof it could be held to be no more, as the Oxford

and Henderson road was), it delivered the tobacco in good condition to the succeeding line. It is true that, in the third allegation of the complaint, it is charged that the defendant agreed to carry the tobacco safely to Richmond, but this was denied, and though it made an issue, it was not presented nor tendered as such by the plaintiff, and cannot therefore be considered.

In response to the material issues tendered by the plaintiff, the jury find that the tobacco was not damaged when in the possession of the defendant, or by its negligence, or that of its agents or servants.

In *Phifer v. Railroad*, 89 N. C. 311, 45 Am. Rep. 687, it was alleged that the defendant company (the Carolina Central), "for a valuable consideration, contracted to carry cotton from Lincolnton to New York over its own and the line of other companies, using the latter as agencies of its own for this purpose"; and in a second cause of action, "that the defendant, as one of a partnership association of common carriers formed by itself (and other companies, naming them), on behalf of all, undertook and agreed to convey cotton safely along and over the entire route to the terminus in New York. There was not only allegation of association, but of partnership, and the evidence was certainly as strong as in the present case (in which there are no such allegations), and it was held that the facts of that case, to which we need only refer, constituted a mere association between the different lines, each undertaking to transport over its own line, and not as agent in forwarding to the next succeeding line, and that it was not a copartnership in which one was liable for all. The subject is there discussed at length by the chief justice, and we refer to it and the authorities cited (among them *Phillips v. Railroad*, *supra*) as conclusive against the plaintiff upon the question of the liability of the defendant for loss beyond its terminus.

The objection to the answer given by the witness Tilgman cannot be sustained. The Raleigh and Gaston road delivered to the Petersburg and Weldon road at Weldon; the agent of the receiving road makes examination of the goods or packages, and if not in good condition, or apparent good condition, they will not be received; but if in good condition, they are checked as "all right." This was the custom, and was a very good foundation for his knowledge.

Neither can the objection to the evidence of the witness Clark, and the record introduced by him, be sustained. Un-

doubtedly he might refresh his memory by a written memorandum made at the time, but the record of the state of the weather was something more: it was a record (official or quasi official in its character, and of a public nature), made in the course of his public duty, of what occurred under his personal observation, and when properly authenticated, was in itself evidence: 1 Greenl. Ev., sec. 483. It was competent to show the state of the weather: *Burwell v. Railroad*, 94 N. C. 451. It does not appear from the record, though insisted upon here for the plaintiff, that there was any objection to the refusal of his honor to charge the jury that there was no evidence of any damage to the tobacco while in defendant's custody; and we cannot see how the refusal to so charge could prejudice the plaintiff. It was agreed that the notes of his honor need not be read; and we cannot discover any expression of "opinion," as is insisted by the plaintiff, in what was said by his honor in refusing to give the instruction asked for by the defendant.

There is no error.

CONNECTING LINES OF CARRIERS, LIABILITY OF: See *Atchison etc. R. R. Co. v. Roach*, 57 Am. Rep. 199; *Condon v. Marquette etc. R. R. Co.*, 54 Id. 367; *Felder v. Columbia etc. R. R. Co.*, 53 Id. 657; *Montgomery etc. R'y Co. v. Cutver*, 51 Id. 483; *Little Rock etc. R'y Co. v. Dean*, 51 Id. 584; *Peoria etc. R'y Co. v. Chicago etc. R'y Co.*, 50 Id. 605; *Hot Springs R. R. v. Trippe*, 48 Id. 65; *Knight v. Providence etc. R. R. Co.*, 43 Id. 46; *Halliday v. St. Louis etc. R'y Co.*, 41 Id. 309; *Marquette etc. R. R. Co. v. Kirkwood*, 40 Id. 453; *Packard v. Taylor*, 37 Id. 37; *Mobile & G. R. R. Co. v. Copeland*, 35 Id. 13; *Grover & B. S. M. Co. v. Missouri P. R'y Co.*, 35 Id. 444; *Shriver v. Sioux City & St. P. B. R. Co.*, 31 Id. 353; *Lowenburg v. Jones*, 31 Id. 379; *Wilmington etc. R. R. Co. v. Greenville etc. R. R. Co.*, 30 Id. 23; *Merchants' Dispatch & T. Co. v. Moore*, 30 Id. 541; *Taylor v. Little Rock etc. R. R. Co.*, 29 Id. 1; *Bancroft v. Merchants' Dispatch & T. Co.*, 29 Id. 482; *Pittsburgh etc. R'y Co. v. Morton*, 28 Id. 682; *Erie R'y Co. v. Wilcox*, 25 Id. 451; *Grandle v. Eastern Express Co.*, 24 Id. 31; *Crawford v. Southern R. R. Assoc.*, 24 Id. 628; *East Tenn. & V. R. R. Co. v. Rogers*, 19 Id. 589; *Irish v. Milwaukee etc. R'y Co.*, 18 Id. 340; *Illinois C. R. R. Co. v. Mitchell*, 18 Id. 564; *Rawson v. Holland*, 17 Id. 394; *Mulligan v. Illinois C. R. R. Co.*, 14 Id. 514; *Gray v. Jackson*, 12 Id. 1; *Conkey v. Milwaukee & St. P. R'y Co.*, 11 Id. 630; *Hooper v. Chicago & N. W. R'y Co.*, 9 Id. 439; *Laughlin v. Chicago & N. W. R'y Co.*, 9 Id. 493; *Lamb v. Camden & A. R. R. & T. Co.*, 7 Id. 327; *Mills v. Michigan C. R. R. Co.*, 6 Id. 152; *Hill Mfg. Co. v. Boston & L. R. R. Co.*, 6 Id. 202; *Barter v. Wheeler*, 6 Id. 434; *Illinois C. R. R. Co. v. Frankenberg*, 5 Id. 92; *Toledo etc. R'y Co. v. Merriam*, 4 Id. 590; *Schneider v. Evans*, 3 Id. 56; *Lawrence v. Winona etc. R. R. Co.*, 2 Id. 130; *Cincinnati etc. R. R. Co. v. Pontius*, 2 Id. 391; *Nashua Lock Co. v. Worcester & N. R. R. Co.*, 2 Id. 242; *Burroughs v. Norvaich & W. R. R. Co.*, 1 Id. 78; *Cutts v. Bruinerd*, 1 Id. 353; *Knight v. Portland etc. R. R. Co.*, 96 Am. Dec. 440; *Baltimore & O. R. R. Co. v. Schumacher*, 96 Id. 510; *Gass v. New York etc. R. R. Co.*, 96 Id. 742, and the notes to those cases, where other cases in that series are collected; also *Falvey v. Georgia*, ante, p. 58.

PERRY v. ADAMS AND WIFE.

[98 NORTH CAROLINA, 167.]

SALE OF LAND OF DECEDENT TO MAKE ASSETS FOR PAYMENT OF HIS DEBTS IS VOID, and passes no title as against his heirs or devisees not made parties in some sufficient way to the proceeding in which the order directing such sale was made.

CASES WHERE NO SERVICE AT ALL HAS BEEN MADE ARE NOT EMBRACED IN CURATIVE ACT, — section 387, code of North Carolina, — making valid judgments and other proceedings against infants and certain other classes of persons in certain cases. The object of that statute is to cure the judgment or proceeding when personal service upon an infant was omitted.

PURCHASER AT INVALID SALE OF DECEDENT'S LAND FOR PAYMENT OF DEBTS IS ENTITLED TO BE SUBROGATED, to the extent that the money paid by him was applied to the payment of such debts, to the rights of the creditors of the decedent, and to have the amount due him charged upon the land.

ACTION to recover possession of land purchased by the plaintiff, at a sale thereof, made by the administrator of the female defendant's father, under an order of court authorizing the sale, to make assets for the payment of debts. Other facts appear from the opinion.

John Devereux, Jr., J. B. Batchelor, and E. C. Smith, for the plaintiff.

D. G. Fowle, for the defendants.

By Court, MERRIMON, J. The learned counsel for the plaintiff contended, on the argument here, that inasmuch as the property, both personal and real, of the deceased debtor, in the order mentioned, is subject first and certainly to be applied to the payment of costs of administration and the debts of the decedent, the court had authority to direct a sale of the land to make assets for such purpose, and a proceeding and proper orders and decrees to that end would not be void, although the heir was not made a party thereto, and he cited several cases to support that contention. We cannot accept this view as correct in any aspect of it. The law thus administered might — no doubt would — very frequently work serious injury to the heir or devisee, and he would be left without any practical or efficient remedy. He should, as a matter of common justice, have just opportunity to see that the occasion had properly arisen for resort to the land descended or devised to him, and to show the contrary if he could. But whatever may be the extent of the authority of appellate courts in some

states of the Union to thus devote the land of deceased debtors to the payment of debts, without notice to the heir, in this state the statute (Code, sec. 1438) expressly provides that "no order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by service of summons, either personally or by publication, as prescribed in the chapter entitled 'Code of Civil Procedure.'"

This provision embraces infants as well as adult persons. Hence this court has repeatedly and uniformly held that such proceedings, decrees, and judgments are void, and of no effect as against the heir not in some sufficient way made a party to the same, whether infant or adult: *Stancill v. Gay*, 92 N. C. 462, and the cases there cited.

It distinctly appears in the case before us that the *feme* defendant was not made a party, by service of process or notice in any way, to the proceeding in the court of pleas and quarter sessions in which a decree was made, directing a sale of the land in question, descended to her from her ancestor, to make assets to pay debts against his estate. During the whole time of the pendency of that proceeding, and for a long while afterwards, she was an infant; she was not served with process, nor was her general guardian; nor was any guardian *ad litem* appointed to make defense, nor was any defense made for her. The court, therefore, did not obtain jurisdiction of her at all. The order of sale—indeed, the whole proceeding—was as to her void and inoperative. Jurisdiction of the person was essential to a valid order: *Stancill v. Gay*, *supra*.

It was further insisted for the plaintiff that the proceeding and order of sale therein was cured and made effectual by the curative statute (Code, sec. 387), making valid judgments and other proceedings against infants and certain other classes of persons in certain cases. This is a misapprehension of the true meaning of that statute. Neither by its terms, nor by just interpretation of the meaning, does it apply to or embrace cases where there was no service of process at all. It applies to civil actions and special proceedings, "wherein any or all of the defendants were infants, . . . on whom there was no personal service of the summons," etc. The statutory provision (Code, secs. 181, 214, 217, par. 2), prescribing how the summons in civil actions and special proceedings shall be served on infants, requires, and required at and before the time of the enactment of the curative statute mentioned, per-

sonal service upon them, and likewise service upon the guardian; and where the infant is under the age of fourteen years, service must be made by delivering a copy of the summons to him "personally, and also to his father, mother, or guardian," etc. The personal service upon the infant is not regarded, nor has it been, as so important as that upon his guardian, by whom he defends, and who is required to make defense for him, and it not unfrequently happened that there was no personal service on the infant, as the statute required. The object of the curative statute is to cure the judgment and proceeding, when such personal service was omitted, but it does not embrace cases where no service was made upon the infant or any other person in his behalf, as the statute requires to be done: *Stancill v. Gay, supra*.

The plaintiff, however, undertook to purchase the land, so far as appears, in good faith, and to the extent that the money he paid to the administrator was applied to the payment of debts of the intestate and the costs of administration that the personalty was insufficient to pay,—to that extent he relieved the land in question, and is entitled to be subrogated to the rights of the creditors, whose debts and costs were so paid, and to have the sum of money due him charged upon the land. It would be unconscionable to allow the *feme* defendant in that case to have the land discharged of the debt due the plaintiff for money thus paid by him and applied to relieve the same: *Williams v. Williams*, 2 Dev. Eq. 69; 22 Am. Dec. 729; *Sanders v. Sanders*, 22 Id. 262; *Scott v. Dunn*, 1 Dev. & B. Eq. 425; 30 Am. Dec. 174; *Spring v. Harven*, 8 Jones Eq. 96; *Lawson and Palmer v. Thompson*, 4 Jones, 104.

The plaintiff must be charged with the rents of the land during the time he had possession of it.

So much of the judgment appealed from as declares that the plaintiff is not the owner of nor entitled to the possession of the land is affirmed. In other respects it must be set aside, the administrator made a party defendant, and account be taken, and judgment given in accordance with the rights of the parties, to be ascertained and settled as indicated herein. To that end, let this opinion be certified to the superior court according to law.

RIGHT OF PURCHASER AT INVALID JUDICIAL SALE TO SUBROGATION AND TO RETAIN POSSESSION UNTIL REPAID AMOUNT OF HIS BID. — It is now firmly established by the great weight of authority in this country that the purchaser, in good faith, of property at a judicial sale that turns out to be

void, who pays money which has been applied in the payment of liens upon the property, or in paying claims which, though not secured by specific lien, were enforceable against the assets of an estate, and for the payment of which the property in question might have been sold, is entitled to be subrogated to the rights of the creditors whose debts have been so satisfied. In the note to *Scott v. Dunn*, 30 Am. Dec. 177-182, the nature, origin, and history of this doctrine were considered, and the cases collected. A careful examination of the cases since decided shows that the doctrine has become a fixed one in our jurisprudence, for while we have found a long list of additional cases in which the doctrine has been recognized and enforced, we have been unable to find any recent cases in which it has been denied. The following is a list of additional cases, most of which have been decided since the note to *Scott v. Dunn* was written, and all of which are in harmony with those there cited in support of the doctrine under consideration: *Freeman on Void Judicial Sales*, 2d ed., sec. 53; *Sheldon on Subrogation*, sec. 209; *Davis v. Gaines*, 104 U. S. 386; *Bland v. Bowie*, 53 Ala. 152; *Robertson v. Bradford*, 73 Id. 116; *Waggener v. Lyles*, 29 Ark. 47; *Duncan v. Guiney*, 108 Ind. 579; *Stalls v. Brown*, 112 Id. 370; ante, p. 190; *Gaines v. Kennedy*, 53 Miss. 103; *Hill v. Billingsley*, 53 Id. 111; *Pool v. Ellis*, 64 Id. 555; *Evans v. Snyder*, 64 Mo. 517; *Schafer v. Causey*, 76 Id. 363; 8 Mo. App. 142; *Martin v. Turner*, 2 Heisk. 384; *Starkey v. Hammer*, 1 Baxt. 438; *Bennett v. Collwell*, 8 Id. 483; *Collwell v. Palmer*, 6 Lea, 652; *Davis v. Reaves*, 21 Cant. L. J. 368 (S. C. of Tenn., October, 1885); *Mayer v. Blanton*, 67 Tex. 246. Mr. Justice Woods, in delivering the opinion of the court in *Davis v. Gaines*, 104 U. S. 405, said: "We are aware that it has been held that a purchaser at an irregular or void judicial or execution sale is not subrogated to the rights of the judgment creditor. The weight of authority is, however, against this position." In the case of *Cathcart v. Bugenheimer*, 18 S. C. 123, it was decided that the principle is applicable to a case where the lands of a lunatic have been sold for the payment of his debts. In the case of *Livy v. Martin*, 48 Wis. 198, the plaintiff advanced his money to an executor, at the latter's request, for the purpose of paying off a mortgage on the lands of the testator, and taxes accrued thereon, and took as security a mortgage on the lands, executed by the executor in pursuance of a license from the county court, which, however, proved to be invalid. It was held that he was not a volunteer in the legal sense of that term, and it was decided on the authority of *Blodgett v. Hill*, 29 Wis. 169, that he was entitled to subrogation. In the case of *Crippen v. Chappel*, 35 Kan. 495, 57 Am. Rep. 187, the administrator of Philemon Chappel's estate obtained an order from the probate court authorizing and directing him, as such administrator, to remortgage the property of the estate of his intestate to pay off an existing mortgage thereon. He applied to Crippen for the money, who advanced the same, and took a mortgage from the administrator to secure its payment. The mortgage executed by the administrator was void, because under the laws of Kansas administrators have no power or authority to execute mortgages. It was decided that Crippen was entitled to recover what he had paid under the doctrine of subrogation or equitable assignment, and that he should be subrogated to the rights of the original mortgagee. Valentine, J., in delivering the opinion, said: "Now, while we have not been referred to nor have we found any case precisely analogous to this case, yet we think that under the general doctrine of subrogation or of equitable assignment, this case comes within such doctrine." And in concluding his opinion, he said: "We do not think that any case like the one we have now under consideration has ever been decided differently from the decision which we

now make. Besides, this decision does eminent justice in the case, and any other decision would permit parties to perpetrate gross injustice."

RIGHT OF PURCHASERS AT EXECUTION SALES TO SUBROGATION.—The cases in which the doctrine under consideration has been most frequently applied are cases in which the sales have been made by administrators, executors, or guardians. But the principle has also been frequently invoked with success in cases of sales made under execution: *Freeman on Void Judicial Sales*, 2d ed., sec. 52; *Short v. Sears*, 93 Ind. 505; *McLaughlin v. Daniel*, 8 Dana, 182; *Dufour v. Camfranc*, 11 Mart. (La.) 607; 13 Am. Dec. 360; *McGee v. Wallis*, 57 Miss. 638; *Bentley v. Long*, 1 Strob. Eq. 43; 47 Am. Dec. 523; *Howard v. North*, 5 Tex. 290; 51 Am. Dec. 769.

RIGHT TO SUBROGATION OF PURCHASER UNDER VOID FORECLOSURE SALE.—Purchasers at void sales made under proceedings to foreclose mortgages succeed to the title and rights of the mortgagee, and are entitled to enforce them as the mortgagee could have done had no sale taken place: *Freeman on Void Judicial Sales*, 2d ed., sec. 52; *Brobst v. Brock*, 10 Wall. 519; *Gilbert v. Cooley*, Walk. Ch. 494; *Johnstone v. Scott*, 11 Mich. 246; *Lillibridge v. Tregent*, 30 Id. 105; *Jackson v. Bowen*, 7 Cow. 13.

RIGHT OF PURCHASER TO RETAIN POSSESSION UNTIL REPAID AMOUNT OF HIS BID.—It is generally held that the person entitled to subrogation has a lien upon the property, which cannot be recovered from him until he has been reimbursed the amount paid by him, or so much of that amount as has been applied to the extinction of debts that were enforceable against the property: *Freeman on Void Judicial Sales*, 2d ed., sec. 53; *Bright v. Boyl*, 2 Story, 607; *Bunts v. Cole*, 7 Blackf. 265; 41 Am. Dec. 226; *Short v. Sears*, 93 Ind. 505; *Stultz v. Brown*, 112 Id. 370, *ante*, p. 190; *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152; 77 Am. Dec. 564; *Hill v. Billingsley*, 53 Miss. 111; *Union Hall Ass'n v. Morrison*, 39 Md. 281; *Hatcher v. Briggs*, 6 Or. 31; *Hudgin v. Hudgin*, 6 Gratt. 320; 52 Am. Dec. 124; *Sauls v. Lynham*, 27 Gratt. 291; 21 Am. Rep. 348.

WHERE PURCHASER IS GUILTY OF FRAUD, it is held in Pennsylvania that he thereby forfeits his right to reclaim his purchase-money: *Gilbert v. Hoffman*, 2 Watts, 66; 26 Am. Dec. 103; *Jackson v. Summerville*, 13 Pa. St. 359; *McCuskey v. Graff*, 23 Id. 321; 62 Am. Dec. 336. But see *Grant v. Loyl*, 12 Smedes & M. 191. In nearly all the cases where relief has been granted to purchasers at void sales, stress has been laid upon the fact that the purchase was made in good faith. And Freeman says: "Certainly in all such cases the purchasers' good faith ought to be regarded as material": *Freeman on Void Judicial Sales*, 2d ed., sec. 54.

SALE OF DECEDENT'S LAND WITHOUT NOTICE TO HEIRS IS VOID: See *Mickel v. Hicks*, 27 Am. Rep. 161; *Summersett v. Summersett's Adm'r*, 91 Am. Dec. 494; *Morris v. Hogle*, 87 Id. 243, note 246; *Gibbs v. Shaw*, 84 Id. 737, note 739, where other cases in that series are collected.

DORTCH v. BENTON AND WIFE.

[98 NORTH CAROLINA, 190.]

CLAIMANT OF HOMESTEAD DOES NOT FORFEIT HIS RIGHT THERE TO by making a conveyance thereof with intent to defraud his creditors.

ONE WHO PURCHASES LAND, AND PAYS PORTION OF PRICE, BECOMES AT ONCE ENTITLED TO HOMESTEAD therein, subject to the lien for the unpaid purchase-money.

PERSONAL PROPERTY EXEMPTION CANNOT BE CLAIMED OUT OF MONEY THAT HAS BEEN INVESTED in the purchase of land.

CIVIL action. The plaintiffs were creditors of the husband defendant. The latter, while insolvent, purchased the land described in the complaint for three thousand five hundred dollars, paid thereon sixteen hundred dollars, and with the view to defraud his creditors, had the title made to his wife. He and she at once mortgaged the land back to secure the balance of the purchase-money. The court gave judgment for the plaintiffs, allowing a personal property exemption of five hundred dollars to the husband. The husband and wife appealed.

J. W. Bryan, for the plaintiffs.

R. W. Allen and S. W. Isler, for the defendants.

By Court, MERRIMON, J. It was decided in *Crummen v. Bennet*, 68 N. C. 494, that a party who conveyed his lands to another in fraud of his creditors did not thereby forfeit his homestead, and leave it subject to be sold under execution to pay his debts, because, as to it, the conveyance was not fraudulent, the creditor could not have sold it, if the conveyance had not been made, it was not subject to be sold under execution; in that respect he suffered no detriment. The fraud consisted in conveying the land,—that part of it not embraced by the homestead; this was subject to be sold under the execution, and the conveyance as to it was therefore fraudulent and void as to the creditor. The latter had no interest as to the homestead; that was a matter between the debtor and the person to whom he made the conveyance: *Duval v. Rollins*, 71 N. C. 218; *Rankin v. Shaw*, 94 Id. 405, and cases there cited.

The husband defendant had the right to purchase the land in question, and having done so, and paid sixteen hundred dollars of the purchase-money, he at once became entitled to a homestead in it, subject to the charge of the balance of the purchase-money remaining unpaid, and debts as to which the

homestead is not exempt from execution or other final process, as pointed out in *Mebane v. Layton*, 89 N. C. 396. The homestead in the land thus purchased was not subject to sale under the execution to satisfy the debts of the plaintiffs,—they had no interest in it, and it was not therefore as to them fraudulent for the husband to cause the title as to it to be conveyed to his wife. The conveyance was, however, fraudulent as to the excess above the homestead as to creditors, and to that extent the plaintiffs had the right to have the land sold to pay their debts, subject to the mortgage debt,—the balance of the purchase-money thereof.

If the husband defendant had not employed the money he had in the purchase of the land, he might have been entitled to the personal property exemption to be taken out of it, but he chose to employ the money in the purchase of the land; he thus turned it into real estate, and thereby precluded himself from the right to the personal property exemption to be assigned out of it. The money ceased to be personal property of the defendant; he turned it into land, as he had the right to do. He was therefore entitled to the homestead, and not to the personal property exemption. And as to the homestead, that was a matter between the husband defendant and his wife, to whom he caused the conveyance to be made.

There is error. Let this opinion be certified to the superior court, to the end the judgment may be modified in conformity with it, and as thus modified, affirmed.

HOMESTEAD RIGHT NOT FORFEITED BY CONVEYANCE FRAUDULENT AS TO CREDITORS: See *Fellows v. Lewis*, 39 Am. Rep. 1; *Evans v. Hooks*, 31 Id. 642, note 645; *Pike v. Miles*, 99 Am. Dec. 148, note 152, where other cases in that series are collected.

HOMESTEAD, WHEN LAND BECOMES: See *Reake v. Reake*, 47 Am. Rep. 594; *Hawthorne v. Smith*, 93 Am. Dec. 397.

HODGES v. LATHAM.

[98 NORTH CAROLINA, 239.]

WHERE VENDOR CONVEYS SAME LAND TO TWO SUCCESSIVE GRANTEE, in an action by the second grantee for a breach of covenant of warranty the vendor will be estopped to deny that the first grantee obtained the title.

PURCHASER OF LAND NEED NOT SHOW ACTUAL EVICTION BY LEGAL PROCESS to enable him to recover for a breach of covenant of warranty. If it appears that he yielded possession to the rightful owner, or that the premises, being vacant, the rightful owner took possession, it is such an eviction as will entitle him to recover.

ACTION for breach of warranty. The plaintiff testified that he purchased the land in question from the defendant, and paid part of the purchase price; that he cultivated it for a time, and then rented it to one Mitchell; that he left the neighborhood for a few months, and upon his return found that Willis Cherry, who had married a daughter of C. C. Little, had got possession of the land. The court intimated that the jury should be instructed that the plaintiff could not recover, and thereupon the plaintiff submitted to a judgment of nonsuit, and appealed. Other facts appear from the opinion.

George H. Brown, Jr., for the plaintiff.

No counsel for the defendant.

By Court, DAVIS, J. It was under and by virtue of the judgment in the special proceeding of D. H. Latham, administrator, etc., of C. C. Little v. Willis Cherry *et al.*, that the land in question was conveyed to W. A. Blount by the defendant Latham, and the proceeds of the sale, or so much thereof as was applicable to that purpose, applied in discharge of the balance of the purchase-money due upon the sale of the land made to C. C. Little in 1861. The paramount title was in the heirs of Little, claiming under the sale made to their ancestor in 1861, by the defendant Latham. He cannot be heard to say that their title was not good and paramount to that acquired by the plaintiff from him.

One of the heirs of Little had acquired possession in the manner stated in the case. Was that such an eviction, actual or constructive, as to entitle the plaintiff to recover upon the warranty in the deed from Latham to him? We think it was.

"The existence of a better title, with an actual possession under it, is of itself a breach of the covenant." The purchaser

is not required to bring an unnecessary action, in which he must fail to recover the possession: *Grist v. Hodges*, 3 Dev. 198; *Herrin v. McEntyre*, 1 Hawks, 410; *Duvall v. Craig*, 2 Wheat. 45.

If there has been no eviction by legal process, the burden of showing that there was a better or paramount title is upon the purchaser; and even then the mere existence of a superior title in another is not a breach of the covenant, but the purchaser need not be actually evicted by legal process. "It is enough that he has yielded possession to the rightful owner; or, the premises being vacant, that the rightful owner has taken possession": 3 Washburn on Real Property, 3d ed., 406.

In *Sprague v. Baker*, 17 Mass. 586, there was a valid prior encumbrance by mortgage, which, upon demand, the purchaser discharged. This was held to be such an eviction constructively as entitled him to recover upon the warranty. So in *Noonan v. Lee*, 2 Black, 507, it is said that an adverse possession by virtue of a paramount title is regarded as an eviction, and involves a breach of the covenant of warranty.

There was error, and the plaintiff is entitled to a new trial.

ACTUAL EVICTION BY LEGAL PROCESS, WHEN NOT NECESSARY TO CONSTITUTE BREACH OF COVENANT OF WARRANTY: See *Scott v. Kirkendall*, 30 Am. Rep. 562; *Green v. Irving*, 23 Id. 360; *Shattuck v. Lamb*, 22 Id. 656; *Cowdry v. Coiz*, 4 Id. 690; *McGary v. Hastings*, 2 Id. 456; *Gragg v. Richardson*, 71 Am. Dec. 190; *Dickson v. Desire*, 66 Id. 661, note 670, where other cases in that series are collected.

GRANTOR AND HIS PRIVIES ARE ESTOPPED BY HIS DEED TO DENY HIS TITLE: See *McCuskey v. McEvey*, 11 Am. Rep. 295; *Doe v. Dowsall*, 11 Id. 757; *Mitchell v. Petty*, 98 Am. Dec. 777; *Village of Mankato v. Willard*, 97 Id. 208; *Childs v. McChesney*, 89 Id. 545, note 549, where other cases in that series are collected.

MILLHISER v. ERDMAN.

[98 NORTH CAROLINA, 292.]

WHERE VENDOR SHIPS GOODS TO BE PAID FOR BY NOTES OF VENDOR, which are to be executed and delivered concurrently with the delivery of the goods, no title passes until the notes are executed and delivered. No sale is consummated if the notes be not delivered, and the statute requiring conditional sales of goods to be reduced to writing and registered does not apply to such a case.

ASSIGNMENT FOR BENEFIT OF CREDITORS OF GOODS TO WHICH DEBTOR HAS ACQUIRED NO TITLE passes no title to the assignee as against the true owner thereof.

ACTION to recover a quantity of tobacco. Defendant Erdman wrote to the plaintiff for certain samples of tobacco. The plaintiff sent the samples, and wrote in reply that his terms were notes at three, four, and five months. Erdman, in reply, sent an order for the goods, which plaintiff filled. Plaintiff also sent three notes to be signed and returned by Erdman. Erdman received the tobacco, but did not return the notes. Plaintiff then wrote to Erdman, asking him to sign and return those notes, or to make and send him five notes instead, at two, three, four, five, and six months from the date of the shipment; otherwise, to return the whole of the goods. Erdman made no reply, and sent no notes. Plaintiff thereupon went to New Berne, and demanded the return of the tobacco, which was refused. The defendants introduced in evidence an assignment for the benefit of creditors, made by Erdman, of a stock of goods including the tobacco in question. The court directed a verdict for the defendants, upon which judgment was entered, and the plaintiff appealed. Other facts are stated in the opinion.

Clement Manly, for the plaintiff.

W. W. Clark, for the defendants.

By Court, MERRIMON, J. In our judgment, the court misinterpreted the contract of sale, and misapprehended the legal effect of what the plaintiff did towards its execution.

The intention of the parties to the contract must prevail, and this must in this case be ascertained from the correspondence set forth as above, and the attending circumstances, as these appear from the facts admitted; and in order to determine the meaning and purpose intended, the whole must receive a reasonable and just interpretation.

Unquestionably, if the plaintiff had not shipped the tobacco in controversy to the defendant Erdman, the latter would have had no title to, nor indeed any right in respect to it, unless he had first tendered to the plaintiff the promissory notes which he had agreed to give for it. This is so because a material and essential part of the contract was, that the delivery of the notes on the part of Erdman to the plaintiff was to be done concurrently, simultaneously, with the delivery of the tobacco to him on the part of the plaintiff. The latter proposed to sell the tobacco to Erdman, in consideration of his three promissory notes, running respectively to

maturity at three, four, and five months, and the latter, by sending his order for it, obviously accepted the terms. The parties agreed to do material concurrent acts necessary to effectuate the sale, each dependent on the other, and neither effectual without the other. It was not contemplated that the tobacco should be delivered, and the notes given at a future day thereafter, nor was it agreed expressly or by reasonable implication that the title to the tobacco should pass to any extent for any purpose, until the concurrent, dependent acts should be done. As no particular time for the delivery of the notes was agreed upon, the implication is, that they should be delivered concurrently with the delivery of the tobacco, as much so as if the parties had been in the presence of each other and dealing across the counter. This plainly appears from the terms of the proposition to sell, and the acceptance of the same, as well as from the letter inclosing the invoices of the tobacco shipped, and the notes to be executed, and sent to the plaintiff by Erdman.

But the contracting parties were not in the presence of each other, so that the things to be done in pursuance of the contract could be presently done; one of them was in Richmond, the other in New Berne, hundreds of miles intervening between them. The plaintiff, in pursuance of the agreement to sell, shipped the tobacco to the buyer, not intending to part with his title to it until the notes should be sent to him, and the buyer was bound to so understand from the terms of sale so proposed and accepted by him, as well as from the invoices and notes prepared for execution sent to him, and the subsequent letter proposing to modify the terms as to the time the notes should become due. When, therefore, the buyer got possession of the tobacco, this was not for the purpose of passing the title to him until he did the concurrent act of sending the notes to the seller. Such shipment and possession were only steps in the way of the execution of the contract, and ineffectual as against the seller, until the concurrent act should be done on the part of the buyer. The possession thus coming about was of and for the plaintiff until the notes should be sent to him. Erdman got no title to the tobacco, because he faithlessly failed to send his notes to the plaintiff as he agreed to do, and as he had no title, had a mere naked possession, and that for the plaintiff without any right, he could not pass any title to the trustee for creditors, as he undertook by the deed of assignment to do. No sale of the tobacco

was consummated or made effectual under the contract. There was only an agreement to sell, which was not perfected. The plaintiff did not agree or intend to part with the title to his tobacco until he received the notes, and Erdman had no right to expect to get title to it until he sent the notes: 3 Kent's Com. 497; Story on Contracts, secs. 800, 803; 1 Parsons on Contracts, 5th ed., sec. 528; Benjamin on Sales, 4th Am. ed., secs. 325, 334, 366, 425, 541, 550, 570, 582, 583; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Palmer v. Hand*, 13 Johns. 434; 7 Am. Dec. 392.

The statute (Code, sec. 1275), which requires "all conditional sales of personal property, in which the title is retained by the bargainer," to be reduced to writing and registered to make the same effectual as against creditors and purchasers, has no application here. There was, as we have seen, no sale consummated, conditional or otherwise.

This statute applies to cases where the bargainer sells and delivers the personal property to the bargainee, retaining the title thereto as a security for the purchase-money until paid, while the latter has possession of, uses, and controls it for his own benefit: *Brem v. Lockhart*, 93 N. C. 191; *Empire Drill Co. v. Allison*, 94 Id. 548.

There is error. The plaintiff is entitled to a new trial, and we so adjudge. To that end let this opinion be certified to the superior court according to law.

SALE AND DELIVERY OF GOODS ON CONDITION THAT PROPERTY IS NOT TO VEST UNTIL PRICE IS SECURED DOES NOT PASS TITLE TILL CONDITION IS PERFORMED: See *Aultman v. Mallory*, 25 Am. Rep. 478; *Freight etc. Co. v. Standard*, 100 Am. Dec. 255, note 260, where other cases in that series are collected.

PROPERTY WHICH DOES NOT BELONG TO DEBTOR DOES NOT PASS TO HIS ASSIGNEE FOR BENEFIT OF CREDITORS: See *Audenried v. Betteley*, 81 Am. Dec. 755.

SUTTLE v. FALLS.

[98 NORTH CAROLINA, 322.]

TESTIMONY AS TO PRICE OF GOODS AT DISTANT MARKET OF DEALER whose knowledge is derived in the course of his business, and from prices current sent to him, is admissible upon the trial of an action for the price of such goods, as some evidence of the value thereof at the place of production, making allowance for the expense of transportation and sale.

ACTION to recover the price of certain mica, sold by the defendant in the year 1883, as agent for the plaintiff. A witness for the plaintiff, whose testimony is referred to in the opinion, testified as to the price of mica in 1883, stating that he sold mica in Utica, New York, in that year, to a house there who sent him the quotations of prices. There was judgment for the plaintiff, and the defendant appealed. Other facts appear from the opinion.

J. F. Hoke, for the plaintiff.

W. P. Bynum, for the defendant.

By Court, MERRIMON, J. It is unnecessary to decide any question presented by the assignment of error as to the instruction of the court to the jury in respect to interest, because the counsel for the appellees agrees here that the interest allowed up to the date of the judgment shall be abated, and a proper order to that effect will be entered. But the principal money of the judgment will bear interest from the date of the latter until the same shall be paid.

We cannot take notice of the general exception to the whole charge of the court; it is so indefinite and vague as to imply nothing. This has been decided many times.

The assignment of error in respect to the evidence admitted on the trial as to the price of mica in the year 1883 cannot be sustained. The witness so testifying said that he was a dealer in that article, — bought and sold it in that year. He therefore had knowledge, and was qualified to testify as to the current price of it.

Nor was the evidence objectionable on the ground that the witness obtained his information in the course of his trade and business as such dealer from merchants, — general dealers in mica in Utica, where there was a market for the same; nor was it objectionable because he derived his information in part from "the quotations of prices" sent to him by the merchants with whom he had such dealings. It is from such sources

and by such means merchants and business men generally come to have information and knowledge as to the methods, customs, and courses of trade and business, and the market value and current prices of classes of goods, articles, and things put upon and sold in the markets of the country. Such knowledge is important and useful. It is acted and relied upon to a greater or less extent, according to circumstances, in buying and selling in the markets, and in business transactions generally. Such information, in appropriate cases, is evidence of greater or less value, in proportion as the witness testifying is more or less trustworthy, and well or ill informed. It is of the nature of hearsay evidence, that comes within well-settled exceptions to the general rule, that hearsay is not ordinarily evidence. The subject is well discussed, and numerous cases cited and commented upon, by the chief justice in *Fairley v. Smith*, 87 N. C. 367, 42 Am. Rep. 522; and also by Mr. Justice Rodman in *Smith v. Railroad*, 68 N. C. 107.

It seems that at first it was expected by the parties that the mica would be sold in the city of Philadelphia. It did not, so far as appears to us, appear on the trial where it was in fact sold. Hence it was contended on the argument here that the price should be that of the place of the contract of bailment. The court was not requested to give such particular instruction, but we think it did so instruct the jury in effect. It said, among other things: "You can consider the testimony as to the quotations of the market, at the place where there is a market, in order to enable you to reach its value here. Its value at the place of production would be less than at the market where it was sold by the expense of transportation and sale." It then directed the attention of the jury to the evidence objected to. The price in Utica—a market for mica—was some evidence of the price at the place of production, and with the explanation given by the court as to the expense of transfer and cost of sale, was unobjectionable. It helped the jury to settle a fair price.

There is no error.

WITNESS KEPT INFORMED OF PRICES IN CERTAIN MARKET BY CIRCULARS AND CORRESPONDENCE IS COMPETENT TO TESTIFY AS TO PRICE IN THAT MARKET: See *Brackett v. Edgerton*, 100 Am. Dec. 211.

McCRACKEN v. ADLER.

[98 NORTH CAROLINA, 400.]

EXECUTION SALE OF DEBTOR'S LAND WITHOUT HAVING HOMESTEAD THEREIN LAID OFF to him by the sheriff is void, and the purchaser thereof acquires no title, whether he be the plaintiff in the execution or a stranger.

SHERIFF AND HIS SURETIES ARE NOT LIABLE FOR VALUE OF HOMESTEAD LOST, but only for all costs and damages which the owner thereof may sustain by reason of the sheriff's neglect to lay off to him his homestead.

DEBTOR'S RIGHT TO HAVE HIS HOMESTEAD SET OFF TO HIM by the sheriff is not impaired by mere fact that some of the buildings thereon are separated from others by the county line.

ACTION to recover land. The plaintiff claimed title under a sheriff's deed upon an execution sale made without having the homestead of the execution debtor in the land laid off to him according to law, or at all. The court instructed the jury that the plaintiff was not entitled to recover, and he excepted and appealed. Other facts appear from the opinion.

G. S. Ferguson, for the plaintiff.

W. L. Norwood and G. H. Smathers, for the defendants.

By Court, MERRIMON, J. Accepting the facts as they appear in the record, the judgment debtor was plainly entitled to have his homestead in the land, which the sheriff undertook and purported to sell, laid off to him as the law directs. Until this was done, the sheriff had no sufficient authority to levy upon and sell it. The law favors the right of homestead, and the statute (Code, secs. 502-506) prescribes in detail and plain terms, leaving little to implication and inference, how it shall be laid off in cases like the present one, and expressly authorizes a levy upon and sale only of the excess of it.

The constitution (art. 10, secs. 2, 5, 8), and the statutory provisions in execution and aid of it, in respect to the right of homestead, strongly indicates a settled purpose to secure and give complete effect to it, and the uniform decisions of the court have been in harmony with that purpose. The homestead shall not be sold "under execution, or other final process obtained on any debt," except in the cases allowed by the constitution, and these are well defined and settled. Neither the constitution nor the statute applicable contemplates a sale of the land subject to the homestead until the latter shall be laid off to the debtor. Moreover, such a sale cannot generally

be made intelligently, fairly, and justly, until the homestead shall have been ascertained. Then, and not till then, the sheriff can see what may be sold; and persons desiring to purchase, what may certainly be bought. The course thus indicated is essential to justice and fair dealing, and as well, important to creditors and debtors. No sensible man will buy at a fair price when he cannot know what and how much he buys. To uphold such sales would be to encourage and establish a vicious practice and absolute wrong, and as well, afford opportunity in many cases for fraud and injustice.

These, and like considerations, led us in deciding the case of *Mebane v. Layton*, 89 N. C. 396, to declare that, generally, a sale of the land of a person entitled to have homestead in the same, without first laying it off to him, was, with certain exemptions specified, unlawful and void. What we have heard, our observation and further reflection on the subject since that decision, do not incline us to recede from or modify what we said and decided in that case: *Arnold v. Estis*, 92 Id. 162; *Durham v. Bostick*, 72 Id. 353; *Andrews v. Pritchett*, 72 Id. 135.

The counsel for the appellant, in his able argument before us, among other things suggested that it is unfair, if not unjust, to purchasers at such sales, to treat them as void, and contended that the owner of the homestead had his remedy against the sheriff, as allowed by the statute (Code, sec. 516). We cannot accept this view as correct. Persons desiring to purchase, and purchasers of land at execution sales, are presumed to know the law; and they ought, in justice to themselves as well as others, before bidding for the property, to inquire whether or not the homestead has been laid off to the debtor. Thus they can easily protect themselves, and encourage a due observance of the law. Such sales are not light and trifling, but serious matters, and require deliberation and scrutiny. The right of action given by the statute just cited is in no sense a substitute for the right of homestead. It only makes it indictable for the sheriff to fail to observe the statute first above cited, and further provides that "he and his sureties shall be liable to the owner of the homestead for all costs and damages in a civil action" that he may sustain by reason of the neglect of the sheriff in failing to lay off to him his homestead, — not for the value of the homestead lost. He might be annoyed and injured in a variety of ways by such neglect, and still be able to assert his right at his cost and expense.

It was further insisted that in any case such deed of the sheriff ought to be void only in case the plaintiff in the execution became the purchaser, as in *Mebane v. Layton*, *supra*.

It is otherwise, because the defect, imperfection, or irregularity in the sale is not simply such as the plaintiff in the execution particularly is presumed to have knowledge of, but the irregularity in failing to lay off the homestead is patent,—one that every person can readily and must take notice of.

The rule thus stated is general and applicable where the execution debtor is entitled to have his homestead laid off to him in the land sold, but there are exceptions to it, as pointed out in *Miller v. Miller*, 89 N. C. 402; *Wilson v. Patton*, 87 Id. 318; and other like cases.

Nor does the rule apply where the land sold is not of the tract or parcels of land to which the execution debtor's right of homestead attaches, as prescribed in the provisions of the constitution and statutes cited above,—as where it is separate and distinct from the homestead property, and not necessary to make the homestead complete, as allowed by the statute: Code, sec. 509. But if the land proposed to be sold is all that the execution debtor has, he is entitled to have his homestead therein laid off to him, although there be no dwelling-house or other habitable building thereon, because he may build a house and other buildings on the land, and thus have the beneficent provision of the constitution: *Flora v. Robbins*, 93 N. C. 38; *Murchison v. Plyler*, 87 Id. 79; *Spoon v. Reid*, 78 Id. 244.

In the case before us, the land which the sheriff undertook to sell was the homestead tract of the execution debtor,—it embraced his dwelling-house, and other buildings used in connection therewith. The mere fact that the county line separated some of these buildings from others could not impair, much less destroy, the debtor's right. It was the plain duty of the sheriff to have the debtor's homestead laid off to him; and it was the folly or misfortune of the plaintiff to bid for, undertake to purchase, pay for, and take the sheriff's deed for the land, until the law in respect to the debtor's homestead had been properly observed.

The view we have taken of the assignment of error above considered renders it unnecessary to consider other questions presented by the record. Judgment affirmed.

SALE OF HOMESTEAD UNDER EXECUTION, WHEN VOID: See *Tucker v. Kenniston*, 93 Am. Dec. 423; note to *Blue v. Blue*, 87 Id. 273, where this subject is discussed.

POWELL v. MORISEY.

[98 NORTH CAROLINA, 426.]

EQUITY WILL ONLY CORRECT MISTAKE IN DEED SUPPORTED BY VALUABLE OR MERITORIOUS CONSIDERATION. It will not correct a mistake in a voluntary deed by inserting therein the word "heirs," which was omitted by the inadvertence of the draughtsman.

VOLUNTARY CONVEYANCE BY GRANDFATHER TO GRANDCHILD is not proof of his intention to place himself *in loco parentis* to the grantee, and thus render the consideration meritorious.

NO JUDGMENT CAN BE ENTERED BY CLERK WHERE ISSUE OF FACT IS RAISED, but the cause must be transferred to the court for trial. It is only upon questions of law that there must be a judgment of the clerk from which an appeal may be taken.

SPECIAL proceeding for the sale of land for partition, commenced before the clerk, and tried before the superior court. The petitioners alleged that James Vann, their ancestor, in 1860, made the deed referred to in the opinion, that the grantees named therein were all dead, and that the petitioners were entitled to partition of the land. The defendants claimed the entire interest in the land. They admitted that the deed appeared on its face to convey only a life estate, but they claimed that the grantor's intention was to convey a fee-simple estate, and that the word "heirs" was omitted by mistake, through the inadvertence of the draughtsman. The jury before whom the issue was tried in the superior court found that the words of inheritance were omitted from the deed by reason of the mistake and inadvertence of the draughtsman. Judgment was rendered for the defendants, and the plaintiffs appealed.

M. C. Richardson, and Haywood and Haywood, for the plaintiffs.

J. L. Stewart, for the defendants.

By Court, DAVIS, J. The consideration mentioned in the deed is the "natural love and affection" of the grantor for the grantees, his grandchildren, and the sum of "one dollar"; and the deed recites that "the said James Vann, Sen., has bargained and sold, given, granted, aliened, enfeoffed, and conveyed, and does by these presents give, grant, alien, enfeoff, and convey [reserving his life estate, or estate during his life, in the following lands]: all that lot of land, etc. [describing it]. . . . To have and to hold the above-described lands and premises to the said James N. Register, Harman H. Register, Gibson S. Register, John R. Register, and Edmund

N. Register, saving and reserving the life estate of the said James Vann in the aforesaid lands."

The record is voluminous, but the foregoing is the case on appeal, as settled and signed by counsel for both sides, and presents the single question: Could the court correct the mistake mentioned? "All agreements, so far as the binding efficacy of their promises is concerned, must be referred to one or the other of these causes: a valuable consideration, a mere voluntary bounty, or the performance of a moral duty. The first alone is binding at law, and enables the promisor to enforce the obligation against the obligor. . . . The third constitutes the meritorious or imperfect consideration of equity, and is recognised as affection by it, within very narrow limits, although not at all by law. While this species of consideration does not render an agreement enforceable against the promisor himself, nor against any one in whose favor he has altered his original intention, yet if an intended gift, based upon such a meritorious consideration, has been partially and imperfectly executed or carried into effect by the donor, and if his original intention remains unaltered at his death, then equity will, within certain narrow limits, enforce the promise thus imperfectly performed, as against a third person claiming by operation of law, who has no equally meritorious foundation for his claim. The equity thus described, as based upon a meritorious consideration, only extends to cases involving the duties, either of charity, of paying creditors, or of maintaining a wife and children. This last duty of maintaining children includes persons to whom the promisor stands *in loco parentis*": 2 Pomeroy's Eq. Jur., sec. 588.

Upon a review of the authorities, this, we think, is as far as equity has gone, and it will only perfect or correct mistakes in deeds supported by valuable or meritorious consideration.

In *Day v. Day*, 84 N. C. 408, the chief justice, citing *Hunt v. Frazier*, 6 Jones Eq. 90, says: "The jurisdiction to reform deeds is not exercised unless the transaction is based on a valuable or meritorious consideration."

In the latter case of *Hunt v. Frazier*, *supra*, the court refused to reform a deed executed in favor of the wife and children of the brother of the grantor.

"It is," says Judge Hall, in *Dawson v. Dawson*, 1 Dev. Eq. 93, 18 Am. Dec. 573, "the old beaten ground, long since occupied by the courts of equity, not to aid voluntary conveyances."

All the cases cited by the counsel for the defendant, in which the mistakes were corrected and the deeds reformed, were based upon valuable considerations.

The deed from James Vann to his grandsons was voluntary, and without valuable consideration. Was the consideration meritorious? Did James Vann stand *in loco parentis* to the grandchildren?

"The proper definition of a person *in loco parentis* to a child is that of a person who means to put himself in the situation of the lawful father of the child, with reference to the father's office in and duty of making provision for the child": Chitty's Equity Digest, tit. Parties in Loco Parentis, and the cases there cited.

The simple fact that the grandfather voluntarily conveyed to the grandchildren is not proof that he intended to assume the office and duty of the father in making provision for them; and in the absence of other evidence, the court cannot assume that he had taken, or intended to take, upon himself such relation. Upon proof of such relation, the consideration becomes meritorious, and courts of equity will lend their aid, as in favor of children; but in the absence of proof, they will not. In this case, no such proof appears, and the court cannot reform the deed. A defective execution cannot be supplied in favor of the grandchild: Adams's Equity, 101.

It does not come within the class of cases represented in *Mordecai v. Boylan*, 6 Jones Eq. 365, and *Scott v. Moore*, Winst. Eq. 98, Hinsdale's ed. 642.

This disposes of the only question presented in the case on appeal.

The special proceeding was originally commenced in 1879, and the case was before this court at January term, 1881, upon appeal of plaintiffs, which appeal was dismissed upon the ground then stated: 84 N. C. 421. The counsel for the appellants now insist that it should have been remanded by the court below to the clerk of the superior court; that there was no judgment rendered by the clerk; and that it could only get properly into the superior court in term by an appeal from his judgment. For this he cites *Taylor v. Bostic*, 93 Id. 415.

This is a misapprehension; and if it were not, we do not see how it could avail the appellants. It is only upon questions of law that there must be a judgment of the clerk from which an appeal may be taken; but "all issues of fact joined before

the clerk shall be transmitted to the superior court for trial at the next succeeding term of said court": Code, sec. 116.

The appellants claim title under the will of James Vann, deceased, which is set out in the petition. We pass no judgment upon the sufficiency of that title, but only declare that the plaintiffs are not entitled to a reformation of the deed stated in the case.

DEFECTIVE VOLUNTARY CONVEYANCE WILL NOT BE PERFECTED IN EQUITY: See *Stone v. King*, 84 Am. Dec. 557, note 564, where other cases in that series are collected. But a court of equity will reform a misdescription in a conveyance founded on a consideration, although the deed is a quitclaim, and contains no covenants: *Deford v. Mercer*, 92 Id. 460.

WALLACE v. WESTERN NORTH CAROLINA R. R. Co.

[98 NORTH CAROLINA, 494.]

WHAT IS CONTRIBUTORY NEGLIGENCE IS QUESTION FOR COURT, when the facts are ascertained. When they are in dispute, the court should explain the law, and direct the jury to apply it to the facts as they find them.

PERSON TAKING PASSAGE ON FREIGHT TRAIN, WITH KNOWLEDGE OF RISKS and inconveniences incidental thereto, is bound to be more careful in guarding against injury than he would be in traveling upon ordinary passenger trains.

WHERE PASSENGER RIDING ON FREIGHT TRAIN WAS STANDING UP in the caboose, although there were seats for all the passengers, when he was thrown down and received injuries from the sudden starting or jerking of the train, there is some evidence of contributory negligence on his part, which ought to be submitted to the jury.

ACTION to recover damages for personal injuries received by the plaintiff while riding on a freight train of the defendant. The complaint alleged that, by the careless, unskillful, and negligent management of the servants and agents of the defendant, the car in which the plaintiff was riding was jerked and jarred with such force as to violently throw him down within the car, producing the injuries complained of. The defendant denied the material allegations of the complaint, and charged that the plaintiff was guilty of contributory negligence in failing to care for himself as he ought, under the circumstances. The evidence showed that the plaintiff was standing up in the car at the time of the accident, although there were sufficient seats for all the passengers on board the train. A witness for the plaintiff testified that "the train had stalled and jerked several times; he kept his seat; was

afraid of their running back to get a start, and knew they were pretty rough about starting." The following is the second issue submitted to the jury: "2. Did the plaintiff contribute to the injury by his own negligence?" And the following are the instructions asked by the defendant, which are referred to in the opinion: "6. That there is no evidence that the engine or locomotive was overloaded; 7. That there is no evidence of careless management of the locomotive or cars on the part of agents of the defendant on this occasion; 8. That in review of and in the light of the evidence in this case, the injury was an accident, and not the result of negligence." The jury found for the plaintiff, and the defendant appealed. Other facts appear from the opinion.

P. J. Sinclair and W. H. Malone, for the plaintiff.

D. Schenck and C. M. Busbee, for the defendant.

By Court, DAVIS, J. The charge of his honor is set out in full, but as we think there was error in instructing the jury that there was no evidence of contributory negligence, it is not necessary for us to consider how far the prayer for instructions, though not given in the form requested, was substantially met by the charge as given, or whether the charge did not cover the instructions asked for to the full extent to which the defendant was entitled; and we may say that the defendant was not entitled to the sixth, seventh, and eighth instructions at all.

In *Smith v. N. C. R. R. Co.*, 64 N. C. 285, it is said: "When the facts are agreed upon, or otherwise appear, what is ordinary care is a question for the court. When the facts are in dispute, the proper course for the judge is, to explain what would be ordinary care under certain hypotheses as to facts, and have the jury to apply the law to the facts, as they find them." The same rule applies to negligence and to contributory negligence. If there is any evidence from which the jury may find facts constituting contributory negligence, it should go to the jury.

Was there any negligence tending to show contributory negligence in this case? We think there was.

A caboose attached to a freight train does not furnish all the appliances and conveniences for the safety and comfort of passengers that are provided for passenger trains, and while it is the duty of the company carrying passengers on

such a train to exercise every reasonable care, and take every precaution against injury or danger to the life of such passengers, which the appliances for that mode of transportation will admit of, it is also the duty of the passenger who travels on such a train, with a full knowledge of the increased risk incidental thereto, to be correspondingly careful in guarding against injury, by reason of the risk incidental to such mode of travel. An act may be negligent or not according to the attendant circumstances. An act on a regular passenger train, with air-brakes and other appliances to secure smooth and comfortable as well as safer travel, may not be at all negligent in the passenger, while the same act in a caboose attached to a freight train might be careless and negligent.

It is a fact of common knowledge that even on a passenger train, with every appliance for comfort and safety that can be devised, there is more or less of jar and jerk incident to the starting and stopping of trains, and it is in evidence in this case that such jars and jerks are much greater on freight trains, and necessarily so, by reason of their character. The passenger on such a train assumes the ordinary risk and discomfort incident thereto, and if the train is managed with such care and prudence, by skillful and competent employees, as to subject him only to the discomfort and risk thus incident, the company would not be liable for any accident resulting therefrom, by reason of the failure of the passenger to show usual and ordinary precaution. There is evidence tending to show that the plaintiff did not do this. It is in evidence that the jerks and jars incident to the freight train were known to him; that on this occasion the train was a long one, and the locomotive was moving it with difficulty, and there had been frequent jerks, more or less severe, and such as seem to have suggested to other passengers the propriety of retaining their seats, for one of the plaintiff's witnesses testified that "he kept his seat," knowing "that they were pretty rough about starting."

It was in evidence that there were seats for all the passengers, and the fact that others in the caboose kept their seats, and none of them were hurt, constitute some evidence tending to show that it was careless and negligent in the plaintiff, under the circumstances, to be standing. We think there was error in withholding from the jury the second issue, and the defendant is entitled to a new trial.

PASSENGER ON FREIGHT TRAIN, WHAT IS CONTRIBUTORY NEGLIGENCE OF PART OF: See *Harris v. Hannibal etc. R. R. Co.*, 58 Am. Rep. 111, note 113; *Woolery v. Louisville etc. R'y Co.*, 57 Id. 114; *Dunn v. Grand T. R'y*, 4 Id. 267. A passenger assumes the risks of the mode of travel which he adopts: *Galana etc. R. R. Co. v. Fay*, 63 Am. Dec. 323, note 333.

WHAT IS CONTRIBUTORY NEGLIGENCE, WHEN QUESTION OF FACT, AND WHEN OF LAW: See *Dulibery v. Minneapolis etc. R'y Co.*, 50 Am. Rep. 585, note 589; *Tolman v. Syracuse etc. R. R. Co.*, 50 Id. 649, note 653; *Stouer v. Pennsylvania Co.*, 49 Id. 764; *Pennsylvania R. R. Co. v. Weber*, 18 Id. 407; *Lewis v. Baltimore & O. R. R. Co.*, 17 Id. 521; *Pittsburg etc. R. R. Co. v. Andrews*, 17 Id. 568; *Cleveland etc. R. R. Co. v. Crawford*, 15 Id. 633; *Barton v. St. Louis etc. R. R. Co.*, 14 Id. 418; *Pennsylvania R. R. Co. v. Beak*, 13 Id. 753; *Bellefontaine R'y Co. v. Hunter*, 5 Id. 201; *Johnson v. Bruner*, 100 Am. Dec. 613, note 618, where other cases in that series are collected; *Detroit etc. R. R. Co. v. Curtis*, 99 Id. 141, note 144.

MAGRUDER v. SHELTON.

[98 NORTH CAROLINA, 645.]

AFFIDAVIT UPON WHICH PROCEEDINGS SUPPLEMENTARY TO EXECUTION ARE BASED NEED NOT SPECIFY PROPERTY owned by the debtor which he refuses to apply to the satisfaction of the judgment.

TO OBTAIN ORDER REQUIRING JUDGMENT DEFENDANT TO ANSWER CONCERNING HIS PROPERTY, three facts must be made to appear by affidavit or otherwise: 1. The want of known property liable to execution; 2. The non-existence of any equitable estate in land subject to the lien of the judgment; 3. The existence of property unaffected by any lien, and incapable of levy.

APPEAL from an order requiring the defendants to answer concerning their property, in a proceeding supplementary to execution. The court below held that the affidavit for the order was sufficient. The facts are sufficiently stated in the opinion.

No counsel for the plaintiffs.

George H. Smathers, for the defendants.

By Court, DAVIS, J. The defendants say that the affidavit fails to specify the property, choses in action, or other thing of value owned by the defendants, which they refuse to apply towards the satisfaction of plaintiff's judgment, and for this failure the affidavit is insufficient.

Subsection 1 of section 488 of the code authorizes an order requiring defendants to answer concerning their property, upon the return of an execution unsatisfied, and subsection 2 authorizes an order to issue before the return of the execution,

"upon proof by affidavit" that the judgment debtor "has property which he unjustly refuses to apply towards the satisfaction of the judgment."

Under the old practice, a suit in the county or superior court was commenced by a writ, issued by the clerk, which commanded the sheriff "to take the body of the defendant," etc., and the defendant was required to give bail for his appearance, etc., and if the sheriff in executing the process failed to require bail, he himself became special bail. The bail was responsible for the appearance of the defendant to satisfy the judgment of the court; and if he failed to appear, the bail became liable. The liability of the bail, however, did not become final or absolute until after notice, and he might, at any time before final judgment against him, discharge his liability in certain modes, the most usual of which was by a surrender of his principal. The *scire facias* could be issued to notify the bail after a return of the execution by the sheriff unsatisfied, without affidavit, and the defendant, being in custody, could only discharge himself by giving notice to the creditor, and filing a schedule containing "an exact account of his estate, and all circumstances relating thereto."

This schedule had to be on oath, and if sufficient, entitled the defendant to his discharge, and he could not get his discharge until it appeared that he had rendered an accurate schedule of all his property, the title to which (except such as was exempt) vested in the sheriff for the satisfaction of the judgment. No *capias ad satisfaciendum* could issue, except upon affidavit that the debtor had no property which could be reached by *feri facias*, sufficient to satisfy the judgment, and that he had property, money, or effects which could not be reached, or had fraudulently concealed his property, etc., or was about to remove from the state.

The supplementary proceeding is designed to enable the creditor to reach the same result as was attained by the *ca. sa.* under the old practice, and in analogy to that practice, it may be that the absence of the requirement of the affidavit to procure the order after the return of the execution unsatisfied, in subsection 1 of section 488, was because it was thought unnecessary. But this court, in a carefully considered opinion, delivered by Dillard, J., in *Hinsdale v. Sinclair*, 83 N. C. 338, has put a different construction upon the statute, and we accept it as now settled, that in order to obtain the order "three facts must be made to appear by affidavit or otherwise: 1. The

want of known property liable to execution, which is proved by the sheriff's return of 'unsatisfied'; 2. The non-existence of any equitable estate in land within the lien of the judgment; and 3. The existence of property, choses in action, and things of value unaffected by any lien and incapable of levy."

Each of these requirements is met by the affidavit in this case. The very purpose of the proceeding is to compel a discovery by an examination of the defendant; and if the scope of the examination were confined, as is insisted, to such "property, choses in action, or other things of value" as the plaintiff might be able to specify in his affidavit, the supplementary proceeding would be shorn of its chief value.

The affidavit is sufficient, and there is no error.

PROCEEDINGS SUPPLEMENTAL TO EXECUTION: See *Lathrop v. Clapp*, 100 Am. Dec. 493, note 500-515, where this subject is discussed at length.

STATE v. THOMAS.

[98 NORTH CAROLINA, 599.]

ACCUSED, BY VOLUNTARILY OFFERING HIMSELF AS WITNESS IN HIS OWN BEHALF, WAIVES his constitutional privilege of refusing to answer a question because the answer may tend to criminate him.

WHERE HOMICIDE IS SHOWN TO HAVE BEEN COMMITTED WITH DEADLY WEAPON, and intentionally, the court may instruct the jury that if the testimony does not satisfy them that the offense is manslaughter, it is their duty to convict of murder.

INDICTMENT for murder. The verdict was guilty of murder, and the defendant appealed. The prisoner was examined on the trial as a witness in his own behalf. The portions of the judge's charge to the jury necessary to an understanding of the opinion are as follows: "The homicide being admitted to have been effected by the use of a deadly weapon, the prisoner must satisfy you that it was committed under circumstances reducing the crime to manslaughter; and in determining the degree of the offense, all the evidence, as well that produced by the state as that produced by the prisoner, must be considered. . . . I have already instructed the jury that, in forming a conclusion as to whether the prisoner be guilty of murder or manslaughter, they must consider all the evidence in the case. The prisoner is permitted to rely upon acts, circumstances, and declarations proved by the state, in order to acquit himself of the more serious offense; and I now again

so charge the jury." The answer of the judge to the inquiry of the jury after their return into court was in the following words: "You have been informed that the prisoner's admission of the killing with a deadly weapon imposes on him the duty of satisfying you that the act is manslaughter. In determining whether it be manslaughter or murder, it is proper for you to consider the character of the witnesses both for the state and the defendant, their interest in the result, their demeanor on the stand, the relationship of the witnesses for the state to the deceased, for the purpose of ascertaining whether they are credible or not. Carefully analyze all the testimony, scrutinize and compare the statements of the different witnesses, ascertain the facts from the testimony, apply the facts to the law the court has announced, and if, upon all the evidence, after attaching such weight and importance to the testimony of each witness as in your opinion it merits, you are not satisfied that the offense is manslaughter, convict of murder; if so satisfied, convict of manslaughter, since the state is relieved of the burden of introducing any testimony upon such admission, and the *onus* as to all matters is on the defendant." Other facts appear from the opinion.

Attorney-general, for the state.

J. C. L. Gudger and G. S. Ferguson, for the defendant.

By Court, SMITH, C. J. 1. The first objection to be considered is to the compelling the prisoner to tell with what crime he was charged before removing from Alabama.

When a person on trial for a criminal offense shall avail himself of the right conferred by the act of 1881 (Code, sec. 1353), to become a witness on his own behalf, he occupies, as such, the same position that any other witness would, and exposes himself to the same discrediting and impeaching evidence: *State v. Effer*, 85 N. C. 585. This results from the necessity of ascertaining the value and weight to be given to his testimony by the jury; and it is certainly a material inquiry whether the witness is entitled to credit and deserving their confidence in the truthfulness of his statements.

In the absence of direct rulings on this point, it would seem that a question ought not to be allowed to be put to an involuntary witness, not a party to the cause, the answer to which would criminate, so that the refusal to answer, and the inferences to be drawn from it, would be almost, if not quite, as

prejudicial and disparaging as a direct and affirmative reply. In the language of Battle, J.: "It is manifest that the only mode by which a complete protection can be afforded to the witness is to prevent the question from being put at all": *State v. Garrett*, Busb. 357.

But the ruling in this court has been otherwise, and in the case cited the refusal of the witness to answer the inquiry, "Have you not been indicted, convicted, and whipped in the county court of Warren, for stealing?" was allowed to be commented on before the jury to the discredit of the witness. As the disparaging question may be asked, and a refusal to answer can be used to discredit, the judge, in the opinion from which we have quoted, adds: "We are inclined to think with the very eminent judges who decided *State v. Patterson*, 2 Ired. 346, 38 Am. Dec. 699, that it follows as a necessary consequence that the witness is bound to answer."

The testimony sought to be elicited in this case was disparaging only, and would not expose the witness to the perils of a criminal prosecution, if true, for that is assumed to have already taken place.

In the more recent case of *State v. Murray*, 63 N. C. 81, which was on an indictment for rape, the prosecutrix was asked if she "had not been delivered of a bastard child, and had had sexual intercourse with other men," and the judge below would not allow the question to be put. Upon appeal, Pearson, C. J., speaking for the court, declared this to be error. But in *State v. Marsh*, 64 N. C. 378, a witness was asked if he had not committed willful and corrupt perjury in Georgia, by swearing that he had not brought negroes into the state, and this question was propounded to impeach the credibility of the witness. It was ruled out, and upon appeal, Battle, J., delivering the opinion, thus disposes of the exception: "If the witness had been asked whether he had or had not committed perjury in this state, he certainly would have been protected from answering what might have exposed him to a criminal prosecution in our courts, and in such case, we are inclined to think that the question ought not to be allowed to be put at all. But our courts, in administering justice among their suitors, will not notice the criminal laws of another state or country, so far as to protect a witness from being asked if he had not violated them. We are of the opinion, therefore, that the question was improperly ruled out, and that the defendant is entitled to the benefit of another trial."

This ruling proceeds upon the principle that self-criminating evidence cannot be drawn from the witness, against his will, when it relates to offenses committed within the jurisdiction of the state; but the protection does not extend to such as are committed beyond its jurisdiction, and which violate the laws of another state or country. The crime of perjury exists under the common law, and is recognized as such in like manner as homicide.

This case is not distinguishable in principle from that before us. We prefer, however, to put our decision upon other ground,—more satisfactory to our own minds, and well sustained by adjudications in other courts.

A person charged with crime may, "at his own request, but not otherwise," become a witness on his own behalf upon the trial, and his failure to claim the privilege and offer his own testimony is not permitted to become the subject of comment to his prejudice by counsel for the prosecution: Code, sec. 1353. He is, when he chooses to testify, bound to disclose all he knows, whether criminating or disparaging to himself, as does an ordinary witness when testifying on matters of which he might claim the privilege of being silent; binds himself to tell the whole truth, and all that he knows of the transaction, to part of which only he has testified. In either such case the privilege is waived.

In *McGarry v. People*, 2 Lans. 227-233, it is said of a party testifying: "It was not compelling him" to be a witness against himself, within article 1, section 6, of the constitution of this state. He was a voluntary witness under the provisions of chapter 678 of the laws of 1869. He was not only a volunteer, but had taken the necessary oath to enable him to testify, "to tell the truth, the whole truth, and nothing but the truth," upon the whole issue of traverse between himself and the people. He could not have been compelled to give evidence at all; but when he made himself a witness under the privilege conferred upon him by this statute, he waived the constitutional protection in his favor, and subjected himself to the peril of being examined as to any and every matter pertinent to the issue. To the same effect is *Burdick v. People*, 58 Barb. 51-53.

In *Brandon v. People*, 42 N. Y. 265, upon the trial of the accused for larceny, she was asked: "Have you ever been arrested before for theft?" An objection to the testimony was overruled, and she answered in the affirmative.

In *Commonwealth v. Lannan*, 13 Allen, 563-569, Hoar, J., uses this language: "The defendant, by offering himself as a witness, waives his right to object to any question pertinent to the issue on the ground that the answer may tend to criminate him. He is not required to testify, and may protect himself by not doing so," citing *Commonwealth v. Price*, 10 Gray, 472; 71 Am. Dec. 668.

Again, says Bigelow, C. J., in *Commonwealth v. Mullen*, 97 Mass. 545, 546: "If he offers himself as a witness, he waives his constitutional privilege of refusing to furnish evidence against himself, and may be interrogated as a general witness in the cause."

"By taking the stand as a witness," to use the words of Cobb, J., "he waived his constitutional privilege of refusing to furnish evidence against himself, and subjected himself to be treated as a witness": *Commonwealth v. Morgan*, 107 Mass. 199-205. These references, in connection with *State v. Marsh*, *supra*, dispose of the exception.

2. We do not find anything in the charge of the court to warrant the exceptions taken to it. So far as it relates to the burden of proof in reducing the grade of the homicide, when there had been a willful killing, the charge is in accord with the law as declared in *State v. Bowman*, 80 N. C. 432, and *State v. Brittain*, 89 Id. 481, and the series of cases cited by Mr. Justice Ashe in the last.

The presiding judge, as the case on appeal states, while not setting out in words the charge upon the point, "explained to the jury the difference between murder and manslaughter, and applied the rule of law so announced to the evidence in the case," and to this no exception is taken. The charge is not, therefore, obnoxious to the complaint, based upon the ruling in *State v. Jones*, 87 N. C. 547, when the court declared the law in general terms, without adapting it to the different aspects of the evidence, as required by the Code, section 412. So he did direct the jury to find of what crime the prisoner was guilty, from an examination of all the evidence, and of course, if that of the state showed the mitigating circumstances, it would be as protective as if proved by the prisoner. He was not bound by the very words of the introduction, if correct in itself, when it was substantially given: *State v. Neville*, 6 Jones, 423; *State v. Boon*, 82 N. C. 637; *Rencher v. Wynne*, 86 Id. 268.

The exception, based upon what transpired on the return

of the jury, when information was asked whether in case of doubt of the testimony of any witness the prisoner was entitled to it, is also untenable. The inquiry, in form, is indefinite in its terms, but assuming it to refer to a supposed defect in the inculcating evidence, the answer from the judge seems to meet it, and was accepted by the jurors as satisfactory. It was virtually a repetition of what had been before said, that the homicide being conceded to have been committed with a deadly weapon, and intentionally, the law pronounced it murder, unless, upon the evidence, it should be reduced to a lower grade, and that the doubt as to whether this was sufficiently proved was not to be resolved in the prisoner's favor.

The case has been ably argued for the prisoner and the defense considered with the consideration due to it. It must be declared there is no error, and the judgment affirmed.

WHETHER ACCUSED OFFERING HIMSELF AS WITNESS CAN REFUSE TO ANSWER QUESTION, BECAUSE HIS ANSWER WOULD CRIMINATE HIM: See *People v. Noelke*, 46 Am. Rep. 128; *Hanoff v. State*, 41 Id. 496; *People v. Brown*, 28 Id. 183, note; note to *State v. White*, 27 Id. 140; *State v. Wentworth*, 20 Id. 688; *Commonwealth v. Nichols*, 19 Id. 346, note 348; *State v. Oler*, 13 Id. 88, note 92; note to *Fries v. Brugler*, 21 Am. Dec. 61.

CASES
IN THE
COURT OF APPEALS
NEW YORK.

FISHER v. BISHOP.

[108 NEW YORK, 25.]

UNDUE INFLUENCE. — If an antecedent fiduciary relation exists, a court of equity will presume confidence placed and influence exerted. This rule is not limited to the relation of attorney and client, guardian and ward, trustee and *cestui que trust*, or other similar relations, but holds good wherever fiduciary relations exist, and there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding.

BURDEN OF PROOF RESTS ON PERSON OCCUPYING FIDUCIARY RELATION to show that a transaction entered into between him and the person trusting him is just and fair, and that no unfair advantage was derived from the fiduciary relation.

PERSON HOLDS CONFIDENTIAL RELATION TO ANOTHER when the latter employs him, because of his supposed ability and integrity, as a confidential adviser to transact business, and he is precluded from taking advantage of his situation, and from using information thus acquired, to the detriment of his employer.

MORTGAGE OBTAINED BY REPRESENTATIONS OF MORTGAGOR'S LEGAL ADVISER, to the effect that a previous transfer to the mortgagor could and would be set aside as fraudulent, unless he made such mortgage, and thereby secured certain creditors of his grantor, will be vacated in equity as procured by the undue influence of such legal adviser. It is immaterial that he was not a regular attorney, if he was employed and trusted as such by the mortgagor and others.

BILL for the cancellation of a mortgage. The prayer of the bill was granted in the trial court. On appeal to the general term, the judgment was modified so as to require the complainant to refund one dollar paid to him as a nominal consideration of such mortgage.

W. H. Johnson, for the appellants.

William Youmans, for the respondent.

By Court, RUGER, C. J. This is an action in equity to procure the surrender and cancellation of a bond and mortgage, alleged to have been procured by duress and undue influence exercised by the defendants upon the plaintiff to that end.

The proof showed that the plaintiff was a farmer, almost seventy years of age, residing in Sidney, and had become much involved as an indorser for his son, who had recently failed in business, and absconded. On the day of his flight the son had executed to his father a transfer of property for the purpose of securing him, as far as he was able, for the liabilities which his father had incurred on his account. The plaintiff had become much embarrassed by these liabilities, as well as mortified and distressed by the shame and disgrace which he apprehended from his son's misconduct. The defendant Wattles was also a resident of Sidney, where he had been a justice of the peace for many years, and was largely employed by the people of the vicinity as a legal adviser and conveyancer. He had been frequently employed in that capacity by the plaintiff, and was engaged by him in the transaction wherein the son attempted to secure the plaintiff, and drew the transfer made on that occasion. Three days after the son had absconded, the defendants obtained the bond and mortgage in suit, and the proof shows that it was executed by the plaintiff through fear excited by the representations of Wattles that the transfers from the son to plaintiff were fraudulent against creditors, and that unless the plaintiff secured the defendants they could and would set aside such transfers as fraudulent. These threats were several times repeated during the two or three days occupied by the negotiations between defendants and plaintiff, and during which the plaintiff resisted all efforts to induce him to give the security demanded. Finally, on the third day, his resistance was overcome, and he consented to execute the mortgage. He was under no legal or moral obligation to do so, as his liabilities for his son already exceeded the value of the property received by him as security.

We think the circumstances of the case establish the fact of undue influence within the meaning of the rule which avoids contracts and conveyances so obtained. It is said in Pomeroy's Equity Jurisprudence, section 951: "Where an antecedent

fiduciary relation exists, a court of equity will presume confidence placed and influence exerted; where there is no such fiduciary relation, the confidence and influence must be proved by satisfactory extrinsic evidence; the rules of equity and the remedies which it bestows are exactly the same in each of these two cases. The doctrine of equity concerning undue influence is very broad, and is based upon principles of the highest morality. It reaches every case, and grants relief where influence is acquired and abused, or where confidence is reposed and betrayed."

Lord Cranworth, in *Smith v. Kay*, 7 H. L. 771, laid down the rule in these words: "There is no branch of the jurisdiction of the court of chancery which it is more ready to exercise than that which protects infants and persons in a situation of dependence, as it were, upon others, from being imposed upon by those upon whom they are so dependent. The familiar cases of the influence of a parent over his child, of a guardian over his ward, of an attorney over his client, are but instances"; but as said by Lord Eldon in *Gibson v. Jeyes*, 6 Ves. 266, it is "the great rule applying to trustees, attorneys, or any one else." It will be seen that the rule is not limited to cases of attorney and client, guardian and ward, trustee and *cestui que trust*, or other similar relations, but it holds good wherever fiduciary relations exist, and there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding: *Freelove v. Cole*, 41 Barb. 318; *Ford v. Harrington*, 16 N. Y. 285. When this relation is shown to exist, it imposes the burden of proof upon the person taking securities, or making contracts inuring to his benefit, to show that the transaction is just and fair, and that he has derived no unfair advantage from his fiduciary relation: *Mason v. Ring*, 2 Abb. Pr., N. S., 322. Cases holding that contracts obtained under circumstances which amount to legal constraint only, or threats of doing that which the party threatening had a legal right to do, are not controlling, or even important, in considering the case made by the proof in this action. One who has, by reason of his supposed ability and integrity, been employed by another as a confidential adviser to transact the business of obtaining surety from an insolvent debtor, and who draws the transfer of property for that purpose, occupies a confidential position towards his employer, which, in good faith and common honesty, should preclude him from taking advantage of his situation, and using the in-

formation thus acquired to the detriment or disadvantage of his employer.

There was no evidence in the case which tended to show that the transfers from the son were in fact tainted with fraud, or subject to any suspicion, but the assertion that they were subject to be set aside for that reason, coming from the person in whom the plaintiff had confided, and whom he had reason to suppose competent to determine that question, must have weighed with great force upon the mind of an old man, ignorant of legal proceedings, and already involved in debts and liabilities almost beyond his capacity to meet. The plaintiff might well have been quite unconscious of any fraud in the transaction, and yet have lent a ready belief to the proposition so often asserted by his confidential adviser, that the transfers were fraudulent, and could and would be set aside.

The extent to which the plaintiff confided in the defendant Wattles is clearly shown by the fact that he had frequently employed him in business transactions, and that the conveyances which he then threatened to annul and overthrow were drawn by him, and accepted under his advice and co-operation. It was a gross breach of good faith for a person thus trusted, and who had, by conducting the business, vouched for its validity and lawfulness, to turn around, for the purpose of gaining a personal advantage, and assert that he had been engaged in an illegal transaction, which he could at his own option annul and destroy.

The case shows that by these means the defendants have obtained security for a large amount, from an old man who was under no legal or moral obligation to give it, and without any consideration to support it, except the nominal one of a dollar, and that this was extorted at a time when he was laboring under much distress and anxiety of mind on account of the trouble that encompassed him. The parties, in this case, did not meet on equal terms, and the defendants took an unfair advantage of the position in which they had been placed, and of the confidence reposed in them by the plaintiff, to procure from him a valuable security to which they had no legal right.

We think the case is clearly within the rules above laid down, and that the defendants should be required to cancel the obligation obtained. The disposition made by the general term of the appellants' claim, that the mortgage should be sustained, because the plaintiff did not offer to return the

consideration of one dollar before suit brought, was correct: *Allerton v. Allerton*, 50 N. Y. 670. That disposition was a modification of the judgment below, by directing a repayment of the one dollar.

The judgment should be affirmed.

TRANSFER BY FATHER, UNDER INFLUENCE OF SON, of all his property to his son, is presumptively void: *Jacox v. Jacox*, 29 Am. Rep. 547. Conveyance by minor, on day he becomes of age, of all his property to one holding relation of parent and guardian, will be upheld in equity only upon a showing that it is just and equitable: *Berkmeier v. Killerman*, 30 Id. 577. The same is true where a daughter assumes an obligation for the benefit of her father, with whom she was living: *Noble's Adm'r v. Moses*, 60 Id. 175.

UNDUE INFLUENCE OF WIFE AVOIDS TRANSFER TO HER OF HER HUSBAND'S PROPERTY: *Haydock v. Haydock*, 38 Am. Rep. 385. Undue influence of husband invalidates transfer by wife: *Boyd v. La Montagnie*, 29 Id. 197; *Darlington's Appeal*, 27 Id. 726.

UNDUE INFLUENCE OF GUARDIAN.—Transaction between guardian and ward, from which guardian derives benefit, is presumptively void: *Perguson v. Lowery*, 25 Am. Rep. 718. Equity will not permit guardian, or other person standing in a fiduciary relation, to derive profit from any transaction which occurs during the continuance of such relation: *Lony v. Mulford*, 98 Am. Dec. 638.

CONTRACT MADE BETWEEN SPIRITUALISTIC MEDIUM AND BELIEVER in his powers is presumed to have been induced by undue influence: *Conner v. Stanley*, 1 Am. St. Rep. 84.

UNDUE INFLUENCE, QUESTION OF, WHERE PATIENT HAS MADE GIFT TO PHYSICIAN, is proper for the jury: *Woodbury v. Woodbury*, 55 Am. Rep. 479, and note. Gift by patient to physician and confidential friend upheld: *Audenreil's Appeal*, 33 Id. 731, and extended note.

PRESUMPTION OF UNDUE INFLUENCE arises where beneficiary under the will, while holding confidential relations to testator, prepares and directs execution of will: *Yardley v. Cuthbertson*, 56 Am. Rep. 218. Bequests by will, gifts, or grants, obtained from the ward by the guardian, from *cestui que trust* by trustee, from child by parent, or from client by attorney, are generally held to be presumptively void, and obtained through undue influence: *Garrison's Adm'r v. Williams*, 100 Am. Dec. 314, and note 324.

UNDUE INFLUENCE IN OBTAINING WILL, WHAT IS: *Baldwin v. Parker*, 96 Am. Dec. 677, and note; *Taylor v. Kelly*, 68 Id. 150; *Potts v. House*, 50 Id. 329, and note 360. Influence sufficient to invalidate will must be what: *Higgins v. Carlton*, 92 Id. 686; *Monroe v. Barclay*, 93 Id. 620.

UNDUE INFLUENCE, WHAT IS AND WHAT IS NOT: *Dean v. Nagley*, 80 Am. Dec. 620; *Webb v. Fleming*, 76 Id. 675. Gift by testator to his mistress, to the exclusion of his kindred, does not raise the presumption of undue influence: *Porschet v. Porschet*, 56 Am. Rep. 880.

UNDUE INFLUENCE IS PRESUMED where legacy is given by client to attorney by whom will was drawn: *St. Leger's Appeal*, 91 Am. Dec. 735; and where distributee sells to administrator: *Williams v. Powell*, 41 Am. Rep. 742; and where sister leases property to her brother, with whom she is living: *Gillespie v. Holland*, 48 Id. 1. It is not presumed where will is drawn

by confidential friend and husband of a beneficiary under the will: *Montague v. Allen's Ex'rs*, 49 Id. 384; nor where a party to a contract is an attorney, and draws necessary papers gratuitously: *Stout v. Smith*, 50 Id. 633.

ANTENUPTIAL AGREEMENTS, HOW AFFECTED BY UNDUE INFLUENCE: *Pierce v. Pierce*, 27 A.L. Rep. 22, and note.

SMITH v. KERR.

[108 NEW YORK, 31.]

NO OBLIGATION TO REBUILD RESTS ON LANDLORD OR TENANT on the destruction of the leased premises by fire.

TENANT CONTINUES LIABLE FOR RENT OF PREMISES INJURED BY FIRE, so long as any part thereof remains in existence capable of being occupied or enjoyed by him. This rule has been so modified by statute in New York as to give the tenant the option of surrendering possession of premises destroyed by fire, and declaring his lease at an end. He continues answerable under his lease, however, until he exercises his option and effects a full and absolute surrender of the premises.

IF LANDLORD REBUILDS PREMISES AFTER THEIR DESTRUCTION BY FIRE, the tenant has the right to enter upon the premises and hold them, including the new structures, to the end of the term.

LANDLORD HAS NO RIGHT TO ENTER UPON LEASED PREMISES INJURED BY FIRE, for the purpose of rebuilding, without the assent of the tenant, in the absence of a covenant to rebuild.

TO EFFECT SURRENDER OF EXISTING LEASE, BY OPERATION OF LAW, there must be a new lease, valid in law, to pass an interest according to the contract and intention of the parties.

IN CONSTRUING CONTRACTS, COURT SHOULD PUT ITSELF, as near as may be, in the situation of the parties, and from a consideration of the surrounding circumstances and the occasion, and apparent object of the parties, determine the meaning and intent of the language used by them in their agreement.

AGREEMENT TO PAY INCREASED RENT IS INOPERATIVE AND VOID, WHEN TENANT has the right to remain in possession of the premises under an existing lease, for a definite term, although the landlord has erected new buildings in place of those destroyed by fire. Such an agreement is not a surrender of the pre-existing term, and accepting a new term in lieu thereof; and even if construed to operate as such surrender and releasing, it cannot have effect as such, in the present case, because not in writing.

SUMMARY proceeding begun before a justice of the peace to remove the defendant from certain premises for non-payment of rent. The justice gave judgment for the plaintiff, which was affirmed by the county court. This judgment of affirmance was reversed by the general term. The plaintiff then appealed to this court.

W. H. Henderson, for the appellant.

Hudson Ansley, for the respondent.

By Court, RUGER, C. J. On the fifth day of September, 1880, the defendant was in occupation of certain premises in the village of Salamanca under a written lease from the plaintiff to him, dated February 20, 1880, describing such premises by metes and bounds, and the building thereon, for a term of three years, at an annual rent of three hundred dollars. The premises consisted of a plat of ground extending thirty-five feet front and rear, and twelve rods long, upon which was erected a wooden building intended to be used for mercantile purposes. On that day the building was destroyed by fire, and thereafter, within four months, the landlord rebuilt upon the same premises a much enlarged building of brick, at an expense considerably in excess of the cost of the original structure. Immediately after the fire the defendant erected a shanty upon the same premises and continued to occupy it as a drug-store until about Christmas, 1880, when he removed his goods into, and took possession of, the brick structure. This proceeding was commenced by the plaintiff to remove the defendant from the premises by summary proceedings, upon the ground of a failure to pay the rent due August 1, 1881, under a parol contract for an increase of rent alleged to have been made about the 1st of December, 1880. The defense interposed was, first, a denial that any such agreement was made; second, that if there had been it was void by the statute of frauds, and ineffectual as a surrender of the existing lease.

Upon the destruction by fire of a structure occupied by a tenant, no obligation rests upon either the landlord or the tenant to rebuild it, in the absence of covenants in the lease requiring it to be done: *Doupe v. Genin*, 45 N. Y. 119. The tenant is, however, at common law, liable to pay the rent reserved by the lease so long as any part of the demised premises remains in existence capable of being occupied or enjoyed by such tenant. Under the statute, however, in case of the destruction of such buildings, the tenant is entitled to exercise an option, either to declare the lease at an end, and to quit and surrender possession of the premises, or to continue in the possession thereof until the expiration of his term, paying the rent reserved by his lease: Laws of 1860, c. 345. The mere fact of the destruction of the buildings does not terminate the lease, and the tenant, unless he exercises this option, and effects a full and absolute surrender of the premises, continues liable under the covenants of his lease for the payment of rent: *Johnson v. Oppenheim*, 55 N. Y. 280. The tenant has

the right to build on the premises, and occupy such building for the remainder of the term, if he chooses to do so, under the conditions of his original lease; or if the landlord voluntarily elects to rebuild, the tenant has the right to enter into possession of such new building, and retain it for the term. It is quite clear that, in the absence of a covenant 'to rebuild, the landlord has no right to enter upon the demised premises and take possession, to the exclusion of the tenant, for the purpose of erecting a new structure; but if the tenant makes no objection to such a proceeding, it would be deemed a license from him to the landlord to enter for the purpose of rebuilding: Wood on Landlord and Tenant, 915.

In the case at bar the tenant did not elect to surrender his lease, and the landlord, with the apparent consent of the tenant, proceeded immediately to make arrangements to rebuild on the premises. Frequent communications between the landlord and tenant occurred during the erection of the building, from which the consent of the tenant to such a proceeding must be inferred, and indeed, he had charge of the work until the foundation walls were laid, and superintended their construction. The landlord at first contemplated erecting a structure substantially of the same material and dimensions as the original building, and had proceeded to some considerable extent in the execution of that project when his design was arrested by the passage of a village ordinance, forbidding the erection of a wooden building in that place. His plans were then changed, and he concluded to build of brick, enlarging the size of the building, and as early as the middle of September had contracted with a builder to perform the work. During the course of the erection, but at what precise time does not appear, he announced to the tenant an intention to increase the rent, but stated that until he knew how much it would cost, he could not tell how much more he should charge. To this the defendant replied that he expected to pay more. The rebuilding then continued until it was nearly completed, when the conversation occurred which the plaintiff claims constituted a new lease for the occupation of the premises and a surrender of the previous term. Although the plaintiff's testimony as to the contract was controverted by the defendant's witnesses, yet, as the justice rendered judgment in favor of the plaintiff, we are bound to assume upon this appeal that the trial court found in favor of the plaintiff's version of the transaction.

Nothing was said in that conversation about the making of a new lease or the surrender of the old one, but an agreement is sought to be implied from the fact that the defendant agreed to pay an increased rent. As stated by the plaintiff, the conversation was as follows: "Arnold [defendant's agent] called me to him and asked me what I was going to charge him for rent of the building; I told him it would be worth eight hundred dollars a year, but I would not charge him that,—that he could have it for fifty dollars per month; he said he thought it was pretty high; I told him it was as cheap as the old building considering the rooms above, insurance, etc.; . . . he wanted to rent the brick new store building; I told him I should not charge him rent from the time of the fire until he took possession of the new building; he asked me what I would allow him for putting in the store fixtures, counters, shelves, drawers, etc.; I told him he could put them in to suit himself, and I would allow him \$250 as rent on this agreement; he said he would keep a correct account of the expenses, and if it did not cost \$250 I need not allow any more than it cost." It was shown that subsequent to this conversation, the defendant took possession of the newly erected buildings and continued to occupy them as a drug-store. It is provided by statute that "no estate or interest in lands, other than leases, for a term not exceeding one year, . . . shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same": 8 R. S., 7th ed., sec. 6, p. 2326.

It is, therefore, quite clear that the new agreement could not operate as a surrender of the old term, unless, by the creation of a new term inconsistent with the existing lease, an intent to do so can be clearly implied. It was said by Allen, J., in *Coe v. Hobby*, 72 N. Y. 145, 28 Am. Rep. 120: "A surrender is implied and so effected by operation of law within the statute quoted when another estate is created by the reversioner or remainderman, with the assent of the termor, incompatible with the existing estate or term. In the case of a term for years, or for life, it may be by the acceptance by the lessee or termor of an estate incompatible with the term, or by the taking of a new lease by a lessee. It will not be implied against the intent of the parties as manifested by their acts; and when such intention cannot be presumed without doing

violence to common sense, the presumption will not be supported. . . . The furthest that our courts have gone is to hold that to effect a surrender of an existing lease by operation of law, there must be a new lease, valid in law, to pass an interest according to the contract and intention of the parties."

In the construction of contracts, it is the duty of the court to put itself as near as may be in the situation of the parties, and from a consideration of the surrounding circumstances and the occasion and apparent object of the parties, determine therefrom the meaning and intent of the language employed in framing their agreement. At the time of this conversation, the defendant had a valid lease of the premises for an unexpired term of about two years and a half, which, by his continued occupation of the premises with a temporary structure, and his frequent conversations with the plaintiff, indicating an intention to continue in possession after a new building should be erected, repel any inference that by the new arrangement he supposed he was surrendering any right to continue his possession under the old lease. His possession of the premises must be assumed to have been continued under his legal title, and not under the permission of the landlord, for he needed no such permission to protect his possession.

What was it the parties undertook to accomplish by the conversation recited? The plaintiff evidently undertook to get an increased rent, and the defendant just as certainly promised to give it to him. The plaintiff testified that the tenant stated "he wanted to rent the brick new store building." This might have been said by the tenant in ignorance of his legal rights, and under the supposition that the destruction of the original buildings terminated his interest therein; but however that may be, he did not indicate an intention to surrender a lease covering twelve rods of land in length and thirty feet in width to obtain the possession of the new building alone. The sole object and purpose of the new contract seems to have been to continue the occupation of the defendant under the existing lease with an increased rent. The old lease was neither surrendered, abrogated, nor annulled, and indeed, no allusion was made to it in the conversation, and the only purpose of the parties seemed to be to leave it in operation and change one of its provisions, viz., that relating to the amount of rent reserved. There was no attempt to create a new term, or to change the extent of the estate demised, or in fact, to execute

a new lease inconsistent with the continued existence of the original one. It seemed to have been assumed by the parties that the defendant could still continue in possession of the whole premises, including that part covered by the buildings, and that he should continue thus to occupy them during the unexpired term of his original lease. It would be doing violence to the plain purpose of the parties to assume that the defendant thereby intended to surrender the rights which he had in possession under his written lease, for a new tenancy subject to be terminated by his lessor at the end of one month, or that he intended to surrender that portion of the property which was not covered by the buildings. No such purpose can be implied from the conversation. If it could in any way be held to have effected a new lease of the premises, it must also be held, in view of the circumstances and the obvious intention of the parties, that it was intended to continue during the unexpired term of the existing lease. Such a term could not be created by parol, and the agreement, therefore, could not create a valid lease, and thereby effect a surrender of the existing lease by operation of law. The case seems to us to come directly within the decision in *Coe v. Hobby, supra*, and to be controlled by it.

The claim of the appellant, that the erection by the landlord of a brick building at an increased cost was a sufficient consideration for the alleged contract, is not supported by the evidence. The landlord had determined to rebuild of brick long before this conversation occurred, and the building had been substantially finished before the alleged agreement was made.

So, also, the claim that the surrender of the claim for rent during the time that the building was in process of erection was a sufficient consideration, is untenable. That rent was payable under the defendant's covenant, and a parol, unexecuted agreement to discharge the claim, was inoperative and void: *Coe v. Hobby, supra*.

The claim, also, that the agreement to allow the tenant to put in the fixtures, and apply the cost thereof to the extent of \$250 upon the rent, has no relation to the provisions of the contract under consideration. The tenant thereby simply agreed to sustain an expense which the landlord would otherwise have borne; and the promise of the landlord to apply it on the rent was an easy method for him to defray the cost of the improvement to his property.

Our conclusion is, that the conversation referred to established a simple executory agreement, without consideration, to alter the terms of an existing, unexpired lease, in which no breach had occurred, and that it was therefore void.

The judgment of the general term should be affirmed.

DESTRUCTION OF DEMISED PREMISES BY FIRE, effect of, on tenant's liability for rent: *Cowell v. Lumley*, 2 Am. Rep. 430.

LESSEE IS NOT BOUND TO RESTORE PREMISES DESTROYED BY FIRE, although he covenanted to restore premises "in as good condition as when delivered to him": *Milner v. Morris*, 40 Am. Rep. 814; *Warner v. Wagner*, 51 Id. 446; and "damages by elements," excepted from a lessee's covenant to repair, includes destruction by fire without the lessee's fault: *Van Wormer v. Crane*, 47 Id. 582. Some of the cases, however, hold that covenant by tenant to repair binds him to rebuild in case of destruction by fire: *Hoy v. Holt*, 36 Id. 659; or by the act of God, or from the elements, or by act of a stranger: *Peluck v. Ploetz*, 95 Am. Dec. 115, and extended note; and where he covenants to repair, and to return in good condition, he is liable: *Abby v. Billups*, 72 Id. 143, and note; but he is released from rebuilding wooden building where an ordinance is passed prohibiting the erection of such buildings: *Corlies v. Miller*, 33 Am. Rep. 430; nor is he liable in damages for accidental destruction of demised premises by fire: *Hovest v. Anderson*, 78 Am. Dec. 538; but if, by agreement, lessee insures building, and collects insurance after destruction of building, and refuses to rebuild, he will be liable for amount of insurance received: *Hayes v. Ferguson*, 54 Am. Rep. 398.

RELATION OF LANDLORD AND TENANT IS TERMINATED by the destruction by fire of the leased apartments: *McMillan v. Salomon*, 94 Am. Dec. 654, and extended note; *Harrington v. Watson*, 60 Am. Rep. 405, and note; or by an act of God or the public enemy, if tenant so elects: *Osgood v. Parker*, 16 Id. 659; nor will tenant who has complied with terms of lease as to keeping property insured be liable for rent after destruction of property by fire: *Whitaker v. Hawley*, 37 Id. 277. But *Womack v. McQuarry*, 92 Am. Dec. 306, holds that tenant is not relieved from his express contract to pay rent by the destruction by fire of leased premises; nor where premises were burned through the negligence or fault of tenant: *Dorr v. Harkness*, 60 Am. Rep. 656; nor where premises were rendered damp and unhealthy by reason of the erection of a building on adjoining lot: *Hillard v. New York & C. G. C. Co.*, 52 Id. 99.

LESSOR WHO COVENANTS TO MAKE ALL NECESSARY REPAIRS upon the outside of building is liable in damages for failing to rebuild burned premises: *Crocker v. Hill*, 60 Am. Rep. 322.

ULRICH v. NEW YORK CENTRAL & H. R. R. Co.

[108 NEW YORK, 80.]

PURCHASE OF SEAT IN DRAWING-ROOM CAR BY ONE who is riding on a free pass does not relieve him from the character of a free passenger. He is therefore precluded from recovering for injuries suffered by him through the negligence of the company or its agents, by a stipulation indorsed on his pass to the effect that the company shall not be liable under any circumstances for the negligence of its servants or otherwise.

Frank Loomis, for the appellant.

W. W. Rowley, for the respondent.

By Court, *RUGER, C. J.* This action is brought by the plaintiff to recover damages of the defendant for injuries to his person and property, occasioned by a collision on the defendant's railroad near Spuyten Duyvil in January, 1882, while he was riding from Albany to New York on a regular train of the defendant's railroad. The distance from Albany to New York is about 150 miles, and the regular fare is \$3.10.

It will be assumed in the consideration of the case that the collision occurred through the negligence of the defendant, and that, in the absence of the special agreement hereinafter referred to, the defendant would have been liable for the injuries suffered by the plaintiff. The plaintiff, however, was at the time riding upon a free pass, issued to him by the company in 1881, which had been duly extended to cover the period during which the injuries were sustained. This pass bore the following printed indorsement: "In consideration of receiving this ticket, the person who uses it voluntarily assumes all risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether by negligence of their agents or otherwise, for any injury to his person or for any loss or injury to his property, and that as for him, in the use of this ticket he will not consider the company as common carriers, or liable to him as such." It is conceded that the plaintiff used this pass on the trip during which the accident occurred, and exhibited it to the conductor when his passage ticket was demanded of him. Unless the contract indicated by this pass and its indorsements has been rescinded or annulled by some other valid contract between the parties, it is clear that their rights and liabilities must be governed by its provisions. It is not claimed by the respondent but that if this contract was in full force, and the plaintiff was actually riding at the time of the accident solely

by virtue of it, that it would control the liability of the defendant, and exempt it wholly therefrom: *Seybolt v. N. Y., L. E., & W. R. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75. It is claimed, however, that, by reason of the purchase of a ticket entitling him to the use and occupation of a particular seat during the passage in the drawing-room car Empire, he became a passenger for hire, and that the contract expressed in the pass must be deemed to have been abrogated and annulled to a certain extent by the new contract.

By reference to the opinion delivered in the court below upon a former appeal of this case, and which is contained in the appeal-book, we infer that the judgment in favor of the plaintiff was affirmed upon the theory that the contract for a seat in the drawing-room car was made with the agents of the defendant, and that such a contract subverted or modified for this trip that formed by the pass and its indorsements.

It is not pretended but that the plaintiff secured his transportation on this occasion by virtue of his pass, but it is inferentially argued that the contract for the purchase of a seat annulled the express condition upon which the pass was issued to the plaintiff, while it left the pass in full vigor so far as it gave the plaintiff a right to be carried on defendant's road from Albany to New York. Perhaps the language used by the court below will afford a more accurate view of its position, viz.: "The defendant has taken money from the plaintiff for carrying him, and it has no right to say that he was a free passenger, and to ask the court to incorporate into the drawing-room ticket the provisions of the free pass."

The vice of this argument is in the assumption that "the defendant has taken money from the plaintiff for carrying him." Assuming for the purposes of the argument that the purchase by a passenger on a train of a drawing-room ticket from a drawing-room car conductor has the same force and effect as though purchased from the train conductor, of which there is much doubt, we yet think that such a purchase has no effect upon the *status* of the purchaser as a passenger. The contracts of a railroad corporation must be construed by the same rules which apply to those of other parties, and must be given the force and effect which was within the contemplation and understanding of the parties when they were made. The inquiry then is, What was the intention of the parties in the transaction culminating in the sale of a seat in the drawing-room car for the trip?

It is undoubtedly true that if the plaintiff had paid his fare, or had made a valid contract with the defendant for passage, which was inconsistent with the provisions of the pass, it might be inferred that the parties intended by such an arrangement to rescind the contract previously existing between them, at least to the extent of any inconsistency. But we are of the opinion that the transaction in question had no such effect, and that the purchase of a right to enjoy particular and exclusive accommodations during the trip, whether made with the defendant or otherwise, did not, so long as the pass was used to secure transportation, in any way affect the validity of the agreement expressed therein. Indeed, the terms printed upon the ticket by which the plaintiff secured his seat in the drawing-room car repel a contrary inference, and plainly indicate that the plaintiff was required to rely for transportation upon his pass, for it is there stated that "this check, with passage ticket or fare, will be taken up by the conductor in charge of train."

The inference is irresistible that the ticket for a seat had no relation to his right to transportation, but that the latter was expected to be made the subject of a distinct and separate contract to be formed by agreement between the parties. Instead of its being supposed by the parties that the purchase of a seat modified the previous contract, it was expressly understood that the passenger was to secure the right of transportation by some arrangement already or thereafter to be made with the conductor of the train. This he did by the production and presentation of the pass to the conductor, and its recognition by him, and by the express provisions of the contract embodied therein he forfeited his right to claim damages for injuries suffered, either to his person or property during that trip.

The contract for a seat did not make the purchaser a passenger in any sense, but it simply provided that if the purchaser secured a right to ride on the train, he could also enjoy the advantages of a specified seat during the trip, if he so desired. The securing of a right to ride on the train was the condition upon which he became entitled to occupy the specified seat during the trip, and non-compliance with this condition would clearly preclude the purchaser from deriving any advantage from his purchase of the drawing-room ticket.

We can discover no principle upon which it can be held that the contract expressed by the pass should be considered re-

scinded or inoperative. Certainly, no express agreement was made to that effect, and we think none can be implied from the transaction referred to.

It cannot be claimed that the purchase by a passenger of special and exclusive accommodations on a railroad train, not open to the enjoyment of passengers generally by virtue of their passage tickets, gives the purchaser a right to transportation; and yet the argument of the respondent implies that he had the right to use the pass to secure his transportation, and still repudiate the conditions upon which alone he was authorized to use it. The pass gave the plaintiff the right to enter any of the cars attached to the train and occupy a seat therein during the passage from Albany to New York, except certain cars set apart for special service and use. The pass gave the passenger no right to occupy a seat in such cars, and the money paid by the plaintiff to secure this seat had no relation to his right of transportation. The passenger could not have supposed that it did, for he not only used his pass for that purpose, but from the insignificance of the price paid for his seat, as compared with the regular fare for such a trip, the idea is repelled that he supposed he was thereby securing transportation also.

It could not be contended for a moment that the holder of a drawing-room car-ticket could by force of such ticket alone insist upon being carried over a railroad to his place of destination, or that the railroad company would be liable for damages for ejecting such holder from its cars for non-payment of fare, if he should refuse to pay the customary sum charged for transportation. No such rights are contemplated by the parties to such a transaction. The contract indicated by his purchase of a drawing-room seat certainly did not, by express terms, refer to or provide for any modification or rescission of the previous contract, and there is not a circumstance attending the transaction from which an intention that it should can be inferred. The court below seemed to suppose that the case of *Thorpe v. New York Central and Hudson R. R. Co.*, 76 N. Y. 402, 32 Am. Rep. 325, tended to support the recovery in this case, but we are of the opinion that it has no bearing upon the question involved herein. That case holds that the servants in a drawing-room car in their relations to passengers, and their conduct in preserving order and enforcing the rules and orders of the company, are the servants of the railroad corporation, but that case is very far from hold-

ing that such servants have the right to make contracts on behalf of the company for transportation, or that if they do, they necessarily rescind other contracts existing between the passenger and the company.

We are, for the reasons stated, of the opinion that the judgments of the courts below should be reversed, and a new trial granted, with costs to abide the event.

RIDING ON FREE PASS. — The question whether a railroad company issuing a free pass may exonerate itself from liability for the negligence of itself or its agents, whereby the passenger is injured, is one upon which the authorities are not entirely harmonious. The better opinion is, that it may do so by a stipulation to that effect, clearly and explicitly stated. Some courts, however, deny the right to contract against gross negligence, while a few others deny such right in all cases: *Griswold v. New York etc. R. R. Co.*, 55 Am. Rep. 115, and cases cited in the opinion; *Kinney v. Central R. R. Co.*, 3 Id. 265; *Seybolt v. New York etc. R. R. Co.*, 47 Id. 75; *Carroll v. Missouri R. R. Co.*, 57 Id. 382, and note 368-396; *West. T. Co. v. Newhall*, 76 Am. Dec. 740. So there is a difference of opinion in some cases as to what is a free or gratuitous pass. The pass may have been issued to a person who was shipping live-stock or other freight over the road, in pursuance of a uniform policy of the road to encourage that species of transportation over its lines, in which case the price paid for the transportation of the freight may, without impropriety, be regarded as compensating the company for the pass. Where this view prevails, the person riding on the pass is treated as having the same cause of action for injuries received as if he were riding upon an ordinary ticket: *Lawson v. Chicago etc. R. R. Co.*, 54 Am. Rep. 634; *Cleveland etc. R. R. Co. v. Curran*, 2 Id. 382; *Little Rock etc. R'y Co. v. Milks*, 48 Id. 10, and note 15-19; *New York Central R. R. Co. v. Lockford*, 17 Wall. 367; *Blair v. Erie R'y Co.*, 25 Am. Rep. 55; *contra: Poucher v. New York Cent. R. R. Co.*, 10 Id. 364; *Gardner v. New Haven R. R. Co.*, 50 Id. 12.

PEOPLE v. RICHARDS.

[108 NEW YORK, 187.]

BURGLARY AT COMMON LAW IS OFFENSE against the habitation of man. It might also include the felonious breaking and entering a church.

WORD "BUILDING," AS USED IN PENAL CODE defining the crime of burglary, must be regarded as limited to those structures which the common law, as amended and enlarged by our statutes relative to the crime, made capable of being broken and entered burglariously.

RULE OF CONSTRUCTION. — **WHEN GENERAL WORDS FOLLOW SPECIFIC WORDS** designating certain specified things, the general words are to be limited to cases of the same general nature as those which are specified. Various instances given of the application of this rule.

WORDS "OTHER ERECTION OR INCLOSURE," employed in the statute defining burglary, must be interpreted as including only things of a similar nature to those already described by the specific words found in the statute.

BREAKING AND ENTERING VAULT, INTENDED AND USED FOR INTERMENT of the dead, cannot constitute the crime of burglary at the common law, nor by the statutes of New York.

Louis Marshall and J. McGuire, for the appellant.

George B. Curtiss and Nathaniel C. Monk, for the respondent.

By Court, PECKHAM, J. The defendant was charged in the indictment with having committed the crime of burglary in the third degree, in that on the twenty-third day of October, 1884, with force and arms, in the night-time, at the city of Binghamton, he broke and entered the granite and stone building, erection, and inclosure, known as the Phelps vault, the same being a building, erection, and inclosure for the interment of the dead, and being the property of, etc. Upon the trial, the people proved that this vault was made of granite, at a cost of five thousand dollars. It was built entirely above ground, on a stone foundation, and the structure was ten feet four inches wide, sixteen feet four inches long, ten feet six inches high, and covered with a granite roof. The entrance was by a granite door, protected by a bronze gate. The interior of the vault, immediately inside of the interior granite door, has a compartment about six feet in depth and eight feet across, and is unoccupied. At the rear of this compartment there is a partition across the width of the vault, and behind that partition the bodies are inclosed. There are twelve compartments or graves, as they are described by one of the witnesses; and seven of these graves were occupied at the time of the commission of the alleged burglary by the defendant. In front of each grave was a marble slab, bearing the name and date of death, and the age of the occupant. Other evidence was given in the case connecting the defendant with the commission of the act of breaking into this structure, and examining the dead body of Robert S. Phelps, which was therein contained. His purpose in doing so it is not material to inquire in regard to, under the view which we take of the statute as to burglary.

At the close of the case for the people, defendant's counsel asked the court to direct or advise the jury to find a verdict of not guilty in behalf of the defendant, Richards, upon the grounds, — 1. That the acts proven in this case are not within the provisions of the penal code; 2. Upon the ground that the vault or grave is not a building, within the meaning of

the statute, which is capable of being burglarized; 3. That the proof in the case wholly failed to sustain the offense charged in the indictment.

The court denied the motion, and held that it was a case for the jury. We think the court erred in that decision. We do not believe that the structure described in the indictment and the proof is within the statute describing the crime of burglary in the third or any degree. As was stated by Andrews, J., in *Rogers v. People*, 86 N. Y. 360, 40 Am. Rep. 548, "burglary at common law is an offense against the habitation of men." It may also be stated that the crime of burglary, even at common law, extends to the felonious breaking and entering a church: 3 Inst. 64; 1 Hale P. C. 556; 1 Hawk. P. C., c. 38, sec. 17; 2 Russell on Crimes, 1; *Regina v. Baker*, 3 Cox C. C. 581; 2 Wharton's Crim. Law, sec. 1556. Lord Coke was of the opinion that the crime could be committed in regard to a church, because, as he said, it was the mansion-house of the omnipotent God. Lord Hale said that was only Lord Coke's quaint way of putting it, and that burglary at common law could be committed by breaking and entering, not only a mansion-house, but a church, as a church, and without speaking of it as the mansion-house of God.

It will be seen upon examination that there were two exceptions at common law to the general rule that burglary consisted in breaking into a mansion-house, the word "mansion" being synonymous in that respect with dwelling-house. Those two exceptions were, — 1. In regard to a church; and 2. In regard to breaking through the walls or gates of a town. It was, however, primarily an offense committed against a man's house, his dwelling, and in the night time. The Revised Laws of the state defined burglary without dividing it into degrees. By the Revised Statutes, burglary in the third degree was made to consist of breaking and entering, with intent to steal, or to commit any felony. The exact terms of the statute are as follows: "Every person who shall be convicted of breaking and entering in the day or in the night-time, — 1. Any building within the curtilage of a dwelling-house, but not forming a part thereof; 2. Any shop, store, booth, tent, warehouse, or other building in which any goods, merchandise, or valuable thing shall be kept for use, sale, or deposit, — with intent to steal therein, or to commit any felony, shall, upon conviction, be adjudged guilty of burglary in the third degree": 2 R. S. 669, sec. 17.

From the time of the passage of the Revised Statutes up to 1863, the crime stood as therein defined. By chapter 244 of the laws of 1863 the above section was amended by inserting in the second subdivision, after the words "or other building," the words, "or any railroad car, shop, vessel, or canal-boat." We think it plain that all the words used in the Revised Statutes or in the statute of 1863, in defining burglary in the third degree, referred to structures erected or built for the purpose of answering the necessities of living men in their intercourse with each other of a trading or commercial nature, where their property might be deposited and used, or while awaiting sale or transportation. Hence the Revised Statutes in describing the crime of burglary in the third degree, or the act of 1863 above mentioned, did not cover such a case as is presented by this indictment and proof; and if this were all there was in the case, we think there would scarcely be room for argument on this subject. Great weight, however, is laid by the learned counsel for the people on the language used in the penal code. That statute in defining burglary in the third degree enacts as follows (section 498): "A person who either, — 1. With intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building; or 2. Being in any building, commits a crime therein and breaks out of the same,—is guilty of burglary in the third degree."

Section 504 says: "The term 'building,' as used in this chapter, includes a railway car, vessel, booth, tent, shop, or other erection or inclosure."

There is contained in the section of the code one alteration in the definition of the crime, as it is made burglary to break and enter a building with intent to commit a crime, instead of, as in the old statute, with an intent to commit a larceny or felony. As section 504 does not say that the term "building" shall only include such structures as are therein named, it is argued that anything which can possibly be regarded as a building, under the broadest and most liberal signification of that term, is included therein, or, at least, is included in the expression added at the end of the section, "or other erection or inclosure." If this be sound, a most sweeping enlargement of the generally accepted idea of the nature of the crime of burglary is accomplished in a statute which has been regarded more in the light of a codification of the body of the criminal law than as materially altering and enlarging its scope and nature. We do not believe in this instance that any such re-

sult was contemplated by the legislature. Leaving section 504 for a moment out of view, the crime of burglary is defined as a breaking into a building with intent, etc., and the question arises as to the meaning of the word "building." Finding it used in a statute defining burglary, two courses suggest themselves: 1. To regard the term as limited to those structures which the common law, as amended and enlarged by our statutes relative to the crime, made capable of being broken and entered burglariously; or 2. To take the widest signification which has ever been given to the term "building," and hold that every structure within such meaning is within the statute, provided it could be physically broken and entered. We are persuaded that the first course is the true one. We are unable to believe that the legislature meant to accomplish so radical a change in the nature of this crime by the use of language, which, by its context, is capable of a much more restricted meaning, and one which is fully in accord with the nature of the crime as known to the common law and to our statutes down to the adoption of the penal code. The slight alteration made by the code as to the intent which is to accompany the breaking and entering, from an intent to steal or to commit any felony to an intent to commit any crime, does not militate, as we think, against this reasoning; for that alteration is of comparatively slight importance, and does not really change the nature of the crime. In the absence of other and controlling reasons, we are disposed to limit the term "building" to those structures included in the common law and statutory definitions of the crime. We find at common law that burglary, so far as the character of the building was concerned, was committed by an unlawful breaking and entering of a dwelling-house. Our early statutes made the breaking and entering of such a structure in the night-time with intent to commit some crime therein, when there was a human being within, burglary in the first degree, and when the entry was made in the daytime, burglary in the second degree. Subsequently burglary in the third degree was made to consist in breaking any building within the curtilage of a dwelling-house but not forming a part thereof, or in breaking and entering "any shop, store, booth," etc., as already cited. It is thus seen that, up to the time of the adoption of the penal code, the structures in regard to which burglary could be committed had been quite clearly defined, and the term "building" as used in connection with the crime of burglary had a definite

and well-understood meaning. To attach the same meaning to it in a statute upon the same subject, passed under the circumstances in which this penal code was passed, and where there is no such wide departure from the language used in the Revised Statutes or act of 1863 as to indicate a different and enlarged sense as to the meaning of the word, seems to us to be the natural and the true course to adopt. There would be no propriety in taking the most enlarged meaning anywhere given to the word, and accepting it as the true sense in which it was used in this statute defining burglary in the third degree.

Now, what effect upon this reasoning does a reference to section 504 have? That section simply says that the term "building" includes a "railroad car, vessel, booth, tent, shop," etc., and leaves out the words "in which any goods, merchandise, or valuable thing shall be kept for use, sale, or deposit." This omission we do not regard as very material, or as enlarging in any way the definition of the crime, for the specific words used imply substantially the same meaning which is to be gathered from the use of the words which are omitted, and which is probably the cause of their omission. The meaning of the term "building," other than as including therein the structures specifically mentioned in the statute, is still left, as we think, to be gathered precisely in the same way as it would have been if section 504 had not been passed.

We think that the term, as used in these two sections of the penal code under discussion, does not enlarge the character of the crime of burglary to such an extent as to include the structure described in this indictment and in the proof given under it. Careful and painstaking research has been exhibited in the very full briefs furnished us by counsel for the people; but they have succeeded in finding no case which would include a structure such as this within the term "building" in connection with any statute similar to ours in regard to burglary. We are quite sure none such can be found. Very many cases are cited by counsel on both sides as to what is included in the term "building," when used in various statutes relating to various subjects; such, for example, as the fire law in cities; the English reform act of 1832, section 27, as to what sort of a building was within the section of that act as qualifying the owner or the tenant to vote; also the English act in relation to arson, as to what was a building, and when it was sufficiently completed to be within the statute; also the

statute in relation to mechanic's liens, as to what was a building upon which a lien could be placed. We do not think that any good can be gained by a separate consideration of each one of those cases. We have looked at them all, and the most that can be said is, that each court defines the word with relation to the subject-matter of the statute which was under consideration; and the best that can be said has been said by many of the judges in those cases, which is, that it is impossible to give a general, absolute, and far-reaching definition or meaning to that word which shall cover all possible cases. They say they can but define the language with reference to the facts in each case and the special subject under consideration, and as determining whether, in the particular case in hand, the structure in question does or does not come within the purview of the statute. That is all that we can do here. Taking the law in regard to burglary from the earliest period of the common law where that crime is referred to down to the present time, we feel quite confident that not one case can be found where breaking and entering such a structure as the one in question has been held to come within that crime. We simply intend to decide this case and no other; and when we come to examine the indictment, and the proof giving a description of the structure, we come to the belief that it is really nothing more than a grave above ground. The witness speaks of these various compartments as graves. They are intended solely for the interment of dead bodies, and the structure itself can be put to no other possible use without altering its nature and purpose. The small room, as it is termed, in the front portion of the structure, between the outside wall and the place for the deposit of the coffins, is used for nothing. No services of a religious nature could be carried on there, and language could not be tortured into calling that place a church, or a place for religious worship. If, instead of being placed above ground, this structure had been placed in a foundation deep enough to receive it, and then used for the purpose of burying the dead, and that only, could there be any question that it was not the subject of burglary, even although sufficient of the structure were above ground to enable one to reach it through a door and steps? We think not; and we do not think it becomes a building, within the statute in regard to burglary, any more because it is placed above the ground, when its sole purpose is that it shall be used as furnishing graves for the burial of the dead.

It is claimed, however, if this structure is not included in the term "building" as used in this statute, that the words added at the end of section 504, and already alluded to, viz., "or other erection or inclosure," would include it. They undoubtedly would if the widest meaning of those words is to be taken as within the meaning of the legislature, and if whatever could, under other circumstances and for other purposes, be called an erection or inclosure is to be regarded as the subject of burglary.

We do not attach any such meaning to those words when used in this connection, and we think it quite plain that the legislature never intended any such meaning. A farm lot or a vacant city lot might be inclosed with a fence, and inside that fence there would be an inclosure; can it be supposed possible that the legislature intended that burglary might be committed by breaking and entering such an inclosure? In one sense, and in the widest, anything that is inclosed is an inclosure, and the thing which inclosed it would be the thing the breaking of which and entering the inclosure would be burglary. A bronze statue in a public square is an erection, and if it be of colossal size may be broken and entered. Can any one suppose that burglary could be predicated of such an act? These are extreme cases, but they are nevertheless within the possible meaning of those terms, when such meaning is not to be arrived at and limited by an examination of the context.

It is plain that some limitation must be made to the meaning of those words other than their possible capacity when standing alone. Now, there are certain rules and canons of construction in such cases as this, which seem to us to serve as a perfect guide to the meaning of the language used in this statute. The rule which usually obtains in cases of this kind is, that where general words follow specific words designating certain special things, the general words are to be limited to cases of the same general nature as those which are specified. The rule is familiar, and needs not the citation of many authorities. One or two may be given from this court.

In the *Matter of Hermance*, 71 N. Y. 481, a statute authorizing boards of supervisors "to correct any manifest, clerical, or other errors in any assessments or returns," was under consideration. The question arose as to what was meant by the term "other errors." It was claimed that under that language all errors of assessments might be corrected by boards of su-

pervisors. This court held otherwise, and announced that the case was one for the application of the rule that when a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class.

Again, in the case of *People v. New York etc. R. R. Co.*, 84 N. Y. 565, the action was brought to recover certain real property under the act of 1875, which authorized the people to bring an action to recover "money, funds, credits, and property" held by public corporations, etc., wrongfully converted or disposed of; and this court held that the word "property," although its widest meaning was inclusive of all things that might be owned, yet when taken in connection with the other words used in the statutes, and in view of the surrounding circumstances under which the act was passed, it was plain that the word "property" was not to be given its general and enlarged meaning, but was limited to include only property of the same general character as that already mentioned in the statute, which was personal property. A late case in the house of lords is a very strong illustration of the rule in question. The leading facts therein are as follows: A steamer was insured by a policy on the ship and her machinery, including the donkey-engine. The policy covered "perils of the sea," specially naming many, and then continued, "and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof." For the purpose of navigation, the donkey-engine was being used in pumping water into the main boilers, when, owing to a valve being closed, which ought to have been kept open, water was forced into, and split open, the air-chamber of the donkey-pump. The closing of the valve was either accidental or due to the negligence of an engineer, and was not due to ordinary wear and tear. It was held that the injury was not covered by the policy, as it was not a peril of the sea; and although it was undoubtedly a "loss or misfortune," yet the specific words in the policy which preceded this general language, it was held, restricted the language to the same *genus* as the specific words which preceded it: *Thames etc. Ins. Co. v. Hamilton*, L. R. 12 App. C. 484. In the course of his judgment, the chancellor (Halsbury) said: "If understood in their widest sense, the words are wide enough to include it [the

injury]; but two rules of construction, now fairly established as a part of our law, may be considered as limiting those words. One is, that words, however general, may be limited with respect to the subject-matter in relation to which they are used. The other is, that general words may be restricted to the same *genus* as the specific words that precede them." Opinions were delivered by three other judges, and they all concurred in the rule limiting the meaning of the language used in the policy, broad as it was, to the same class of perils as were specifically enumerated in the policy.

Applying a rule which is so well established both in England and in this country to the case in hand, we think that the phrase "other erection or inclosure" is to be interpreted as including things of a similar nature to those already described by the specific words found in the statute. If this be so, then, under the phrase in question, the erection or inclosure included in burglary in the third degree was to be of that character which mankind used for the purpose of sheltering property, or for the purpose of transporting the same, or the purpose of trade or commercial intercourse.

In arriving at this conclusion, it is not necessary that we should also show that the act committed by the defendant subjected him to punishment as a crime of some kind. We think it was the plain intent of the law-making power to keep the distinction clear between crimes against the living and against the property of the living and crimes against public decency, in the way of desecrating the graves of the dead, or the structures whose only purpose is to be a place for the permanent interment of the dead. Offenses of this general nature are now provided for by the penal code; and whether the particular act of this defendant, as proved in this record, constitutes a crime, it is not necessary for us now to determine.

The law should not be stretched out of its fair and natural meaning for the purpose of including within the statute of burglary a case like this. If the legislature think proper, let the law be amended so as to include in plain terms such a case as this record discloses. The argument that the offense of burglary has been constantly enlarged from what it was at common law, and that the intention to enlarge it so as to include a case like this should be easily imputed to the legislature, we think is not sound. Whenever the offense has been enlarged in this state by the legislature, it has been by plain

language, susceptible of no misunderstanding. We do not think any intent to enlarge the offense to the extent necessary to make the prisoner's act burglary can be founded upon the language used in the penal code.

These views lead to a reversal of the judgment of conviction; and as the defendant cannot be convicted of any crime under this indictment, he should be discharged.

BURGLARY DEFINED. — Burglary is the breaking and entering, in the night-season, the dwelling-house — or, as the old definition runs, the mansion-house — of another, with intent to commit a felony therein: *State v. Wilson*, 1 N. J. L. 439; 1 Am. Dec. 216; 1 Wharton's Crim. Law, 9th ed., sec. 758; 1 Bishop's Crim. Law, 6th ed., sec. 559; *Robinson v. State*, 53 Md. 153; 36 Am. Rep. 399; *State v. Potts*, 75 N. C. 129; 4 Lawson's Criminal Defenses, ed. 1887, 865; *Wyatt v. State*, 2 Swan, 394; 4 Lawson's Criminal Defenses, ed. 1887, 869; *State v. Ward*, 43 Conn. 489; 21 Am. Rep. 36; *State v. McCull*, 4 Ala. 643; 39 Am. Dec. 314; 4 Lawson's Criminal Defenses, ed. 1887, 853. It is immaterial whether the felony be actually carried out or not: *Anderson v. State*, 48 Ala. 665; 17 Am. Rep. 36; *Wilburn v. State*, 41 Tex. 237; 1 Wharton's Crim. Law, 9th ed., sec. 758; 2 Russell on Crimes, 9th ed., 2; Desty's Criminal Law, sec. 141, 141 a.

CHARACTER OF OFFENSE. — The crime of burglary is an offense against the security of the dwelling-house or habitation. It is the possession that is invaded. The crime is not at all against such buildings as property: *State v. Toole*, 29 Conn. 342; 76 Am. Dec. 602; *Anderson v. State*, 43 Ala. 665; 17 Am. Rep. 36; 1 Bishop's Crim. Law, 6th ed., sec. 577; although, under the statute in Wisconsin, burglary is held to be a crime affecting real estate: *Neubrandt v. State*, 53 Wis. 89.

ESSENTIALS OF THE CRIME. — The definition above given logically and necessarily resolves itself into five parts or circumstances, each of which is an essential ingredient of the crime of burglary, and must be proved; they are, — 1. A breaking; 2. An entry; 3. One of these two must have been done in the night-season; 4. It must be committed in a mansion-house or dwelling-house; 5. An intent to commit a felony therein must exist: *State v. Wilson*, 1 N. J. L. 439; 1 Am. Dec. 216, 218. This statement, with some slight modifications, applies equally to statutory cases, the modifications being instanced by the change in the statutes from the night-season to the daytime, and extending the term "dwelling-house" so as to include almost all kinds of buildings or inclosures.

BREAKING AND ENTERING are both necessary, and formerly it was held that the breaking must be such as to enable an entering to be made sufficient to carry out the felonious intent: *Rex v. Hughes*, 1 Leach C. C. 400. And it was said in that case that prior to the statute 12 Anne, chapter 7, that an actual entry after the breaking, and by means thereof, was necessary, and that the breaking must have been in fact. But the rule now is, that the breaking may be actual or constructive: *Clark v. Commonwealth*, 25 Gratt. 308; 4 Lawson's Criminal Defenses, ed. 1887, 838; Desty's Crim. Law, sec. 141 b; 1 Wharton's Crim. Law, 9th ed., sec. 759.

ACTUAL BREAKING. — "Breaking," as used in connection with burglary, implies force: *Matthews v. State*, 36 Tex. 675. But the degree of force or vio-

lence used is, however, of little importance: *Walker v. State*, 63 Ala. 49; 35 Am. Rep. 1; since any, even the slightest, force is sufficient to constitute the breaking: *Burke v. State*, 5 Tex. App. 74. "It may be very slight. The lifting the latch of a door, the picking of a lock or opening with a key, the removal of a pane of glass, and indeed, the displacement or unhooking of any fastening which the owner has provided as a security to the house, is a breaking, — an actual breaking": *Walker v. State*, 63 Ala. 49; 35 Am. Rep. 1. In addition to and as a further definition of actual breaking, it is said there must be a removing by force, or displacing, or putting aside of some portion of the material part of the dwelling-house which is relied on as security against intrusion: *State v. Boon*, 13 Ired. 244; 57 Am. Dec. 555, 556; *Carter v. State*, 63 Ala. 96. So the word "forcibly," used in a statute defining burglary, is held to imply the same as the word "break" at common law; and therefore, one who pushes open a transom over a door which swings on hinges, and which is closed but not fastened, is guilty of burglary, where the other elements necessary to the crime exist: *Timmons v. State*, 34 Ohio St. 426; 32 Am. Rep. 376.

CASES OF "BREAKING." — Where the accused pushed in a portion of a pane of glass which had been cut out about a month before, though no opening was left, the whole piece remaining in its place, it was held to be a breaking: *Regina v. Bird*, 9 Car. & P. 44. So pushing open a closed door is a sufficient breaking: *State v. Reil*, 20 Iowa, 413; and where the door was secured by a chain hooked to a nail, opening such door is a breaking: *State v. Hecox*, 83 Mo. 531. So is pushing against and forcing open a window which is on hinges, but is secured by a wedge: *Rez v. Hall*, Russ. & R. C. C. 355; likewise the forcing open of closed blinds: *Commonwealth v. Stephenson*, 8 Pick. 354; or raising a window left unfastened, and making an entry by that means: *State v. Boon*, 13 Ired. 244; 57 Am. Dec. 555; or pushing up a trap-door in the floor of a mill, about a foot, with intent to commit larceny therein: *Harrison v. State*, 20 Tex. App. 387; 54 Am. Rep. 529; or lifting the flap of a cellar door kept down by its own weight: *Rez v. Russell*, 1 Moody C. C. 377; or breaking and entering the chimney of a house, though no rooms of the house are entered: *Rez v. Brice*, Russ. & R. C. C. 450; *State v. Boon*, 13 Ired. 244; 57 Am. Dec. 555. So where the prisoner, with the intent to commit a felony, pushed his finger against a pane of glass of a shop window, which was part of a dwelling-house, and in doing so the forepart of the finger of the accused went on the shop side of the glass, it was held a sufficient breaking and entry: *Rez v. Davis*, Russ. & R. C. C. 499; and the opening of an inner door to a house in the night-season, if it is a necessary act towards the perpetration of a felony, although the actual felony committed is not done in that particular room, is a breaking: *Rolland v. Commonwealth*, 85 Pa. St. 66; 27 Am. Rep. 626. So where the entry is without breaking, but a chamber door or an inner door is unlatched by the party entering, or he should turn a key, the act being done with a felonious intent, it is a breaking: *Anderson v. State*, 17 Tex. App. 305; 1 Hawk. P. C., p. 38, sec. 4. Again, where the defendant bored a hole up through the floor of a corn crib (which was properly subject to burglary under a statute), and from the outside drew corn therefrom into a sack, intending to steal the same, it was held that the burglary was complete: *Walker v. State*, 63 Ala. 49; 35 Am. Rep. 1. It is likewise a sufficient breaking if during the operation of making an opening into a wall in the night-season, the person engaged in so doing thrusts through a hand or an arm for the purpose of either enlarging such opening or making it more convenient for use as a means of access;

Commonwealth v. Glover, 111 Mass. 395, 402; and such breaking is done by lifting a trap-door fastened simply by a lid door kept in place by its own weight: *Res v. Brown*, 2 Leach C. C. 1016, note; and such act is complete when one, after breaking a window pane, puts in his hand to open a shutter, although he failed to open it: *Res v. Parker*, 1 Car. & P. 300, and note. Where the facts were, that the accused removed a grating on the street, and entered a cellar under a storehouse, the cellar being used for the storage of goods, and being connected with the store by a hatchway, and the question of whether the grating was a part of the store was left to the jury, it was held that such a question was one of law, that the court should have properly instructed the jury thereon, and that the removal of the grating constituted a breaking. In this case the rule was given that the test whether such a grating was a part of the store was this: that if there was an internal communication between the room or apartment broken into and the room or building in which the felony was alleged to have been committed, the entry was complete: *Commonwealth v. Bruce*, 79 Ky. 560, citing Bishop on Statutory Crimes, sec. 282. Again, breaking a window glass, and reaching through with a hook or other instrument, and stealing the owner's goods, or any entry whatever of the body or person, as of the foot or hand, or with any weapon, as a pistol, to commit a felony, is by all the decisions of the common law a breaking: Tomlin's Law Dictionary, tit. Burglary; Bouvier's Law Dictionary, tit. Burglary; 2 American and English Encyclopedia of Law, tit. Burglary. By introducing an instrument is meant, not an instrument by which the breaking was made, but such a one as a hook, or the like, capable of removing the property, and introduced subsequently to the act of breaking, and when that act is completed: *Res v. Hughes*, 1 Leach C. C. 406. As we have seen, the door need not necessarily be an outward door, since if such door is open, and the act consists of entering through that to an inner door, or unlatching or unlocking that with a felonious intent, this is a sufficient breaking; or if the outward door being closed one lifts up the latch, and enters with such intent, this constitutes the crime of burglary: *State v. Wilson*, 1 N. J. L. 439; 1 Am. Dec. 216, 218; see also cases post, under "Dwelling-house."

CASES OF "NO BREAKING."—Entering through a door which is open or partly open, or a window which is partly raised and unfastened, is not a breaking: *Commonwealth v. Strupney*, 105 Mass. 588; 7 Am. Rep. 556; 2 Archbold's Crim. Pr. & Pl., Pomeroy's notes, 1077; *State v. Kennedy*, 16 Mo. App. 287; Tomlin's Law Dict., tit. Burglary; *Green v. State*, 68 Ala. 539; *Ray v. State*, 66 Id. 281; although the entering requires a further opening to admit the body: *Res v. Smith*, 1 Ryan & M. 183. "The law on this point," says the court in *Timmons v. State*, 34 Ohio St. 426, 32 Am. Rep. 376, "is, that if the owner leaves his doors open or partly open, or his windows raised or partly raised and unfastened, it will be such negligence or folly on his part as is calculated to induce or tempt a stranger to enter; and if he does so through the open door or window, or by pushing open the partly opened door, or further raising the window that is a little up, it shall not be burglary"; and it is held that merely breaking the blinds is not sufficient to warrant conviction, when there has been no entry beyond the sash windows: *State v. McCull*, 4 Ala. 643; 29 Am. Dec. 314; 4 Lawson's Criminal Defenses, ed. 1887, 263. So where a loose plank in a partition wall was removed, it was held no breaking: *Commonwealth v. Trimmer*, 1 Mass. 476. Nor is it a burglary where a thief reaches through an open door with a hook or other instrument: Tomlin's Law Dict., tit. Burglary. Nor where a guest at an inn leaves his

own room, enters the bar-room, and there steals some money: *State v. Moore*, 12 N. H. 42; 4 Lawson's Criminal Defenses, ed. 1887, 846. And it is held in *Res v. Lawrence*, 4 Car. & P. 231, that lifting a trap-door of a cellar, kept merely in place by its own weight and unfastened, was not a breaking; this case, however, seems opposed to the majority of cases: See cases *contra*, under title "Cases of 'Breaking,'" *supra*.

OTHER CASES. — Where it appeared, however, that the opening through which the alleged burglarious entry was made was intended for a window, but its only protection and covering was an old cloak hung by two nails at the top and one at each side, but it was loose at the bottom, and had been removed from one of the nails, the court as a majority declined to express an opinion as to whether this was a sufficient breaking and entering or not, but one of the judges declared that in his opinion it did not amount to a burglary (citing *Lawrence's Case*, 19 Eng. Com. L. 560): *Hunter v. Commonwealth*, 7 Gratt. 641, 644, 645; 56 Am. Dec. 121. In the case of *Lowder v. State*, 63 Ala. 143, 35 Am. Rep. 9, 4 Lawson's Criminal Defenses, ed. 1887, 853, it was decided that a servant who in the night-time, with the intent to steal, enters an office to which his employer had given him the key, and in the inner room of which the latter slept, is guilty of burglary, but that if the servant was accustomed to enter in order to sleep there, and this fact was known to his employer, and he does enter for that purpose, and afterwards forms the intent to steal, this does not constitute burglary. So while the removing or enlarging an obstruction or filling to a crib where corn was kept, and thrusting in the hand and taking corn therefrom, intending to steal the same, is a sufficient breaking and entering; yet if the obstruction was already removed, and the accused merely put his hand through the opening and took the corn, no burglary is committed: *Miller v. State*, 77 Ala. 41.

BREAKING OUT. — There seems to be some doubt, so far as indicated by the decisions, upon the question whether there is a breaking when the entry within the house is made without breaking, and the party so entering unlatches, unlocks, or opens a door or window to escape or get out. It is held in the case of *State v. Ward*, 43 Conn. 489, 21 Am. Rep. 665, that such act of breaking out constituted a burglary at the common law, that the statute of 12 Anne, chapter 7, was declaratory of that law, and that if it be considered as an alteration or amendment of the common law, it might be considered a part of the law of Connecticut by adoption, though having no binding force as a statute. So far, however, as the statute of Anne is concerned, the beginning of that act is as follows: "And whereas, there has been some doubt whether the entering the mansion-house of another without breaking the same, with an intent to commit some felony, and breaking the said house in the night-time to get out be burglary, be it enacted," etc., 12 Anne (A. D. 1713), stat. 1, c. 7, sec. 3. This statute was subsequently repealed (Tomlins's Law Dict., tit. Burglary), but was substantially re-enacted by 7 & 8 Geo. IV. (A. D. 1827), c. 29, sec. 11, which provided that such breaking out in the night-time should be burglary. And it is decided in *Rolland v. Commonwealth*, 82 Pa. St. 306, 22 Am. Rep. 758, that such breaking out is not burglary, and the statute of 12 Anne is not recognized as any authority in that state. So it is held not a sufficient breaking to constitute burglary, in *White v. State*, 51 Ga. 285, and in *State v. McPherson*, 70 N. C. 239, 16 Am. Rep. 769; the court, although not directly deciding the point, intimates that in its opinion the authorities are that in the crime of burglary the breaking must be to effect an entrance, not to escape. So where one effected an entry through an open door, and secreted himself under a bed, intending to commit a felony,

but on being discovered unlocked a door to make an escape, it was held that the facts did not warrant a conviction for burglary, there being no breaking: *Addinson v. State*, 5 Bart. 569; 30 Am. Rep. 69; 4 Lawson's Criminal Defenses, ed. 1887, 849; and the case of *Brown v. State*, 55 Ala. 123, 28 Am. Rep. 693, 4 Lawson's Criminal Defenses, ed. 1887, 852, which was brought under a statute providing against breaking into and entering, etc., holds that although the theft is actually committed, there is no breaking. These cases which oppose the doctrine of the Connecticut case are all well-considered causes, and are entitled to much weight on this question in those states where there is no statutory provision covering the ground, or where the statute is dependent upon the common law for its construction.

CONSTRUCTIVE BREAKING is where, by threats, fraud, trick, artifice, and pretense, an entry into a dwelling-house or other building subject to burglary is effected with intent to commit a felony therein, or where such entry is obtained by confederacy with servants residing in the house: 2 Archbold's Crim. Pr. & Pl., Pomeroy's notes, 1081, 1082; *Rolland v. Commonwealth*, 82 Pa. St. 306; *Cornwall's Case*, 2 Strange, 881; *Summers v. State*, 9 Tex. App. 396. The entry in case of a constructive breaking must, however, be immediate: *State v. Henry*, 9 Ired. 463. So obtaining an entry into a house at night, upon the pretense of having business with the occupant, is such a constructive breaking as to support a charge for burglary by breaking and entering, it being said by the court that "when a person rings a door-bell of a house the owner has a right to presume that his visitor calls for the purpose of friendship or business. If in obedience to the summons he withdraws his bolts and bars, and the visitor enters to commit a felony, such entry is a deception and fraud upon the owner, and constitutes a constructive breaking": *Johnston v. Commonwealth*, 85 Pa. St. 54; 27 Am. Rep. 622; Tomlins's Law Dict., tit. Burglary; and it was held in *Nicholls v. State*, 68 Wis. 416, 60 Am. Rep. 870, that there was a constructive breaking where the defendant had secreted himself in a box, and thereby obtained an entry into an express car, with intent there to commit a felony.

CONSENT OF OWNER — CONNIVANCE — MEASURES TAKEN TO SECURE ARREST. — Where a firm, suspecting that their bank was to be robbed, employed detectives, who induced the defendant, by representing themselves to him as professional burglars, to enter into a plan for committing the robbery, of which plan the bankers had full knowledge and consented thereto, and the detectives first entered the bank with force, and then solicited the defendant to enter, it was decided that there was no burglary, although there may have been a guilty purpose and intent, and that the detectives were the servants and agents of the bankers: *Speiden v. State*, 3 Tex. App. 156; 30 Am. Rep. 126, and note 129. So if the entry is made by the actual consent of or connivance with the owner, as where a servant notified his master of a contemplated burglary, and the master, by advice of the police, furnished the means of effecting the entry to the servant, and he with the defendant entered the premises, it was held that defendant was not guilty of burglary: *Allen v. State*, 40 Ala. 334; 91 Am. Dec. 477, and note to same 482; see also note to 81 Id. 386. But if there is an actual breaking with felonious intent, it makes no difference in the criminal's liability to punishment that the owner of the building was informed of the contemplated crime, and made no efforts to prevent its commission, but took measures to secure the arrest of the burglar: *Thompson v. State*, 18 Ind. 386; *French v. State*, 18 Id. 386; 81 Am. Dec. 364.

ENTERING. — It is essential that there should be an entry; otherwise there is no burglary: 1 Wharton's Crim. Law, 9th ed., sec. 773. Broadly stated,

this includes any kind of entry made without consent, with a felonious intent: *Martin v. State*, 1 Tex. App. 525; *Anderson v. State*, 17 Id. 305; and an entry of any part of the person, whether by hand or foot, is sufficient; so putting in an instrument or weapon to commit a felony is an entry: *State v. McCall*, 4 Ala. 643; 39 Am. Dec. 314; 4 Lawson's Criminal Defenses, ed. 1887, 863; 2 Archbold's Crim. Pr. & Pl., Pomeroy's notes, 1083-1085; *Burke v. State*, 5 Tex. App. 74; *Franco v. State*, 42 Tex. 276; *Nash v. State*, 20 Tex. App. 384. But although the entry must be by force, threats, or fraud, *Ross v. State*, 16 Id. 554, 4 Lawson's Criminal Defenses, ed. 1887, 859, yet the slightest force is sufficient if the entry is at night: Id.; and see cases *ante*, under title "Cases of 'Breaking.'" Although the rule last given holds, yet this contemplates a previous breaking, whereby an opportunity to commit the intended felony is afforded: *Rea v. Hughes*, 1 Leach C. C. 408.

The Breaking and Entering may be at Different Times, as is illustrated by a case where a hole was made in the night through a wall into a bank-vault, and the entrance was not effected till daylight: *Commonwealth v. Glover*, 111 Mass. 395. So where the breaking was done on Friday night, and the act of entering was on the Sunday night following, the breaking being made with intent to enter thereafter, it was held that this constituted the crime of burglary: *Rea v. Smith*, Russ. & R. C. C. 417; see also 2 Archbold's Crim. Pr. & Pl., Pomeroy's notes, 1085; see further, on breaking and entering, note to 4 Lawson's Criminal Defenses, ed. 1887, 880 et seq.

NIGHT-TIME. — As has been seen (see definition), the burglarious act at the common law must have been committed in the night-season: 1 Wharton's Crim. Law, 9th ed., sec. 806; which was not confined to the exact time between sunrise and sunset, but was extended to that period when there was not enough daylight left to discern a man's face: *State v. Bancroft*, 10 N. H. 105; Tomlins's Law Dict., tit. Burglary; and the fact that the features could be distinguished by reflection from the street lights on the snow, or by moon-light, does not affect the question of time in respect to burglary: *State v. Morris*, 47 Conn. 179. The California Penal Code, section 463, defines "night-time" as the period between sunset and sunrise: See *People v. Griffin*, 19 Cal. 578.

DWELLING-HOUSE. — By the common law, the breaking and entry must have been into the dwelling-house or mansion-house of another: 1 Wharton's Crim. Law, 9th ed., sec. 781; 2 Bishop's Crim. Law, 9th ed., secs. 104, 106; and all the outhouses within the curtilage were protected, inasmuch as they were held to be parts or parcel of the dwelling-house, although this was changed by statute which required that there should be an immediate connection, or one by means of a covered or closed passage: 2 Archbold's Crim. Pr. & Pl., Pomeroy's notes, 1089-1093. So a building when used as a sleeping-room is a dwelling-house within the curtilage: *State v. Mordecai*, 68 N. C. 207.

The Curtilage is said to be the common fence including the dwelling-house and its offices: 2 Archbold's Crim. Pr. & Pl., Pomeroy's notes, 1089; see *State v. Shaw*, 31 Me. 523; *State v. Hecca*, 83 Mo. 531.

DWELLING-HOUSE DEFINED. — "A dwelling-house," says the court in *Fulfer v. State*, 4 Ala. 273, "is the apartment, building, or cluster of buildings in which a man with his family resides," citing 1 Bishop's Crim. Law, sec. 295; see also *State v. Sampson*, 12 S. C. 567; 32 Am. Rep. 513; 4 Lawson's Criminal Defenses, ed. 1887, 867; Bishop on Statutory Crimes, ed. 1873, secs. 282, 285; 2 Bishop's Crim. Law, 6th ed., sec. 104; or "any permanent building in which a party may dwell and lie": 1 Wharton's Crim. Law, 9th ed.,

secs. 787, 781, 784. The test at the common law was whether the owner or occupier, or his family, slept at night in the house; if so, then it was a dwelling-house, and the fact that meals were eaten there did not make it such dwelling-house if no one slept there: 2 Archbold's Crim. Pr. & Pl., Pomeroy's notes, 1086; *Rez v. Martin*, Russ. & R. C. C. 108; nor is it a dwelling-house, although used by the owner both for his meals and carrying on his business: *Rez v. Martin*, *supra*. In the case of *People v. Steckman*, 34 Cal. 242, the word "house" in a statute where the words were "any house, room, apartment, or tenement" was held to "include every kind of buildings or structures 'housed in' or roofed, regardless of the fact whether they are at the time or ever have been inhabited by members of the human family. A house in the sense of the statute is any structure which has walls on all sides and is covered by a roof." The mere sleeping in it, however, was not sufficient to make it such dwelling-house: Bishop on Statutory Crimes, ed. 1873, sec. 279; so where one not the owner nor one of his family sleeps in a part partitioned off from a store, for the purpose of protection only, such store is not a dwelling-house: *State v. Potts*, 75 N. C. 129; 4 Lawson's Criminal Defenses, ed. 1837, sec. 865; and the fact that the owner causes a servant to sleep every night in a house in which he never intends to reside, and which is done to protect the furniture, does not make it a dwelling-house: *Rez v. Davis*, 2 Leach C. C. 876; nor does the sleeping by a servant in a warehouse to protect goods make it a dwelling-house: *Rez v. Smith*, 2 East P. C. 497, cited in 2 Leach C. C. 1018, note a.

INTENT TO RESIDE IN HOUSE. — It is held in Pennsylvania, where the owner had intended to reside in a house, and had put all his furniture in there for that purpose, that although he had never resided there otherwise than to go there occasionally, yet it was such a house as that burglary might be committed therein: *Commonwealth v. Brown*, 3 Rawle, 207; although it is held in England by the common law that where the house is one in which the owner has not resided, but in which he has merely placed his goods, it is not a dwelling-house: *Rez v. Thompson*, 2 Leach C. C. 771; *Rez v. Harris*, 2 Id. 701.

INTENT TO RETURN. — It would seem that a dwelling-house which is locked up by the owner, and left by him with a settled purpose of not returning, is not such a dwelling-house as that the unlawful breaking necessary to constitute the crime may be made therein. The owner must have quitted it *animo revertendi* to make unlawful breaking burglary. It is not necessary that he remain in the house, or be there at the time, nor is the duration of his absence material, provided he actually intends to return: *State v. Meerchouse*, 34 Mo. 344; 86 Am. Dec. 109; *Ex parte Vincent*, 62 Id. 714, and note; *Workman v. Insurance Co.*, 22 Id. 144. But where there is a temporary absence, with the intention of returning, the fact that there is no one in the occupation during his absence makes it no less his dwelling-house: *Harrison v. State*, 74 Ga. 801.

SERVANT'S OCCUPATION. — Where the place where the alleged burglary was committed was a banker's shop, in which no one slept, but which was accessible by means of a trap-door and a ladder from upper rooms in the house, where a workman with his family lived by permission of the owners of the entire house, it was held to be properly averred to be a dwelling-house, since the owners inhabited it by their servants: *King v. Stock*, 2 Leach C. C. 1015, and note; and where the servants of the owner occupied a building apart from the dwelling-house for a place to sleep in, this was decided to be a distinct dwelling-house: *Rez v. Westwood*, Russ. & R. C. C. 495.

SEPARATE FAMILIES IN SAME HOUSE. — Where there are separate families in a house, each part so occupied is the dwelling-house of the occupier: *Ul-*

man v. State, 1 Tex. App. 220; 28 Am. Rep. 405; Bishop on Statutory Crimes, ed. 1873, sec. 287.

LODGERS. — "The same rule applies where the entire building is let to lodgers; the separate door leading to each tenement is to be deemed the outer door of the occupant's dwelling-house. But if the owner lets to lodgers some of his rooms, retaining for inhabitation the residue, the whole is considered in law the dwelling-house of the owner": *Ulman v. State*, 1 Tex. App. 220; 28 Am. Rep. 405; Bishop on Statutory Crimes, ed. 1873, sec. 287; 2 Bishop's Crim. Law, 6th ed., secs. 106, 108; *Rex v. Rogers*, 1 Leach C. C. 89; *Rex v. Trapshaw*, 1 Id. 427. So a garret used as a shop, let with a sleeping-room to a lodger and used by him, is a dwelling-house of the lodger, if the owner sleeps under another roof: *Rex v. Carrell*, 1 Id. 287. But in California, where rooms are let to lodgers, and another has supervision and control of the whole house, the ownership may be laid to be in the lodger: *People v. St. Clair*, 38 Cal. 137. And at the common law, lodging-rooms over stables and coach-houses were the dwelling-houses of the lodgers when the entrance thereto was by an outer door: *Rex v. Turner*, 1 Leach C. C. 305.

GUEST AT HOTEL. — One who, while residing at a hotel, or being a guest there, breaks into the room of another guest, is guilty of burglary, there being a felonious intent: *State v. Clark*, 42 Vt. 629; see 1 Wharton's Crim. Law, 9th ed., 763. And where a boarder entered the room of a fellow-boarder in the same house, and committed a theft therein, it was decided that it was a burglary, although the manner of the entry or time when it was made did not appear: *Ulman v. State*, 1 Tex. App. 220; 28 Am. Rep. 405. By the code of Georgia, a "hired room or apartment in a public tavern, inn, or boarding-house" is the dwelling-house "of the person or persons occupying or hiring the same"; and where the prosecutor was a servant or waiter at an inn, it was held that the room occupied by him was his dwelling-house within the meaning of the code, and that the fact that another occupied it with him made it no less such dwelling, the court saying that "all that the law required was that the indictment should identify the dwelling broken and entered with burglarious intent, and that it should show that it was not the dwelling of the party so breaking and entering, but that it was occupied by the prosecutor": *Jones v. State*, 75 Ga. 825.

A Mill-house, separated from a dwelling-house by a highway, and seventy-five yards therefrom, and which does not appear from the proof to be appurtenant thereto, and in which no one sleeps, is not the subject of burglary at common law; nor so within the terms of a statute defining burglary, and providing, with regard to dwelling-houses, that "all houses, outhouses, buildings, sheds, and erections which are within two hundred yards of it, and are appurtenant to it, or to the same establishment of which it is an appurtenance, shall be deemed parcels": *State v. Sampson*, 12 S. C. 567; 32 Am. Rep. 513.

Stable. — A stable is a building, within the meaning of a statute defining burglary, and designating (outside of certain ones named) "other buildings," as a class of structures wherein the crime might be committed: *Orrell v. People*, 94 Ill. 456; 34 Am. Rep. 241.

Cellar Used as Storehouse. — An underground cellar used for storing goods is not a dwelling-house when not under the control of any occupant of the house not connected therewith internally: *State v. Clark*, 89 Mo. 423; 6 Am. Crim. Rep. 91.

Storehouse. — A storehouse which is not parcel of the dwelling-house is not such a building as to be subject to burglary: *Hollister v. Commonwealth*, 60 Pa. St. 103.

Store. — If the clerk of the owner of a store habitually sleeps therein, such store is a dwelling-house: *State v. Williams*, 90 N. C. 724; 47 Am. Rep. 542, distinguishing and criticising *State v. Potts*, 75 N. C. 129. So where a statute provided that "no building shall be deemed a dwelling-house, or any part of a dwelling-house, . . . unless the same be joined to, immediately connected with, and part of a dwelling-house," and it appeared that the store wherein the alleged burglary was committed was occupied by A and B, copartners, and consisted of two adjacent stores opening into each other, and that A lived over one of them, but that the only connection between them and his living apartments was through a fenced yard, and stairs therefrom to the upper floors, it was held to be a "dwelling-house," within the statute: *Quinn v. People*, 71 N. Y. 561; 27 Am. Rep. 86. And under an indictment for breaking and entering "a building, to wit, the store of A," the evidence was that the building was occupied by A for keeping a bar, and that he sold liquors and cooked meals for customers; that there were two dining-rooms, a bedroom, and a kitchen; and that the entry was made into the kitchen: it was held that there was evidence to go to the jury that the building was a place in which merchandise was kept for sale, which constituted a "store," and that there was not, as a matter of law, such a variance between the proof and the allegation as to entitle the accused to an acquittal: *Commonwealth v. Whalen*, 131 Mass. 419; for "shop," see *People v. Macks*, 4 Park. Cr. 153; 1 Wharton's Crim. Law, 9th ed., sec. 792; Bishop on Statutory Crimes, ed. 1873, sec. 295.

Building may be within Statutory Definition, although when the statute was passed no such building was known: *State v. Bishop*, 51 Vt. 287; 31 Am. Rep. 690. See further, on dwelling-house, note to 4 Lawson's Criminal Defenses, ed. 1887, 883.

INTENT. — A felonious intent is essential to the crime, and although there be a breaking and entering, yet the crime is not burglary, but a mere trespass, unless such intent to commit a felony exists: *State v. Beal*, 37 Ohio St. 108; 41 Am. Rep. 490; *Robinson v. State*, 53 Md. 151; 36 Am. Rep. 399; *People v. Shaber*, 32 Cal. 36; *People v. Garnett*, 29 Id. 622; *Barber v. State*, 73 Ala. 21; *Commonwealth v. Newell*, 7 Mass. 245; *State v. Ryan*, 12 Nev. 401; 4 Lawson's Criminal Defenses, ed. 1887, 872. But the fact that the felonious intent was not carried out makes it no less the crime of burglary: *Dodd v. State*, 33 Ark. 517, 519; *Olive v. Commonwealth*, 5 Bush. 377; 1 Bishop's Crim. Law, 6th ed., sec. 437; *Lanier v. State*, 76 Ga. 304. Nor is the fact that the defendant found nothing, any defense, as in a case where it appeared that the safe the accused intended to rob had no money in it at the time of the breaking and entering: *State v. Beal*, 37 Ohio St. 108; 41 Am. Rep. 490, and note 492. Such intent must, however, exist at the exact time the breaking and entry are effected: *Harris v. State*, 20 Tex. App. 652; 1 Bishop's Crim. Law, 6th ed., sec. 207.

INSTANCES. — Entering to have illicit intercourse with a lewd woman, with whom the accused had been intimate on former occasions, is not burglary: *Robinson v. State*, 53 Md. 153. So where the alleged intent was to steal, and it appeared that the accused together with others entered the prosecutor's house, but that he went there simply as a detective, it was held that there could be no conviction: *Price v. People*, 109 Ill. 109. And in *McCourt v. People*, 64 N. Y. 583, 4 Lawson's Criminal Defenses, ed. 1887, 874, the accused, who was partially intoxicated, stopped at a house where he had before obtained cider, and asked the prosecutor's daughter, C., for some, offering to pay for it, but on being refused, and although forbidden, entered a cellar

and took the cider. The act was committed in the presence of C., and with her knowledge, and it was decided that the necessary intent was lacking, it being merely a trespass. Again, where there was an actual breaking and entering, and the property which was a hand-car was taken from the tool-house of a railroad company, and used by the defendants, but was afterwards abandoned by them and left on the side of the track, it was held that the necessary felonious intent did not exist, and that there was no burglary: *State v. Ryan*, 12 Nev. 401; 28 Am. Rep. 802. See further, on intent, note to 4 Lawson's Criminal Defenses, ed. 1887, 886; "intent," as distinguished from "attempt," in burglary: See *Regina v. McPherson*, 3 Jur., N. S., 522; 3 Lawson's Criminal Defenses, ed. 1887, 699; see also *Regina v. McCann*, 28 U. C. Q. B. 514; 3 Lawson's Criminal Defenses, ed. 1887, 713.

INDICTMENT. — That every essential factor necessary to constitute the crime of burglary ought to be averred, is the general rule. The place and the intent, as well as the character of the felony intended to have been committed, ought to be set out in order to apprise the accused of what he must defend: *Pairo v. State*, 49 Ala. 25.

Breaking and Entering, being essentials of the crime, should be alleged: Note to *Jones v. State*, 2 Bennett and Heard's Lead. Crim. Cas. 126, 131. If the entry is not averred, it is fatal: *Pines v. State*, 50 Ala. 153; 1 Wharton's Crim. Law, 9th ed., sec. 818. In a case where the statute used the words "with force, break and enter," etc., and the indictment was, "did break and enter," the omission of the words "with force" was held immaterial, since the verb "to break" implied force, and its meaning at the common law was definite and settled: *Shotwell v. State*, 43 Ark. 348, citing *Ducher v. State*, 18 Ohio, 308, where the word "forcibly" occurs in the statute. In addition to the breaking and entering, there must be an averment that it was the dwelling-house or mansion-house of another: Note to *Jones v. State*, 2 Bennett and Heard's Lead. Crim. Cas. 126, 131; 1 Wharton's Crim. Law, 9th ed., sec. 815; 1 Bishop's Crim. Proc., 3d ed., sec. 573. But an allegation that the building where the burglary was committed was the "dwelling-house of" the prosecutor means that it is his place of residence, and was so occupied by him: *Bell v. State*, 20 Wis. 599. So the place where the house was located, as the township or county, was necessary at common law to be stated: 2 Archbold's Crim. Pr. & Pl., Pomeroy's notes, 1076. The intent to commit a felony, or the commission of a felony, must be averred: *Desty's Crim. Law*, sec. 141; 1 Wharton's Crim. Law, 9th ed., sec. 810; note to *Jones v. State*, 2 Bennett and Heard's Lead. Crim. Cas. 126, 139. It was said in *Jones v. State*, 11 N. H. 269, 2 Bennett and Heard's Lead. Crim. Cas. 123, that it was not necessary to aver an intent to steal, — that if the larceny be proven, it sufficiently evidenced the intention. The indictment in that case alleged the actual stealing of a watch. "The rule seems to be settled, . . . where there is an averment of a completed larceny, or some felony actually consummated, it is unnecessary to aver the intent to be felonious, the legal presumption being that it is so. The doing of the criminal act, under such circumstances, seems to be regarded as conclusive of the felonious intent": *Barber v. State*, 79 Ala. 21, citing 1 Wharton's Crim. Law, 9th ed., secs. 818 et seq. Where there is a failure to charge the requisite felonious intent, or there is an insufficient averment of the asportation necessary to constitute larceny, the count is bad for burglary or larceny: *Barber v. State*, 78 Ala. 19. In Texas it is held that the felony intended to be committed, with all the statutory ingredients, — that is, all the constituent elements, — must be averred: *Rodriguez v. State*, 12 Tex. App. 553; *Webster v. State*, 9 Id. 78.

But it is held in *State v. Gay*, 25 La. Ann. 472, that where the intent alleged is to commit rape, the indictment need not set out the common-law essentials of that crime, especially where the accused is fully informed by the allegations of the indictment of the crime of which he is charged. So in an indictment for burglary with the felonious intent to commit arson, it was held that the averment need not so specifically set out the felony intended as in case of an indictment for the actual commission of such felony itself: *Shotwell v. State*, 43 Ark. 345, 348; see also note to *Jones v. State*, 2 Bennett and Heard's Lead. Crim. Cas. 126, 143.

Statutory Cases of Intent. — Where the code provided that the breaking and entering, with intent, etc., a railroad car in which goods and merchandise were kept, etc., for "transportation as freight," should be burglary, it was held that the indictment should allege that the goods in the car were kept for "transportation as freight," the averment that they were kept therein "for transportation" being declared insufficient: *Graves v. State*, 63 Ala. 134. And in *Brewster v. People*, 110 Ill. 535, where the statute provided that entering a railroad car "willfully and maliciously, without force (the doors and windows being open), . . . with intent" to commit larceny, should constitute burglary, and the count in question, being otherwise correct, averred that the accused entered into a railroad car, "then and there being open, with intent," etc., it was objected that the count was bad, in that it failed to allege that the doors and windows were open. The court determined that the objection was to form rather than substance, and that since the question was not raised by motion or otherwise until after trial, conviction, and sentence, it must be presumed that the proof showed that the doors and windows were open, and that the count sufficiently identified the offense to constitute a bar to a second indictment therefor. The court further said that it would express no opinion as to whether the objection would or would not have been sustained if taken at the proper time. So "breaking and entering a store" were held sufficient under a statute using the word "shop" instead of "store": *State v. Smith*, 5 La. Ann. 341; see *People v. Macks*, 4 Park. Cr. 153.

"*Feloniously and Burglariously*" are essential, and must be used. The latter term is declared by the old writers to be a term of art, which cannot be expressed by any other term or circumlocution: 1 Wharton's Crim. Law, 9th ed., sec. 814; Wharton's Crim. Law (Prin. Pl. & Ev.), sec. 399; 2 Bishop's Crim. Proc., 3d ed., 129, 130; 2 Archbold's Crim. Pr. & Pl., Pomeroy's ed., 1076; note to *Jones v. State*, 2 Bennett and Heard's Lead. Crim. Cas. 126, 129. It is held in Louisiana that the common-law crime of burglary is unknown by name in that state, as are other crimes, such as murder, etc., but that the statutory offense is what would be burglary at common law; but the statute, by defining it, thereby withdraws it from the common-law definitions, and it is therefore sufficient to charge that the offense was done "feloniously," the word "burglariously" not being necessary: *State v. Newton*, 30 La. Ann. 1253; *State v. Jordan*, 39 Id. 340; see *State v. Curtis*, 30 Id. 814; 2 Bishop's Crim. Proc., 3d ed., secs. 129, 130; Wharton's Crim. Pl. & Ev., 8th ed., sec. 265. In a case where the statutory words in burglary were "willfully and maliciously, and with force, break and enter," and the indictment was "feloniously, willfully, and burglariously did break and enter," it was held that the word "maliciously" added no new element to the offense; that the averment was sufficient for the common-law offense; that "when the elements of a crime at common law and under the statute are the same, the indictment may follow either, as a general rule," and is therefore sufficient for

the statutory crime: *Shotwell v. State*, 43 Ark. 345, 348, citing *Tully v. Commonwealth*, 4 Met. 357; *Lyons v. People*, 68 Ill. 271.

Night-season. — While it is necessary to allege that the crime was committed in the night-time, the particular hour of the night need not be averred: *State v. Robinson*, 35 N. J. L. 71; *State v. Woods*, 31 La. Ann. 267; 2 Bishop's Crim. Proc., 3d ed., secs. 132, 133; *People v. Burgess*, 35 Cal. 115. But it has been held that by the common law the hour must be alleged, to show that it was in the night-time: 2 Archbold's Crim. Pr. & Pl., Pomeroy's notes, 1075. In *State v. Ruby*, 61 Iowa, 86, an allegation that "on the second day of February, 1886, and in the night-time of said day," the burglary was committed, was held sufficient, since the last words of the averment limited the word "day," used in the first part, to the night-time of that day.

Other Allegations. — That some one was in the house at the time the burglary was committed is not necessary to be stated in the indictment: *State v. Reid*, 20 Iowa, 413.

Description of Property. — The property which it is alleged was intended to be taken need not be described: *Summers v. State*, 9 Tex. App. 396; *Kelly v. State*, 72 Ala. 244.

Value. — The value of the articles stolen or their amount is immaterial, and need not be specifically averred: *Commonwealth v. Williams*, 2 Cush. 582; *Short v. State*, 63 Ind. 376; *Matthews v. State*, 55 Ala. 65. And where the thing taken is of that class known as goods and merchandise kept for a particular purpose, as for deposit or sale, the presumption is said to be that they are known to be of value, and therefore no value need be alleged. It is otherwise, however, of articles other than those of the class above-mentioned: *Kelly v. State*, 72 Id. 244; *Henderson v. State*, 70 Id. 23; *Williams v. State*, 67 Id. 183. These cases were under the code provision using the words "in which any goods, merchandise, or other valuable thing is kept for use, sale, or deposit": Code, sec. 4343. So under a statute defining the crime of burglary as "breaking and entering into the dwelling, mansion, or storehouse . . . with intent," etc., it was held not necessary to describe the goods or set out the value: *Lanier v. State*, 76 Ga. 304.

Ownership of the building or dwelling-house must be alleged, or it is fatal to the indictment, and it must also be stated with accuracy: *Beall v. State*, 53 Ala. 460; *Ward v. State*, 50 Id. 120; *Pell v. State*, 20 Fla. 776, and cases cited; *Rex v. White*, 1 Leach C. C. 552; 1 Wharton's Crim. Law, 9th ed., sec. 816; 2 Archbold's Crim. Pr. & Pl., Pomeroy's notes, 1076. "There are only two reasons for requiring the ownership of the house to be stated in an indictment for burglary: 1. For the purpose of showing on the record that the house alleged to have been broken into was not the dwelling-house of the accused, inasmuch as one cannot commit the offense of burglary by breaking into his own house; 2. For the purpose of so identifying the offense as to protect the accused from a second prosecution for the same offense": *State v. Trapp*, 17 S. C. 467; 43 Am. Rep. 614; and if the name of the owner of the house is unknown, it should be so stated: *State v. Morrissey*, 22 Iowa, 158. Where the information described the house by street and number, and also as the N. club-house, and set out that it was occupied by persons to the district attorney unknown, it was held not necessary to state the ownership: *State v. O'Kron*, 30 La. Ann. 951.

Title in Wife. — Where the title to a house is in the wife, still if she and her husband occupy the same together, it is his house equally with her, for the purposes of averring ownership in an indictment for burglary: *Harrison v. State*, 74 Ga. 801; *Rex v. Smyth*, 5 Car. & P. 201; *State v. Short*, 54 Iowa,

392. And this has been held the law, although she be living in a house separate from her husband out of an estate vested in trustees for her sole use, and out of which she paid the rent, and though her husband had never been in the house. But the case turned upon the point that at law the wife could have no property: *Rex v. French*, Russ. & R. C. C. 491. In South Carolina it has been held that the offense might properly be laid as committed in the dwelling-house of a wife, although she and her husband both lived in the house, but she had leased the same and owned the goods therein, and had separate estate: *State v. Trapp*, 17 S. C. 467; 43 Am. Rep. 614.

Corporate Name. — The ownership may be alleged to be in a certain corporation, as "The Oxford Iron Company," and such allegation is sufficient; nor need there be any averment of incorporation: *Fisher v. State*, 40 N. J. L. 169; and an allegation that a building was the office of a certain corporation is sufficient, although the corporation used it as its general office, and had several other offices in the same town: *Commonwealth v. Moriarty*, 155 Mass. 540. So where the code provided that it is necessary only to set out the offense charged sufficiently to enable it to be easily understood by the jury, and the corporate name of the owner of the house burglariously broken and entered was described only as "The Walker Iron and Coal Company," it was held sufficient: *Hatfield v. State*, 76 Ga. 499. The court cited *Crawford's Case*, 68 Id. 822, where the allegation of the incorporation of the owner was held to be surplusage, and not necessary to be proven.

Actual Occupier and Others. — It is sufficient if ownership is averred to be in one who was in actual occupancy and possession at the time when the crime was committed: *Matthews v. State*, 55 Ala. 65; 1 Bishop's Crim. Proc., 8d ed., sec. 573; or ownership may be laid in him in whom the right to the use and occupation exists, although the real ownership is in another: *Webb v. State*, 52 Ala. 422; or it may be laid in the general or special owner: *Johnson v. State*, 73 Id. 483; or in the tenant in possession: *State v. Golden*, 49 Iowa, 48; *State v. Rivers*, 68 Id. 611. So ownership may be averred to be in him who has, as against the burglar, the rightful possession; and where one rented a part of the house in which the burglarious entry was made, it was held to be his dwelling-house, although the owner of the house lived on the floor above: *Smith v. People*, 115 Ill. 17, 20, citing 2 Bishop's Crim. Proc., sec. 138; *Mason v. People*, 26 N. Y. 200. And where there is a general tenancy, the duration of which is not determined by contract, and which, by virtue of a statute, is converted into a tenancy from year to year, the ownership must be averred to be in the tenant: *McCrillis v. State*, 69 Ind. 159. So it is held in the last case that "the rule is applied as well in cases where the tenant is the servant of the landlord, and is allowed to occupy the premises because he is such servant, as in other cases": Citing 2 Russell on Crimes, p. 29; 2 Wharton's Crim. Law, secs. 1571, 1577; and the property being held under a written lease, it was said that the averment of ownership in the landlord, and proof of such tenancy, was a material variance, and fatal; that the ownership should have been alleged to have been in the tenant: *McCrillis v. State*, 69 Ind. 159. Ownership may also be properly averred to be in a tenant at will: *Rex v. Collett*, Russ. & R. C. C. 498; and where a warehouse is let to A and B as joint tenants, and a house connected therewith internally is let to A, all being under the same roof, an averment that it is the dwelling-house of A was held to have been wrongly laid in an indictment for burglary of the warehouse: *Rex v. Jenkins*, Id. 244. It was held in *Rogers v. People*, 86 N. Y. 360, 40 Am. Rep. 548, that in charging the offense as an attempt to commit burglary, it was necessary to set out the offense as com-

mitted in the dwelling-house of the innkeeper, and not of the guest in whose room the alleged criminal act was done. It is held in Alabama, in an indictment brought under a code provision regarding burglary by breaking and entering a car, that the ownership of the car must be averred: *Jackson v. State*, 73 Ala. 483.

Amendment. — A mistake in the ownership or location may be amended: 2 Archbold's Crim. Pr. & Pl., Pomeroy's notes, 1076, 1093, 1097, 1103.

JOINDER. — Burglary and larceny are an exception to the general rule that two distinct offenses cannot be charged in the same count: *State v. Nichols*, 37 La. Ann. 779; *State v. King*, 37 Id. 662; *Breeze v. State*, 12 Ohio St. 146; 80 Am. Dec. 340, 341; see also *Gordon v. State*, 71 Ala. 315; *Barber v. State*, 78 Id. 19; *State v. Kelsoe*, 76 Mo. 505; *Dunham v. State*, 9 Tex. App. 330; 1 Bishop's Crim. Proc., 3d ed., secs. 423, 438, 439, 449.

OTHER CASES. — An averment of intending to steal the goods of A, and that having entered, the accused stole the goods of B, is good: *State v. Brady*, 14 Vt. 353. Since under the Arkansas statute any house comes within the prohibition against burglary, it is not necessary to aver that an outhouse is one within the curtilage: *Shotwell v. State*, 43 Ark. 345, 349. Where an indictment was brought under a statute relating to the possession of burglarious instruments, it was held that it was sufficient to allege a general intent to use such instruments: *Commonwealth v. Tison*, 8 Gray, 375; 69 Am. Dec. 248.

EVIDENCE. — Generally, as to the dwelling-house, it is necessary to show that the owner was in the occupancy and possession of the building burglarized: *State v. Teeter*, 69 Iowa, 717; and it is held that it should be proven that the doors were shut, before there can be a conviction: *State v. Wilson*, 1 N. J. L. 439; 1 Am. Dec. 216.

Night-season. — Evidence is sufficient that the burglarious act was done at any hour of the night in question: *State v. Tawell*, 30 La. Ann. 884; and where a reasonable doubt arises as to whether the offense was committed in the night-season, the accused is entitled to the benefit of the doubt: *Waters v. State*, 53 Ga. 567; 4 Lawson's Criminal Defenses, ed. 1887, 864. In the case of *State v. Morris*, 47 Conn. 179, the court, on the trial below, for the purpose of showing that the time when the crime was committed was the night-season, permitted an almanac to be introduced showing the hour of sunset on the day laid in the indictment, and it was held to be no error, since, although the fact was one of which the court would take judicial notice, yet such almanac might be introduced like a statute to refresh the memory of the court and jury.

Intent, how Proven. — It is not necessary to prove an actual larceny; the intent to commit the larceny may be shown: 2 Archbold's Crim. Pr. & Pl., Pomeroy's notes, 1108. But it is a rule of evidence that where the principal act charged involves the intent to commit another crime, the prosecution must show some act or deed evidencing such criminal intent: *Davis v. State*, 22 Fla. 633, 636. Therefore, where the charge was burglary, and the intended crime was averred to be rape, it was held that the intent as charged was "an essential ingredient," and necessary to be proved by the prosecution, and that being a material averment, if there was any variance between it and the proof, it operated to defeat the averment: *Davis v. State*, 22 Fla. 633, 636, 637. Although it is not necessary to prove an actual larceny, yet such fact is competent, and may be shown as tending to prove an "intent to steal": *State v. Woods*, 31 La. Ann. 267; 2 Bishop's Crim. Law, 6th ed., sec. 115. But evidence is not admissible on the question of "intent to steal" that the

accused, at another time and place, committed another burglary and larceny: *State v. Johnson*, 38 La. Ann. 686. As a general rule, the intent is to be proven by circumstantial evidence, since being a mental state of the accused, it is not from its nature susceptible of direct proof: *State v. Mamuel*, 42 Iowa, 208, 211; and the court, citing from Wharton's Criminal Law, section 1603, says: "The intent may be inferred from the facts. . . . The very fact of a man's breaking and entering a dwelling-house in the night-time is strong presumptive evidence that he did so with intent to steal, and the jury will be warranted in finding him guilty, unless the contrary be proved."

OTHER CASES. — Opinion of Witness — Footprints. — It is error to admit evidence that certain footprints — described by the owner of the premises where the burglary was committed — could have been made by the shoes of the defendant, which were produced on the trial: *Blatt v. State*, 12 Tex. App. 39; 41 Am. Rep. 666.

Particular Room. — Where a particular room was described as the one entered, it was held that the proof could not be of entry into a different room: *People v. Barnes*, 48 Cal. 551.

Specific Felony. — Where the allegation is of an intent to commit a specific felony, evidence of intent to commit a different felony does not support the averment: 1 Bishop's Criminal Procedure, 3d ed., note 2, sec. 521.

Burglarious Tools and implements found in the possession of the accused shortly after the burglary, and at the time of his arrest, may properly be introduced before the jury on trial, although some of the tools are not adapted to the purpose of burglary: *Commonwealth v. Williams*, 2 Cush. 582; *State v. Franks*, 64 Iowa, 39; and it is held in a recent case in Massachusetts that evidence is admissible that the accused had used the same or similar tools on other occasions for burglary: *Commonwealth v. Day*, 138 Mass. 186.

Possession of Stolen Property. — The prosecution may show not only that the accused was found in possession of the stolen property, but may also prove every fact and circumstance attendant thereupon, and his conduct at the time, for the purpose of connecting him with the *corpus delicti*: 2 Bishop's Crim. Proc., 3d ed., secs. 152, 747; *Prince v. State*, 44 Tex. 431; *State v. Shaffer*, 59 Iowa, 293. While the prosecutor may show such fact, it is not, however, indispensable to a conviction for burglary with intent to steal to prove the possession by the defendant of the stolen property, or rather to trace the fruits of the crime into his hands, especially if there is a strong case without it. The court declared in this case that "convictions in this class of cases are frequently sustained without such evidence, and to hold otherwise as an inference of law would lead to the gravest consequences, and often defeat the manifest ends of justice": *Garrity v. People*, 107 Ill. 162, 163. The rule of law undoubtedly is, that the mere possession of the stolen goods unaccompanied by other evidence is not *prima facie* evidence of burglary, and herein the rule differs from that in larceny: *Walker v. Commonwealth*, 28 Gratt. 969; *People v. Gordon*, 40 Mich. 716; 4 Lawson's Criminal Defenses, ed. 1887, sec. 877; *People v. Beaver*, 49 Cal. 57; *Takisfero v. Commonwealth*, 77 Va. 411; *State v. Rivers*, 68 Iowa, 611; *Smith v. People*, 115 Ill. 17; 6 Am. Crim. Rep. 80, and note 82; 1 Wharton's Crim. Ev., 9th ed., sec. 763.

It is held in Georgia, however, that the possession by the accused shortly after of the property stolen from the house which is burglarized, when such possession cannot be satisfactorily accounted for, is strong presumptive evidence of guilt, and sufficient to warrant a conviction: *Davis v. State*, 78 Ga.

16, 17; *Harrison v. State*, 74 Id. 801; *Wilkinson v. State*, 73 Id. 799. And the same rule obtains in Florida: *Tilly v. State*, 21 Fla. 242, 249, citing *Commonwealth v. McGorty*, 114 Mass. 299; *State v. Hogard*, 12 Minn. 293; *Knickerbocker v. People*, 43 N. Y. 177; and see *State v. Hodge*, 60 N. H. 510. So such possession — although only a part of the property was found, and that a month afterwards — was held proper and competent evidence of guilt, and the court said that “the same person who committed the larceny no doubt committed the burglary, and whatever went to show one to be guilty of the larceny equally evidenced his guiltiness of the burglary”: *Smith v. People*, 115 Ill. 17, 21; 6 Am. Crim. Rep. 80, and note 82. Dr. Wharton, however, qualifies the rule first above given, as follows: “But where goods have been feloniously taken by means of a burglary, and they are immediately or soon after found in the actual and exclusive possession of a person who gives a false account or refuses to give any account of the manner in which the goods came into his possession, proof of such possession and guilty conduct may sustain the inference, not only that he stole the goods, but that he made use of the means by which access to them was obtained”; and adds, “there should be some evidence of guilty conduct besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of larceny”: 1 Wharton’s Crim. Ev., 9th ed., sec. 813. Where at the time when the stolen property is found in the possession of the accused, a reasonable explanation accounting therefor is given by him, the state must prove it false: *Ross v. State*, 16 Tex. App. 554; 4 Lawson’s Criminal Defenses, ed. 1887, 859.

Declarations of Accused Regarding Possession. — Where a part of the stolen property was found in the house of the accused shortly after the commission of the burglary with which he was charged, and there was some evidence on the point that he was out of the state at the time the crime was committed, it was held that it was competent for him to show on his part that immediately on discovering such property after his return home he had asked his wife whose it was, and “how it came there”: *Henderson v. State*, 70 Ala. 23; 45 Am. Rep. 72, and note 74.

Intoxication of the accused at the time the burglary was committed is proper evidence for the jury on the question of intent: *State v. Bell*, 29 Iowa, 316. So it is likewise admissible on the part of the accused on trial for burglary and larceny to show that he was physically unable by reason of drunkenness to have committed the burglary in the manner it was proven to have been done: *Ingalls v. State*, 48 Wis. 647; 2 Lawson’s Criminal Defenses, ed. 1887, 712.

Declarations to Officer. — Evidence on the part of the accused, who claims to have acted as a detective against his co-defendants, is admissible on a trial for burglary, to show that when he was approached and asked to commit the crime charged, he went to a justice of the peace and asked him in reference thereto, and the conversation had at that time with such officer is competent evidence: *Price v. People*, 109 Ill. 109.

CHARGE TO JURY. — Where the accused was indicted for burglary, the intent alleged being to commit rape, and it appeared that the breaking and entry were made in the night-time into the room where the prosecutor and his wife were asleep; that the defendant put his hand in the bed upon her, and that she awoke and gave the alarm, whereupon he fled. It was held error in the court below to charge substantially that if the accused, either by force, fraud, or strategy, attempted to have carnal knowledge of the woman, he was guilty: *Wyatt v. State*, 2 Swan, 394; 4 Lawson’s Criminal Defenses, ed.

1887, 869. In a case where the prosecution proved the necessary facts to constitute burglary, and then showed that the accused had been in recent possession of the goods stolen, and he could not account therefor otherwise than by swearing that he had bought them, but could not tell from whom, it was held that the court might properly refuse to give a general charge in his favor: *Ross v. State*, 82 Ala. 65.

In *McClure v. Commonwealth*, 2 Crim. Law Mag. 210, 3 Lawson's Criminal Defenses, ed. 1887, 147, it appeared that the accused were boys under fourteen, and that they did the breaking and entering charged in the indictment, at the solicitation of an older brother of one of them, and the court refused to charge the jury substantially that if the accused committed the breaking as alleged, "but did so at the request of another, and in consequence of youth or mental infirmity, not perceiving the wicked character of the act, or not knowing their responsibility therefor," they should be acquitted, it was held error.

VERDICT — CONVICTION OF ONE OFFENSE WHERE TWO ARE CHARGED. — A verdict of guilty of burglary was found against the accused upon an indictment charging both burglary and larceny. Subsequently a new trial was obtained on the ground of certain irregularities in the trial below; upon a second trial on the same indictment, the jury brought in a verdict of guilty of larceny, and were discharged. It was held that the second verdict was in effect an acquittal of burglary, since the jury ought to have found a verdict in regard to the same, and that as to the larceny, inasmuch as the first verdict acquitted the accused of that crime, the second verdict could not stand, and was a mere nullity: *Bell v. State*, 48 Ala. 684; 17 Am. Rep. 40. Where burglary and larceny are both charged, the accused may be found guilty of larceny and acquitted of the other: *State v. Kennedy*, 88 Mo. 341; *State v. Owens*, 79 Id. 619; *State v. Brandon*, 7 Kan. 106; *Shepherd v. State*, 42 Tex. 501; Wharton's Crim. Law, 9th ed., sec. 819; *State v. Morgan*, 39 La. Ann. 214, where the doctrine *contra* laid down in 1 Bishop's Crim. Law, sec. 1062, is criticised, and the rule given in Wharton's Crim. Law, secs. 383, 560, 617, 1615, is said to be founded on the better reason, the rule being that larceny may be sustained under such charge.

SENTENCE. — The court may, upon a proper verdict of guilty of burglary, where the indictment charged both burglary and larceny, sentence for the former crime without waiting for a verdict as to the latter crime: *Breece v. State*, 12 Ohio St. 146; 80 Am. Dec. 340.

ACCOMPLICE. — Though not present at the actual commission of the burglary, a person may be held guilty of the crime where he consents with others in a general felonious plan, as where one agreed to keep the owner of a store away, and did so while the confederate committed the burglary: *Breece v. State*, 12 Ohio St. 146; 80 Am. Dec. 340. So it is declared in *Wilkinson v. State*, 73 Ga. 779, that "if two or more persons agree and go together to a house for the purpose of burglary or theft, it is not necessary that they should all enter the house for the purpose of making them all guilty. If one aids in any way, stands by, and receives the goods as they are handed out, he is just as guilty as the party who actually entered the house." But a person is not an accomplice in burglary because he receives the goods stolen, although he knew the taking to have been felonious, and received the goods from the burglar: *State v. Hayden*, 45 Iowa, 11.

WALLING v. MILLER.

[108 NEW YORK, 172.]

SALE UNDER EXECUTION OF PROPERTY IN CUSTODY OF RECEIVER, though under a levy made prior to his appointment, is void, unless authorized by the court.

LIEN OF EXECUTION IS NOT DESTROYED BY APPOINTMENT OF RECEIVER, but the lien-holder must seek the enforcement of his lien only by permission of the court appointing the receiver, if he has obtained possession of the property.

POSSESSION OF RECEIVER MUST NOT BE DISTURBED, except by permission of the court, by persons having adverse though paramount liens.

IT IS CONTEMPT OF COURT FOR THIRD PERSON to attempt to deprive a receiver of possession, whether by force or by suit.

RECEIVER CAN NEVER BE TREATED AS TRESPASSER for selling property in his possession pursuant to the order of the court by which he was appointed. Neither can the plaintiff who procured the appointment of such receiver become a trespasser by advising and aiding him to execute such order.

TROVER for the conversion of certain buildings. Judgment for plaintiff.

M. N. Kane, for the appellant.

W. F. O'Neill, for the respondent.

By Court, **EARL, J.** This action was brought to recover damages for the wrongful conversion of certain buildings situated upon the land of J. W. Utter, in Orange County. In February, 1883, the buildings belonged to John W. Vanderoef, who was the tenant of Utter under a lease expiring April 1, 1883. On the 26th of February, 1883, he gave his wife, Eliza, a chattel mortgage, payable one day after date, covering these buildings and all the rest of his personal property. Neither Vanderoef nor his wife removed the buildings during the term of the lease. On the 6th of March, 1883, Utter leased the premises, upon which the buildings were situated, to Miller, the defendant, and to Jacob Price, for one year from April 1, 1883, and on April 4th they entered into possession of the premises and of the buildings under their lease. Both Miller and Price were judgment creditors of Vanderoef; and on the 17th of April, 1883, they commenced an action in the name of Miller against Vanderoef and his wife to reach Vanderoef's equitable interest in the buildings. In that action, Vanderoef made default, and his wife answered that her chattel mortgage had been satisfied. Thereupon a motion was made for the appointment of a receiver pending the trial of the action,

and on May 14, 1883, George W. McElroy was appointed a receiver expressly of these buildings. Upon the same day, he filed security, and took possession of the property. A final decree was entered in the action September 3d, by which the receiver was directed to sell the buildings, and on the 11th of September following he sold them; and the purchasers at the sale thereafter took them down and removed them. Afterward, this action was brought by the plaintiff against Miller and Price, and McElroy, the receiver, and the purchasers of the buildings, claiming that he was the owner of the property, and charging the defendants with its conversion. His title was founded upon an alleged sale by virtue of an execution issued upon a judgment against Vanderroof. The judgment was confessed by Vanderroof to his brother James, who assigned it to another brother on the 7th of May, 1883. Thereafter execution was issued on that judgment, and it was claimed that a levy was made on the 12th of May, 1883. A sale was had under the execution on the first day of June, 1883, at which the property was struck off to the owner of the judgment, who afterward sold the same to this plaintiff.

This action was discontinued as against the receiver, and upon the trial the complaint was dismissed as against all the other defendants except Miller, and a verdict was rendered against him.

We will assume, as most favorable to the plaintiff, that these buildings were personal property, and that they did not become a part of the realty upon the termination of Vanderroof's lease. Utter, the landlord, so treated them, and so did Miller and Price, the lessees who succeeded Vanderroof, by seizing and selling them as personal property. The rule of law which would otherwise have attached these buildings to the realty as a part thereof, after the expiration of the lease, is defeated in its operation by the intention and conduct of the parties interested.

We will also assume, without determining it, that there was a valid levy upon these buildings as personal property on the twelfth day of May, 1883, under the execution issued upon the judgment recovered against Vanderroof, and yet we reach the conclusion that the judgment ought to be reversed for at least two reasons: 1. Two days after the levy, by virtue of the execution issued upon the judgment against the owner of the property, a receiver of the property was appointed. There is no question that the equitable action was regularly com-

menced, and that the court had jurisdiction to appoint the receiver. On the same day he took possession of the property, and thereafter it was, in theory of law, in the possession and custody of the court; and the sheriff had no right to interfere with it by virtue of his lien under the execution in his hands. The lien of the execution was not destroyed by the appointment of a receiver, but the rights and interests of all parties in the property were thereafter to be adjusted by the court which appointed the receiver, and the property could not be taken out of the possession of the receiver and sold upon the execution without leave of the court. The execution creditor could bring his lien to the attention of the court in the action in which the receiver was appointed, and ask to have the execution satisfied out of the proceeds of the property. But persons having liens upon the property had no right to interfere with its possession by the receiver, and, without any application or adjudication of the court, sell and dispose of it, and thus dissipate it, and deprive the court of jurisdiction to administer it: *Noe v. Gibson*, 7 Paige, 513; *Albany City Bank v. Schermerhorn*, 10 Id. 263; *Wiswall v. Sampson*, 14 How. 52. In *Albany City Bank v. Schermerhorn*, *supra*, the chancellor, speaking of a case where an execution creditor claimed a prior lien, said: "If the plaintiffs in the execution had acquired a legal lien, so as to overreach the lien of the complainants in the creditors' bills, they could not get the property out of the hands of the receiver except by an application to the vice-chancellor for an order upon the receiver to deliver over the proceeds to be applied on the execution." In the case of *Noe v. Gibson*, *supra*, it was held that where property is rightfully in the hands of a receiver, it is in the custody of the court, and cannot be distrained upon for rent without permission of the court by whom the receiver was appointed; and that any person who takes the property out of the possession of the receiver without such permission, after he has notice of the character in which such possession is holden, is guilty of contempt; and that the same principles are applicable to any other interference with the possession of a receiver, sequestrator, committee, or custodian who holds the property as the officer of the court of chancery, as his possession is, in law, the possession of the court itself. The chancellor said in that case: "It is well settled that after a receiver has been appointed, and has taken the rightful possession of the property, it is a contempt of court for a third person to attempt to deprive him of that possession

by force, or even by a suit, or other proceeding against him, without the permission of the court by whom the receiver was appointed. Where the receiver is in possession of property upon which a third person has a claim for rent, the proper course for the landlord is to apply to the court, upon notice to the receiver, for an order that the receiver pay the rent, or that the landlord be at liberty to proceed, by distress or otherwise, as he may be advised." In *Wiswall v. Sampson*, *supra*, it was held that a sale of real estate in the hands of a receiver, under a judgment pending the equity suit, and while the court was in possession of the estate, without leave of the court, was illegal and void.

Therefore, before a legal sale could be made of these buildings upon the execution, application should have been made to the court which appointed the receiver for leave to make the sale. An application might also have been made to the court for payment of the execution out of the proceeds of the sale. But the sale under the execution, without leave of the court, while the property was thus in the custody of the court, was wholly illegal and void. Therefore, as the plaintiff's title rests wholly upon the execution sale, it fails, and for that reason he should have been nonsuited at the trial. 2. The judgment in which the receiver was appointed was regularly obtained. The receiver was regularly appointed, and he was directed by the judgment to sell this identical property. Therefore, in selling it, he was not a trespasser, and all persons aiding and assisting him had the same protection. The defendant did not become a trespasser because he commenced the action and had a receiver appointed; nor did he become a trespasser or wrong-doer by advising the receiver to discharge his duty as such, or in aiding him to make the sale which he was bound to make by the judgment: *Day v. Bach*, 87 N. Y. 56; *First National Bank of Oswego v. Dunn*, 97 Id. 157; 49 Am. Rep. 517.

We are therefore of opinion that the judgment should be reversed, and a new trial granted, costs to abide event.

EXECUTION AGAINST PROPERTY IN HANDS OF RECEIVER. — "It is very clear that all property in custody of the law is not subject to any seizure or interference by officers acting under writs of execution; but some difficulty may be experienced in determining when property is so within the custody of the law as to be shielded by this rule. When a court of equity has acted by taking property into its possession by the appointment of a receiver, such property, whether real or personal, is clearly *in custodia legis*. The whole

purpose of the suit might be defeated if an officer could wrest the property from the agent of the court, and sell it by virtue of a writ against one of the contending parties. Such property is not subject to execution. No officer has any right to levy on it without permission of the court. Proceeding without such permission, he may be brought before the court, punished for contempt, and obliged to relinquish his levy. Property has been held to be in custody of law where a receiver had been appointed but had declined to act. The effect of the appointment of a receiver, in a suit brought by one partner against another for the dissolution of the partnership and the settlement of its affairs, has been considered in a series of cases in California arising out of the somewhat notorious failure of Adams and Company. The conclusion there reached was, that until the dissolution of the partnership is decreed and the *pro rata* distribution of its assets ordered among the creditors, they are, notwithstanding the appointment of a receiver, at liberty to pursue their remedies at law, and entitled to retain any liens resulting from their diligence in such pursuit. The reasons given in support of these decisions were, that the suit was one to which the creditors were not parties, and over which they had no control; that the parties might settle or adjust the case between themselves, or the plaintiff might dismiss it at any time; that until the dissolution was decreed, it could not be known that the firm business would be terminated and its affairs settled by the court; and that it would be unwise to deny the creditors the right to pursue the partnership because one of its members had obtained the appointment of a receiver in a suit which he might dismiss or delay at pleasure. This reasoning is not without force; but we think it more appropriate when presented to the court in opposition to the appointment of the receiver, or in support of a motion for leave to proceed notwithstanding such appointment; for generally courts of equity will not permit a party who has defied their authority, by seizing under execution property in their possession, to excuse himself on the ground that the order appointing the receiver was irregularly or improvidently made. An assignee appointed in proceedings at law for the benefit of insolvent debtors seems to stand in the same position as a receiver. He is an officer of the court, and moneys and effects in his hands are in the custody of the law. They cannot be reached by garnishment, unless a dividend has been declared, and the assignee has been directed to pay it over to the respective creditors. One to whom a debtor has made a voluntary assignment of his assets for the benefit of creditors is liable to be garnished. If he has in his hands assets more than sufficient to discharge the claims of the creditors assenting to the assignment, a dissenting creditor may reach the surplus by garnishment": *Freeman on Executions*, 2d ed., sec. 122. The principal case is, so far as we are aware, the only one in which is considered the question of the effect of a sale of property, in the custody of a receiver, under a levy made prior to his appointment. The general rule of law is, that when property is seized under the process of any court of competent jurisdiction, no other court will authorize its seizure, and that, to avoid an unseemly contest between different courts and their officers, that court whose officers first obtain possession will be permitted to proceed: *Id.*, sec. 204. Had the property in controversy in the principal case been taken into the actual possession of the officer who levied the writ, and had he retained such possession until the sale, we judge that such sale would have conveyed a title paramount to that of the receiver: *Id.*, sec. 434.

WHEELOCK v. NOONAN.

[188 NEW YORK, 170.]

LICENSE CANNOT JUSTIFY ACTS unless they are within its terms; and those terms will not be strained beyond a fair and reasonable interpretation.

LICENSE TO PLACE "A FEW STONE" on a lot does not justify the covering it with boulders several feet in depth.

PAROL LICENSE, GRANTED WITHOUT CONSIDERATION, IS REVOCABLE AT PLEASURE.

TRESPASS — REFUSAL TO REMOVE STONE FROM PLAINTIFF'S LAND, by one whose license to keep them there has terminated, is a continuing trespass, for which an action at law can be maintained; but the remedy at law is inadequate, and is not exclusive.

EQUITY WILL NOT INTERFERE WHERE TRESPASS IS CONTINUING ONE, and a multiplicity of actions is involved in the legal remedy.

EQUITY WILL NOT REQUIRE RIGHT OF PLAINTIFF TO BE ESTABLISHED AT LAW as a condition precedent to granting relief, if the facts are not in doubt, and his right is clear.

MANDATORY INJUNCTION WILL BE GRANTED to compel the removal from plaintiff's premises of a large quantity of stone, placed there by the defendant pursuant to a license which he has abused, and which has, moreover, expired by lapse of time.

SUIT to compel defendant to remove from plaintiff's premises a large quantity of stone placed thereon by defendant. Judgment for plaintiff, which was affirmed by the general term.

L. L. Kellogg, for the appellant.

George A. Strong, for the respondent.

By Court, FINCH, J. The findings of the trial court establish that the defendant, who was a total stranger to the plaintiff, obtained from the latter a license to place upon his unoccupied lots, in the upper part of the city of New York, a few rocks for a short time, the indefiniteness of the period having been rendered definite by the defendant's assurance that he would remove them in the spring. Nothing was paid or asked for this permission, and it was not a contract in any just sense of the term, but merely a license, which, by its terms, expired in the next spring. During the winter, and in the absence and without the knowledge of plaintiff, the defendant covered six of the lots of plaintiff with "huge quantities of rock," some of them ten or fifteen feet long, and piled to the height of fourteen to eighteen feet. This conduct was a clear abuse of the license, and in excess of its terms, and so much so that if permission had been sought upon a truthful statement of the intention, it would undoubtedly have been re-

fused. In the spring, the plaintiff, discovering the abuse of his permission, complained bitterly of defendant's conduct, and ordered him to remove the rocks to some other locality. The defendant promised to do so, but did not, and in the face of repeated demands has neglected and omitted to remove the rocks from the land.

The court found as matter of law from these facts that the original permission given did not justify what was done, either as it respected the quantity of rock or the time allowed; that after the withdrawal of the permission in the spring, and the demand for the removal of the rock, the defendant was a trespasser, and the trespass was a continuing one, which entitled plaintiff to equitable relief; and awarded judgment requiring defendant to remove the rocks before March 15, 1886, unless for good cause shown the time for such removal should be extended by the court. The sole question upon this appeal is, whether the relief granted was within the power of the court, and the contention of the defendant is mainly based upon the proposition that the equitable relief was improper, since there was an adequate remedy at law. The plaintiff objects that no such defense was pleaded. If it arises upon the facts stated in the complaint, it can scarcely be said to be new matter required to be stated in the answer; and I doubt whether, under the present system of pleading, the technical objection in such case is good. It is better, therefore, to consider the defense which is interposed.

One who would justify under a license or permission must bring his acts within the terms of the license. He exceeds them at his peril. There is no equity in allowing him to strain them beyond their fair and reasonable interpretation. The finding shows permission asked for "a few stone," described as "a portion" of what defendant was getting from the boulevard. The plaintiff was justified in inferring that for the bulk of his stone the defendant had a place of deposit, and only wanted additional room for a small excess,—for a few stone. Under this permission defendant was not justified in covering six lots with heavy bowlders to a height of fourteen to eighteen feet. The thing done was gravely and substantially in excess of the thing granted, and the license averred does not cover or excuse the act. Beyond that, the permission extended only to the spring of 1880, and expired at that date. The immediate removal of the stone was then demanded, and from that moment its presence upon plaintiff's

lands became a trespass, for which there was no longer license or permission. Such parol license, founded upon no consideration, is revocable at pleasure, even though the licensee may have expended money on the faith of it: *Murdock v. Prospect Park etc. R. R. Co.*, 73 N. Y. 579. And this was a continuing trespass. So long as it lasted, it encumbered the lots, prevented their use and occupation by the owner, and interfered with the possibility of a sale.

It is now said that the remedy was at law; that the owner could have removed the stone, and then recovered of the defendant for the expense incurred. But to what locality could the owner remove them? He could not put them in the street; the defendant presumably had no vacant lands of his own on which to throw the burden; and it would follow that the owner would be obliged to hire some vacant lot or place of deposit, become responsible for the rent, and advance the cost of men and machinery to effect the removal. If any adjudication can be found throwing such burden upon the owner, compelling him to do in advance for the trespasser what the latter is bound to do, I should very much doubt its authority. On the contrary, the law is the other way: *Beach v. Crain*, 2 N. Y. 86, 97; 49 Am. Dec. 369. And all the cases which give to the injured party successive actions for the continuance of the wrong are inconsistent with the idea that the injured party must once for all remove it. Such is neither an adequate remedy, nor one which the plaintiff was bound to adopt.

But it is further said that he could sue at law for the trespass. That is undoubtedly true. The case of *Uline v. New York Central & H. R. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, demonstrates upon abundant authority that in such action only the damages to its date could be recovered, and for the subsequent continuance of the trespass new actions following on in succession would have to be maintained. But in a case like the present, would that be an adequate remedy? In each action the damages could not easily be anything more than the fair rental value of the lot. It is difficult to see what other damages could be allowed, not because they would not exist, but because they would be quite uncertain in amount, and possibly somewhat speculative in their character. The defendant, therefore, might pay those damages and continue his occupation, and if there were no other adequate remedy, defiantly continue such occupation, and in spite of his wrong, make of himself in effect a tenant who could not be dispo-

sessed. The wrong in every such case is a continued unlawful occupation, and any remedy which does not or may not end it is not adequate to redress the injury, or restore the injured party to his rights. On the other hand, such remedy in a case like the present might result to the wrong-doer in something nearly akin to persecution. He is liable to be sued every day, *de de diem*, for the renewed damages flowing from the continuance of the trespass; and while ordinarily there is no sympathy to be wasted on a trespasser, yet such multiplicity of suits should be avoided, and especially under circumstances like those before us. The rocks could not be immediately removed. The court have observed that peculiarity of the case, and shaped their judgment to give time. It may take a long time, and during the whole of it the defendant would be liable to daily actions.

For reasons of this character, it has very often been held that while ordinarily courts of equity will not wield their power merely to redress a trespass, yet they will interfere under peculiar circumstances, and have often done so where the trespass was a continuing one, and a multiplicity of suits at law was involved in the legal remedy. The doctrine was recognized and the authorities cited in the *Murdock* case, *supra*, and the rule deemed perfectly settled.

That case, and those referred to, it is true, were cases of intrusion where no consent had been given for the entry of the intruder, but whether the trespass was such from the beginning, or became one after a revocation of the license, can make no difference, as it respects the adequacy of the legal remedy. That is the same in either event. Two cases of the former character were cited in the *Uline* case: *Bowyer v. Cook*, 4 Man. G. & S. 236; *Holmes v. Wilson*, 10 Ad. & E. 503. In one, stumps and stakes had been left on plaintiff's land, and in the other buttresses to support a road; in each an action of trespass had been brought, and damages recovered and paid; and in each, after a new notice to remove the obstruction, a further action of trespass was brought and sustained. So that, as I have said, the legal remedy is identical, however the trespass originated.

It is a general rule that a court of equity will act in such cases only after the plaintiff's right has been established at law, but that rule has its exceptions: *T. & B. R. R. Co. v. B. H. T. R. R. Co.*, 86 N. Y. 128. Where the facts are in doubt, and the right not clear, such undoubtedly would be a just

basis of decision, though the modern system of trying equity cases makes the rule less important. Where, as in an intrusion by railroad companies whose occupation threatens to be continuous, the injury partakes of that character, an action at law to establish the right has not been required. Indeed, I am inclined to deem it more a rule of discretion than of jurisdiction.

In *Avery v. New York Central and Hudson River R. R. Co.*, 106 N. Y. 142, to which we have been referred since the argument, we were disposed to sustain a mandatory injunction requiring defendant to remove so much of a fence as obstructed plaintiff's right of way, although the obstruction was not a nuisance, but an invasion of a private right. In that case the equitable remedy was not challenged by either counsel or the court, and evidently stood upon the grounds here invoked, — those of a continuing trespass, the remedy for which at law would be inadequate, and involve repeated actions by the injured party for damages daily occurring.

These views of the case enable us to support the judgment rendered. It should be affirmed, with costs.

INJUNCTION AGAINST CONTINUING OR REPEATED TRESPASSES: See note to *Smith v. Gardner*, 53 Am. Rep. 346-355; note to *Jerome v. Ross*, 11 Am. Dec. 498-507; *Burnley v. Cook*, 65 Id. 79; *Reddall v. Bryan*, 65 Id. 554; *Hine v. Stephens*, 80 Id. 217; *Ryan v. Brown*, 100 Id. 162.

MANDATORY INJUNCTIONS. — This subject is treated in note to *Murdock's Case*, 29 Am. Dec. 389-402.

LEASERS BY PAROL, EFFECT OF, AND WHEN REVOCABLE: *Johnson v. Skillman*, 53 Am. Rep. 192, and note 196-199; *Chute v. Carr*, 91 Am. Dec. 442; *Reuck v. Kern*, 16 Id. 497, and note 501-506; *Beatty v. Gregory*, 85 Id. 552; *Wickersham v. Orr*, 74 Id. 348; *Jewell v. Mahood*, 84 Id. 90.

TYSON v. POST.

[106 NEW YORK, 217.]

FIXTURES. — MACHINERY, SHAFTING, ROLLERS, AND OTHER ARTICLES CONSTITUTING A MARINE RAILWAY, are parts of the realty, as between vendor and vendee, or mortgagor and mortgagee, in the absence of any agreement to the contrary.

FIXTURES. — OWNER OF LAND MAY, BY CONVENTION, reimpress the character of personality on chattels which have become fixtures according to the ordinary rules of law, if they have not become so incorporated into the realty as to lose their identity, and the reconversion does not prejudice the right of creditors or third persons.

PAROL AGREEMENT THAT CERTAIN FIXTURES MAY BE TREATED AS CHATTELS, and removed by one of the contracting parties, is not invalid be-

cause by parol, nor because inconsistent with the terms of a mortgage to which he was not a party.

RULE FORBIDDING USE OF PAROL EVIDENCE TO CONTRADICT a writing does not apply to a third person whose rights are paramount to such writing.

SUIT to foreclose two mortgages made by the defendant Cooney in favor of the plaintiffs, who had been the owners of the mortgaged premises and had conveyed them to Cooney, taking the mortgages to secure payment of part of the purchase price. The defendant Post claimed the plant and machinery of two marine railways on the premises, under an agreement entered into between him and the plaintiffs and the mortgagor during the negotiations for the sale, to the effect that he would advance certain moneys, in consideration of which the railways were to become his, and he was to remove them from the property. The trial court decided in favor of plaintiffs, but its judgment was reversed on appeal to the general term.

C. Elliott Minor, for the appellants.

P. H. Butler, for the respondent.

By COURT, ANDREWS, J. The question whether the defendant Post acquired title to the plant and machinery of the marine railways embraced in the plaintiffs' mortgage, as security for the six thousand two hundred dollars paid by him to the plaintiffs at the request of Carroll, to enable the latter to complete the first payment on the contract with the plaintiffs for the purchase of the land, does not depend upon the character of the property, whether real or personal, when placed upon the mortgaged premises. There can be little doubt, however, that the machinery, shafting, rollers, and other articles became, as between vendor and vendee, and mortgagor and mortgagee, fixtures, and a part of the realty: *McRae v. Central Nat. Bank*, 66 N. Y. 489. But, as by agreement, for the purpose of protecting the rights of vendors of personalty, or of creditors, chattels may retain their character as chattels, notwithstanding their annexation to the land in such a way as in the absence of an agreement would constitute them fixtures: *Ford v. Cobb*, 20 Id. 344; *Sisson v. Hibbard*, 75 Id. 542. So, also, it would seem to follow that, by convention, the owner of land may reimpres the character of personalty on chattels, which, by annexation to the land, have become fixtures according to the ordinary rule of law, provided only that they have not been so incorporated as to lose their iden-

tity, and the reconversion does not interfere with the rights of creditors or third persons.

The plant and machinery in question were personal property when placed on the land, and the only issue presented is, Did the plaintiffs agree with Post that he might take the title to the plant and machinery for his security, free of the mortgage, and remove them at any time from the mortgaged premises, thereby reimpressing the property with the character of personality? In determining this question, it does not seem to us to be very material to inquire whether the deed from the plaintiffs to Cooney (the nominee of Carroll), and the mortgage back, embraced, or was intended to embrace, the plant and machinery. Post was not a party to the instruments, and is not concluded by them. The rights of Post depend wholly upon his agreement with the plaintiffs, and if they received his money upon the agreement that he should have the plant and machinery, with the right to remove them without restriction as to time, the agreement was valid although by parol, and even if it contradicts the legal import of the mortgage, it being an agreement between different parties, it is not within the rule which forbids parol evidence to contradict a written instrument. The only point of disagreement between the parties relates to a restriction alleged to have been placed on the time within which Post should exercise the right of removal. The plaintiffs concede that the right of removal was given to Post, but they allege that it was subject to the limitation that the right should be exercised before any proceedings were taken to foreclose the mortgage. The defendant, on the other hand, claims that the right was unrestricted and absolute. The paper executed by the plaintiffs on the closing of the transaction contains the restriction claimed by the plaintiffs. But we think the evidence sustains the contention of the defendant, that the paper was not delivered to or accepted by him, and that he had no knowledge of its contents. The question of fact, therefore, depends upon the other evidence bearing upon the actual agreement. It would not be useful to state the evidence in detail. It is sufficient to say that after a careful examination of the testimony, we have reached the conclusion that the claim of the defendant is most consistent with the conceded facts, and is supported by a preponderance of evidence.

The orders of the general term should therefore be affirmed, and judgments absolute directed in accordance with the stipulations.

FIXTURES, WHAT ARE: *Gray v. Holdship*, 17 Am. Dec. 680, and note 686-696; *Richardson v. Copeland*, 66 Id. 424. The leading modern case on the subject of fixtures is *Teaff v. Hewitt*, 59 Id. 634; see also *Goodman v. Hannibal R. R. Co.*, 100 Id. 337, and *Potter v. Cromwell*, 100 Id. 493.

GUTTA PERCHA AND RUBBER MFG. CO. v. MAYOR ETC. OF HOUSTON.

[106 NEW YORK, 274.]

JUDGMENT IS NOT A CONTRACT FOR ALL purposes and under all circumstances.

JUDGMENT IS A CONTRACT "EXPRESS OR IMPLIED" within the terms of the statute authorizing the issue of attachments on such contracts, whether it was founded on a contract or a tort. The previous cause of action was merged in the judgment which became a debt that the defendant was under obligation to pay, and the law implied a promise or contract on his part to pay it.

JUDGMENTS ARE TREATED AS CONTRACTS for the purposes of actions and remedies.

MOTION to vacate an attachment on the ground that the action was upon a judgment; and that such judgment was not a "contract express or implied" upon which an attachment could properly issue. The motion was denied by the special term, whose order was reversed by the general term.

Pelton and Poucher, for the appellant.

M. H. Cardozo, for the respondent.

By Court, EARL, J. The plaintiff commenced this action against the defendant in the supreme court of this state to recover the amount of a judgment rendered in its favor against the defendant in Texas, by a court in that state having jurisdiction of the action. For the purpose of obtaining an attachment against the defendant, an affidavit was made on behalf of the plaintiff, in which it was stated, among other things, that the judgment was duly recovered in the Texas court; but there was no allegation in the complaint or statement in the affidavit showing what the judgment was recovered for. The attachment having been granted, a motion was made to vacate it on the ground that it did not appear for what the judgment was rendered, and hence that it may have been rendered in an action *ex delicto*, not embraced within section 635 of the code, which specifies the only cases in which attachments can be granted against the property of defendants. The motion to

vacate was denied by the judge who granted the attachment, and then the defendant appealed from his order to the general term, and there the order was reversed and the attachment vacated upon the ground that "the plaintiff's papers did not show that the action was brought to recover a sum of money only as damages for the breach of a contract, express or implied, other than a contract to marry."

A judgment is not for all purposes and under all circumstances to be treated as a contract, and yet it has frequently been so treated. There is always on the part of the judgment debtor an obligation or promise implied by law to pay the judgment. In *Taylor v. Root*, 4 Keyes, 335, an action upon contract, it was held that a judgment in an action of slander could be set up as a counterclaim, for the reason that it was a cause of action arising on contract and existing at the commencement of the action. In *Nazro v. McCalmont Oil Company*, 36 Hun, 296, upon an appeal from an order of the special term denying a motion to vacate an attachment issued in an action brought upon a judgment recovered in the state of Pennsylvania, Davis, P. J., said: "We think a judgment is a contract, 'express or implied,' within the meaning of section 635 of the Code of Civil Procedure." In *Donnelly v. Corbett*, 7 N. Y. 500, an attachment was based upon a judgment recovered against the defendant in a suit in the state of South Carolina.

Two kinds of contracts are contemplated by section 635: express contracts, which are such as are voluntarily made by the parties thereto; and implied contracts, which, though not expressly made by the parties, are made by the law when it, enforcing a sound morality and a wise public policy, acting upon principles of equity and justice, imposes upon a party an obligation to pay a debt or discharge a duty. After the recovery of this judgment, whether it was recovered for a tort or upon contract, the recovery became a debt which the defendant was under obligations to pay, and the law implied a promise or contract on his part to pay it. The previous cause of action, whatever it was, became merged in the judgment: *Besley v. Palmer*, 1 Hill, 482; *Goodrich v. Dunbar*, 17 Barb. 644; *McButt v. Hirsch*, 4 Abb. Pr. 441; *Mallory v. Leech*, 14 Id. 449, note; *Clark v. Rowling*, 3 N. Y. 216, 227; 53 Am. Dec. 290; *Suydam v. Barber*, 18 N. Y. 468; 75 Am. Dec. 254; *Atlantic Dock Co. v. Mayor etc.*, 53 N. Y. 64; *Freeman on Judgments*, secs. 215, 217.

This is not, therefore, an action *ex delicto*, but *ex contractu*, and the plaintiff was entitled to such remedies only as are authorized in actions upon contracts. If the Texas judgment had been for tort, and the defendant had been a natural person, upon any judgment recovered in this action, an execution could not have been issued against the person of the defendant. We find nothing in the letter of the statute, or in the policy upon which it is founded, which requires us to hold that the plaintiff is not entitled to an attachment in this case, and we find no authority sustaining the contention of the defendant. There are authorities which hold that judgments, for some purposes, are not contracts; but there is no authority that they are never to be treated as contracts, and all of them recognize the implied obligation of every judgment debtor to pay the judgment, and that for the purpose of actions and remedies upon them they are to be treated as contracts: *O'Brien v. Young*, 95 N. Y. 428; 47 Am. Rep. 64; *Chase v. Curtis*, 113 U. S. 452. In a suit upon a binding judgment, whether foreign or domestic, the plaintiff must therefore be entitled to the same provisional remedies to which he would be entitled in an action upon a contract, express or implied.

If the plaintiff's original cause of action was for a tort, that was merged in the judgment, and the plaintiff could not thereafter sue in this state for the tort; but even if he could, there is no authority holding that he was obliged to, and that he could not take his remedy in this state upon the judgment treating the tort as merged therein.

We are therefore of opinion that the order of the general term should be reversed, and that of the special term affirmed, with costs in all the courts.

THAT A JUDGMENT IS NOT, STRICTLY SPEAKING, A CONTRACT, we think must be affirmed upon principle. It is wanting in the essential elements of a contract. It may be for or against parties who are incapable of assent; and it is, when between parties capable of assenting, almost uniformly rendered without the assent and with the unquestionable dissent of the party bound thereby. These considerations show that it is not a contract; and for most purposes, it does not fall within statutory provisions respecting contracts: *O'Brien v. Young*, 47 Am. Rep. 64; Freeman on Judgments, sec. 4; *McConn v. N. Y. C. & H. R. R. R.*, 50 N. Y. 176; *Chase v. Curtis*, 113 U. S. 452. Hence, though a statutory liability may be merged into a judgment therein, the latter is not a contract, nor within the protection of that provision of the constitution inhibiting a state from impairing the obligation of a contract: *State v. Mayor*, 109 N. Y. 285. From these conclusions there is a very serious dissent: *Taylor v. Root*, 4 Keyes, 344; *Morse v. Tappan*, 3 Gray, 411; *Stewart v. Lander*, 76 Am. Dec. 538. There is, however, no doubt that an action may

be maintained on a judgment. Such action is, strictly speaking, neither an action in contract nor in tort; but it resembles the former more nearly than the latter. And there is no impropriety in extending to it the remedy by attachment, when that remedy is accorded to actions on contracts, express or implied; *Namre v. McCalmont Oil Co.*, 36 Hun, 296.

PEOPLE v. GREENWALL.

[108 NEW YORK, 296.]

PEOPLE ARE BOUND BY ANSWER GIVEN ON CROSS-EXAMINATION of the defendant in respect to collateral matters. They cannot ask him about such matters for the purpose of impeaching or contradicting him in regard thereto.

EVIDENCE OF CRIME DIFFERENT FROM ONE CHARGED is never admissible except for the purpose of showing motive, interest, or guilty knowledge. In rebuttal of evidence of good character, it is not competent to give evidence of specific acts of immorality or crime.

EVIDENCE OF DEFENDANT'S BAD CHARACTER is not admissible unless he has first offered evidence to show that his character is good.

INDICTMENT for murder, resulting in his conviction in the trial court.

C. F. Kinsley and A. Suydam, for the appellant.

James W. Ridgway, for the respondent.

By Court, EARL, J. The defendant was indicted for the murder of Lyman S. Weeks, in the city of Brooklyn, on the fifteenth day of March, 1887. He was tried and convicted of murder in the first degree, and has brought this appeal directly to this court under chapter 493 of the laws of 1887.

It is undisputed that Mr. Weeks was killed by a pistol-shot fired by some person who had burglariously entered his house in the night-time. There was no witness who saw or heard the shot fired, or was able to testify that the defendant was the person who fired it, or that he was present in the house of Mr. Weeks on the night of the homicide.

The evidence on the part of the people to connect the defendant with the crime, and to establish his guilt, was, in substance, as follows: Three witnesses were called, who gave evidence tending to show by their identification of him that he was in the vicinity of Mr. Weeks's house on the night of the 15th of March near the time when the homicide was committed; that shortly before that day he had a pistol with the same calibre as the one had which was fired at Mr. Weeks, and that after the homicide it disappeared from his possession;

that on the night of the homicide he wore a Prince Albert coat, which also thereafter disappeared. In addition to this, there was evidence that the defendant was a burglar, an associate of criminals, and that shortly after the homicide he confessed the crime to two of his criminal comrades. At the time of his arrest he denied that he had ever been in the city of Brooklyn; and that denial was upon the trial shown to be false.

On the part of the defense, evidence was given tending to throw some doubt upon the identification of the defendant by the three witnesses called upon the part of the people to show his presence near Mr. Weeks's house on the night of the homicide. The defendant produced as a witness Charles Miller, who was jointly indicted with him for the same murder, and he gave evidence tending to show that the person who committed the crime was Paul Krause, and that the defendant had no connection with it; and there was some other evidence on the part of the defense tending in some degree to show that Krause was implicated in the crime. The defendant was sworn as a witness on his own behalf, and positively denied his guilt, and his presence at or near the scene of the crime on the night of the 15th of March.

For the purpose of showing that the defendant did not tell the truth when he denied that he had ever been in the city of Brooklyn, George Mohring was called as a witness on behalf of the people, and testified that the defendant worked for him in the city of Brooklyn twenty-two days, commencing on the sixth day of January, 1887, and during that time slept in his house. And his evidence was confirmed by that of his wife. The defendant also testified that he worked and lived with Mohring in the city of Brooklyn, as testified to by him. Upon his cross-examination, he was questioned as to various crimes with which he was supposed to have been connected, and he admitted that he had been in the state prison. He was then examined as follows in reference to a crime alleged to have been committed at Mr. Mohring's house:—

“Q. After you left Mohring's house, did you and Butch Miller, within a few days afterwards, enter Mohring's house about one o'clock in the morning? A. No. Q. Were not you and Butch Miller found in Mohring's house about one o'clock in the morning? A. No. Q. And that you ran into the cellar and out of the house, leaving behind you a knife and your shoes? A. No. Q. And did n't you ask him, two days before you went in the house, whether he had a pistol in his house

or not? A. No. Q. Did you ever ask him if he ever had burglars enter his house? A. No. Q. Did you say to him, 'Would you shoot a burglar if you found him in the house?' and did n't he reply to you that he had no pistol to shoot anybody with? A. No; I did n't care whether he had a pistol in his house or not."

Upon his re-examination on his own behalf, he denied that he ever entered any man's house in the night with intent to steal. Then, after the defendant had rested his case, Mohring was recalled for the prosecution, and the following took place:—

"Q. Did you ever see that knife before? A. I never seen it until he came to work for me; Greenwall had that when he worked for me.

"Defendant's counsel moved to strike out the last answer, as it is collateral, and the prosecuting attorney is contradicting his own witness.

"The prosecuting attorney: The evidence is admissible in rebuttal; the defendant swore he was not in the house of this witness; and it is offered as to character.

"The court: Admitted as to whether the accused broke into this witness's house.

"Q. When Greenwall worked there did you see him have that knife? A. Yes. Q. Do you remember his whetting it on a stone to shave himself? (Objected to.) Q. Was your house entered at any time after Greenwall left there? A. Yes. Q. At what time in the night? A. One o'clock. Q. How did you know there was anybody in the house at one o'clock at night? A. I slept in the front bedroom, and I heard somebody up in the garret; I heard somebody sneak up there without shoes on; then I went in the back room and called my wife, and we went up there together; then when I came up in the garret I saw two men up there. Q. Did you see two men in the room? A. Yes. Q. Did you speak to the two men? A. I spoke in German, 'What are you doing here?' Then they gave the answer: 'Nothing.' Q. Who were the men, if you know? A. I can swear to it that Greenwall was one of them, and the other I did not know. Q. Did they answer you in German or in English? A. They told me in German; then I turned around to come down stairs, and they came after me, and passed me, and threw the lamp out of my hands, and went down three flights of stairs, down through the cellar, out. Q. Did you go down the cellar after them?

A. I went down the cellar until they went out the cellar. Q. Did you find anything in the cellar? A. I had a shelf there by the door where they broke in, and on the shelf lay these two pair of shoes and this knife. Q. How did these two men enter this house? A. They came through the garden and went into the cellar; in the cellar there is a partition of boards; they busted one of the boards off, and went in from the cellar up. Q. Was anything the matter with any of the bolts? A. They broke one of the boards out; then they went through the partition; and I had about fifty bottles of sherry wines there, and they moved that. Q. Did you see any clippings, to indicate that a knife had been used? A. No. The court: Tell what else you saw. A. I saw they cut the bolt out, and through that made an entrance. Q. A few days before you discovered Greenwall in your house, did you have any talk with him about burglars, pistols, or anything of that kind? (Objection sustained.)"

It is too clear for reasonable dispute that this evidence was incompetent. It was not offered for the purpose of showing that the defendant was in Brooklyn at the time, and thus contradicting what he stated at the time of his arrest, because that had already been proved by Mohring and his wife, and the defendant had admitted it in his own evidence. It was not admissible for the simple purpose of contradicting the evidence of the defendant, and thus discrediting him by the contradiction, because his cross-examination as to the burglary upon the house of Mohring was collateral; and it is familiar law that the people were bound by his answers given upon such cross-examination, and that they could not afterward call witnesses to contradict him in reference to such answers: *Stokes v. People*, 53 N. Y. 164; 13 Am. Rep. 492; *People v. Ware*, 29 Hun, 473; affirmed, 92 N. Y. 653. Nor was it admissible in rebuttal of the defendant's evidence given on his re-examination, that he had never entered any man's house in the night-time for the purpose of stealing. That evidence was rendered competent by the course of his cross-examination, and did not lay the foundation for proof of the crime committed at Mohring's house. It was not competent for the purpose of showing that the defendant was a burglar, and addicted to the crime of burglary. It is never competent upon a criminal trial to show that the defendant was guilty of an independent crime not connected with or leading up to the crime for which he is on trial, except for the purpose of showing mo-

tive, interest, or guilty knowledge, and this evidence was not proper or competent for that purpose: *Sharp v. People*, 107 N. Y. 427; 1 Am. St. Rep. 851. Nor was it competent in rebuttal of evidence introduced by the defendant on his own behalf as to his good character. It is never proper for the purpose of impeaching the character of a party or a witness to call witnesses to prove specific acts of dishonesty, immorality, or crime. If the people desired to prove that the defendant's character was bad, the only course open to them was to call witnesses who were acquainted with his character: *Commonwealth v. O'Brien*, 119 Mass. 342; 20 Am. Rep. 325; *Troup v. Sherwood*, 3 Johns. Ch. 558; *Wehrkamp v. Willet*, 4 Abb. App. 548; *Bakeman v. Rose*, 18 Wend. 146; *People v. Rector*, 19 Id. 569; *Corning v. Corning*, 6 N. Y. 97; *Rathbun v. Ross*, 46 Barb. 127; 1 Greenl. Ev., sec. 461. But there was no foundation for calling witnesses to impeach the defendant's character. He had not by any evidence on his part really put his character in issue. All the evidence on the part of the people, as well as that on the part of the defense, tended to show that his character was bad. There was but a single witness, who, by any possibility, could be said to have been called by the defendant as to his character, and the whole of his direct evidence is as follows:—

"I live at 856 Eighth Avenue, New York; my business is tailor; I am engaged in business for myself; I have known the defendant here, John Greenwall, since August, 1884; he worked for me from that time until Thanksgiving; he is a pretty fair tailor by trade. Q. Did you discharge him, or did he leave you? A. He left me. Q. During the time he worked for you did you find him a good workman and an honest man? A. I cannot complain about him; he was a good workman and did n't steal anything." On his cross-examination this witness testified that while the defendant worked for him, he told him that he left Germany because he had killed a man. Here was certainly no evidence as to his good character, and there was nothing in this evidence which justified the people in entering upon a general impeachment of his character.

The evidence of Mohring above set out was, therefore, clearly incompetent. It was very damaging in its nature, and we cannot say that it did not have an important influence upon the minds of the jurors in reaching their verdict. The defendant's guilt was not so clearly established by other proof that it can be said that this evidence was harmless. It was objected to;

the attention of the court and of the district attorney was clearly called to its incompetency, and under such circumstances we are of opinion that the error in its reception cannot and ought not to be disregarded. A person on trial for his life is entitled to all the advantages which the laws give him, and among them is the right to have his case submitted to an impartial jury upon competent evidence.

The judgment should therefore be reversed, and new trial granted.

EVIDENCE OF COMMISSION of crimes other than the one of which the prisoner is accused is never admissible against him, except where to make out the crime charged the intent with which the act is done is material: *People v. Sharp*, 1 Am. St. Rep. 851; *State v. Lepage*, 24 Am. Rep. 69. Hence, where the defendant was on trial for obtaining money on false pretenses, by pretending that he was a member of a Masonic lodge and in need of money, it was held to be incompetent to prove that at prior times he had made similar false pretenses and for like purposes: *Strong v. State*, 44 Am. Rep. 292. But it is very probable that the rule was misapplied in this case; for it seems to be one in which the intent of the actor was of the essence of the crime charged. For application of the rule that other crimes or acts may be proved for the purpose of establishing a guilty knowledge or intent, see note to *Calkins v. State*, 98 Am. Dec. 163; *Hopkins v. Commonwealth*, 88 Id. 518.

BAD CHARACTER OF DEFENDANT in a criminal prosecution can never be shown unless he has first tendered the issue by offering evidence for the purpose of establishing good character: Note to *O'Bryan v. O'Bryan*, 53 Am. Dec. 134.

WITNESS CANNOT BE EXAMINED concerning collateral and immaterial matters for the purpose of contradicting or impeaching him. With respect to such questions the party cross-examining is bound by the statements of the witness: *Fletcher v. Boston and Maine R. R. Co.*, 79 Am. Dec. 695; note to *Turnpike Road Co. v. Loomis*, 88 Id. 322.

HOLLAND v. ALCOCK.

[108 NEW YORK, 312.]

TO CREATE VALID TRUST, DEFINED BENEFICIARY is essential, except in the cases of certain "charitable" trusts.

VALIDITY OR INVALIDITY OF TRUST cannot be dependent on the will of the trustee.

THERE CAN BE NO VALID TRUST unless it is capable of being enforced even against the wish of the trustee. A mere honorary obligation which the trustee may perform or not at his will does not create a trust, and the legal representatives of the donor may compel the surrender of the property sought to be charged with such trust.

DISTINGUISHING FEATURES OF CHARITABLE TRUSTS were, as they were administered in England, that they might be established through trustees,

who might consist either of individuals or corporations, and in case of individual trustees, they might hold an indefinite succession, and be self-perpetuating, and the funds might be devoted in perpetuity to the charitable purposes indicated by the donor, while private trusts were not permitted to continue longer than a life or lives in being, and twenty-one years and a fraction afterwards. The persons to be benefited might consist of a class the individual members of which were uncertain, and the scheme of charity might be wanting in sufficient definiteness or details to admit of its practical administration.

CY-PRES, DOCTRINE OF. — If a charitable trust were not sufficiently definite to admit of its practical administration, courts of equity would order a reference to a master in chancery to devise a scheme for its administration which should as nearly as possible conform to the intentions of its founder.

CHARITABLE TRUSTS WERE IN ENGLAND MATTERS OF PUBLIC CONCERN, enforceable at the instance of the attorney-general; and in some cases they were enforced without his intervention, at the instance of a town or parish, or of its inhabitants, or of an individual of the class intended to be benefited.

CHARITABLE USES, ENGLISH STATUTES concerning, mentioned and considered.

USES ARE NOT PROHIBITED AS SUPERSTITIOUS BY LAWS OF NEW YORK, when they are for the observance of any ceremonial, the efficiency of which is recognized by the church of which the donor is a member. All religious beliefs are recognized and tolerated by the constitution of the state and of the United States, and no religious observance can be condemned, as a matter of law, as superstitious.

DOCTRINE OF CY-PRES AND ENGLISH LAW of charitable uses do not prevail in New York. The laws of that state governing such uses must be sought in its statutes and in its corporation laws, general and special. Bequest to executors of personalty "to be by them applied for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of the testator's soul and the souls of his family, and also for the souls of all other persons who may be in purgatory," is void in New York for want of a definite beneficiary.

ACTION by the heirs at law of Thomas Gunning against his executors to recover certain property which the latter claimed the right to hold in trust for certain purposes mentioned in the decedent's will, and referred to in the opinion of the court. A demurrer was interposed by the defendants, which the trial court overruled; but which the general term on appeal sustained.

E. H. Benn, for the appellants.

I. N. Williams and David McClure, for the respondents.

By Court, **RAPALLO, J.** The third clause of the testator's will is in the following words: "All the rest, residue, and remainder of my estate I give and bequeath to my said executors, to be applied by them for the purpose of having prayers

offered in a Roman Catholic church, to be by them selected, for the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory." The validity of this clause is the question now presented for adjudication.

The action is brought by five nieces and a nephew of the testator, who claim to be his next of kin and heirs at law, and as such, entitled to his residuary estate in case the disposition thereof, attempted to be made by the third clause of the will, is adjudged to be invalid. The estate consists wholly of personal property, and amounted, at the time of the testator's death, in 1882, to about the sum of twenty-eight thousand dollars. By the second clause of his will the testator devised and bequeathed all his estate, real and personal, to his executors, in trust, for the uses and purposes set forth in the will, which were to pay certain legacies, amounting in the aggregate to about sixteen thousand five hundred dollars, and to apply the residue as directed in the third clause, before recited. That clause must, therefore, be regarded as creating, or attempting to create, a trust of personal property for the purpose specified. The plaintiffs claim that the trust thus attempted to be created is void; that, as to the residuary estate, the testator died intestate, and that distribution thereof should be made among the next of kin, etc. The defendant Alcock, one of the executors, demurred to the complaint. At special term the demurrer was overruled, and the plaintiffs had judgment. On appeal to the general term, that judgment was reversed, and judgment was rendered in favor of the defendant Alcock, thus affirming the validity of the third clause of the will. The plaintiffs now appeal.

Some of the points involved in the case now before us were passed upon in the late case of *Gilman v. McArdle*, 99 N. Y. 451, 52 Am. Rep. 41. In that case, the deceased had, in her lifetime, placed in the hands of the defendant a sum of money, on his promise to apply it to certain purposes during the lifetime of the deceased and of her husband, and after the death of both of them, to pay their funeral expenses, etc., and to expend what should remain in procuring Roman Catholic masses to be said for the repose of their souls. This court declined to decide whether a valid trust had been created in respect to the surplus, there being no ascertained or ascertainable beneficiary who could enforce it; and the majority of the court expressly reserved its opinion upon that question,

disposing of the case upon the ground that a valid contract *inter vivos*, to be performed after the death of the promisee, had been established; that there was nothing illegal in the purpose for which the expenditure was contracted to be made, and that there was no want of definiteness in the duty assumed by the promisor; and we held that, as there had been no breach of the contract, but the promisor was ready and willing to perform, he was entitled, as against the legal representatives of the promisee, to retain the consideration.

The point upon which the majority of the court in the case last cited reserved its decision is now again presented. There is no contract *inter vivos*, but the will expressly bequeaths the fund in question to the executors, in trust, for the purposes therein specified, one of which is to apply the residuary estate to the purpose of having prayers offered in a Roman Catholic church for the repose of the souls of the testator, of his family, and of all others who may be in purgatory. It is claimed that this disposition contains all the elements of a valid trust of personal property; that there are definite and competent trustees; that the purpose of the trust is lawful; and that it is sufficiently definite to be capable of being enforced by a court of equity, as the court could decree the payment of the fund to a Roman Catholic church, or churches, for the purpose directed by the will. But if all this should be conceded, there is still one important element lacking. There is no beneficiary in existence, or to come into existence, who is interested in or can demand the execution of the trust. No defined or ascertainable living person has, or ever can have, any temporal interest in its performance; nor is any incorporate church designated so as to entitle it to claim any portion of the fund. The absence of a defined beneficiary is, as a general rule, a fatal objection to any attempt to create a valid trust. It is said by Wright, J., in *Levy v. Levy*, 33 N. Y. 107, that "if there is a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary, who can claim its enforcement, is void, whether good or bad, wise or unwise." It is only in regard to the class of trusts known as "charitable" that a different rule has ever prevailed in equity in England, and still prevails in some of our sister states. Whether the English doctrine of charitable uses and trusts prevails in this state will be considered hereafter. In all other cases, the rule as stated by Judge Wright is universally recognized, both in law and in equity.

It is claimed that the trust now under review is not void, according to the general rules of law, for want of a defined beneficiary, because the trust is for the purpose of having prayers offered in a Roman Catholic church to be selected by the executors. It is contended that this is, in effect, a gift to such Roman Catholic church as the executors shall select, inasmuch as the money to be expended for the masses would, according to the usage, be payable to the church or churches where they were to be solemnized, and therefore, as soon as the selection is made, the designated church or churches will be the beneficiary or beneficiaries, and entitled to the payment; that the trust is, therefore, in substance, to pay the fund to such Roman Catholic church or churches as the executors may select; and that a duly incorporated church, capable of receiving the bequest, must be deemed to have been intended. Passing the criticisms to which the assumptions contained in this proposition are subject, and considering the trust as if it had been in form to pay over the fund to such Roman Catholic church as the executors might select, to defray the expense of offering prayers for the dead, the objection of indefiniteness in the beneficiary would not be removed. The case of *Power v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 550, is relied upon by the respondents as supporting their claim. In that case the bequest was of a fund to the executors in trust, to be divided by them among such Roman Catholic charities, institutions, schools, or charities in the city of New York as a majority of the executors should decide, and in such proportions as they might think proper. The opinion of the court by Miller, J., holds that, giving full force and effect to the rule that the object of the trust must be certain and well defined, that the beneficiaries must be either named or capable of being ascertained within the rules of law applicable to such cases, and that the trusts must be of such a nature that a court of equity can direct their execution, and making no exception in favor of charitable uses, the bequest should be upheld as coming within the general rule; that the clause designates a certain class of objects of the testator's bounty, to which he might have made a valid, direct bequest, and that by conferring power upon his executors to designate the organizations which should be entitled to participate, and the proportion which each should take, he did not impair the legality of the provision, so long as the organizations referred to had an existence recognized by law, and were capable of taking, and

could be ascertained; that the evidence showed that at the time of the execution of the will, and of the testator's death, there were in the city of New York incorporated institutions of the class referred to in the will, and that a portion of these had been designated by a majority of the executors; that none but incorporated institutions could lawfully have been selected, and that even if the executors had failed to make a selection or apportionment, the court would have had power to decree the execution of the trust, there being no difficulty in determining what institutions came within the class described by the testator. It must be observed that in the case cited, the beneficiaries were confined to Roman Catholic institutions of a certain class in the city of New York. These were necessarily limited in number. By 1 Revised Statutes, 734, section 97, it is provided that a trust power does not cease to be imperative when the grantee has the right to select any and exclude others of the persons designated as the objects of the trust; by section 99, that when the terms of the power import that the estate or fund is to be distributed between the persons designated in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons, in exclusion of the others; by section 100, that if the trustee of a power, with the right of selection, shall die, leaving the power unexecuted, its execution shall be decreed in equity for the benefit equally of all the persons designated as objects of the trust; and by section 101, that where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be exercised, its execution shall devolve on the court of chancery.

Regarding these provisions as declarations of general rules applicable to all trust powers and governing trusts of personal as well as real property, the decision in *Power v. Cassidy*, *supra*, in no manner infringes upon the rule that the designation of a beneficiary entitled to enforce its execution is essential to the validity of a trust, and the only point as to which the correctness of that decision is open to any doubt is, whether, in fact, the beneficiaries in that case were sufficiently defined and capable of ascertainment to enable a court of equity to enforce the trust in their behalf. The view taken in respect to that point was certainly very liberal, but the court has in subsequent cases repeatedly announced that the decision was not to be extended, and it is evident that without a material extension it cannot be made to cover the present case. Here, if

the church or churches from among which the selection is to be made are to be regarded as the beneficiaries, they are not limited, as in *Power v. Cassidy, supra*, to a Roman Catholic church or churches in the city of New York, but include all the Roman Catholic churches in the world. No one church or the churches of any particular locality can claim the benefit of the bequest. In this respect the case at bar is analogous to that of *Prichard v. Thompson*, 95 N. Y. 76, where the bequest was of a sum of money to the executors to be distributed by them "among such incorporated societies organized under the laws of the state of New York or the state of Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable or educational uses," as the executors or the survivors of them might select, and in such sums as they might determine. This bequest was held void because of the indefiniteness of the designation of the beneficiaries. The opinion was written by the same learned judge who delivered the opinion in *Power v. Cassidy, supra*, and by him distinguished from that case on the ground that in *Power v. Cassidy, supra*, the class of beneficiaries was specially designated and confined to the limits of a single city and to a single religious denomination, so that each one could readily be ascertained, and each had an inherent right to apply to the court to sustain and enforce the trust; while in the case at bar every charitable and educational institution within two states was included. This case (*Prichard v. Thompson, supra*) also establishes that the power to the executors to select the beneficiary or beneficiaries does not obviate the objection of the omission of the testator to designate them in the will, unless the persons or corporations from among whom the selection is to be made are so defined and limited that a court of equity would have power to enforce the execution of the trust, or in default of a selection by the trustee, to decree an equal distribution among all the beneficiaries.

This discussion has proceeded in answer to the claim that the church or churches where the masses were to be solemnized were the intended objects of the testator's bounty and the beneficiaries of the trust; but the correctness of that position is by no means conceded. It is, however, not necessary to discuss it. If the bequest had been of a sum of money to an incorporated Roman Catholic church or churches, duly designated by the testator and authorized by law to receive such bequests for the purpose of the solemnization of masses, a dif-

ferent question would arise. But such is not this case. The bequest is to the executors in trust, to be by them applied for the purpose of having prayers offered in any Roman Catholic church they may select.

It has been argued that the absence of a beneficiary entitled to enforce the trust is not fatal to its existence, where the trustee is competent and willing to execute it, and the purpose is lawful and definite; that it is only where the trustee resists the enforcement of the trust that the question of the existence of a beneficiary entitled to enforce it arises. I have not found any case in which this question has been adjudicated, or the point has been made, and it does not seem to be presented on this appeal. The case now before us arises on a demurrer by the defendant Alcock, one of the executors, to the complaint, on the ground that it shows no right in the plaintiffs.

The complaint alleges that the defendant Alcock, together with Frederick Smyth, were named as executors in the will; that the defendant Alcock did not qualify, and has never acted as executor or as trustee of the alleged trust sought to be created by the third clause, nor participated in any form in carrying out the same, but that his co-executor, Frederick Smyth, has taken possession of the whole estate as such executor and trustee. Smyth is not a party to this appeal. It comes up on the demurrer of Alcock alone, and there is nothing in the complaint to show that he is willing to execute the trust, but on the contrary, it shows that he has in no manner acted or qualified himself to act therein. But aside from these considerations, I do not think that the validity or invalidity of the trust can depend upon the will of the trustee. If the trust is valid, he can be compelled to execute it; if invalid, he stands, as to personal property undisposed of by the will, as trustee for the next of kin, and the equitable interest is vested in them immediately on the death of the testator, subject only to the payment of his debts and the expenses of administration. When a trust is attempted to be created without any beneficiary entitled to demand its enforcement, the trustee would, if the trust property were in his possession, have the power to hold it to his own use without accountability to any one, and contrary to the intention of the donor, but for the principle that in such a case a resulting trust attaches in favor of whoever would, but for the alleged trust, be equitably entitled to the property. This equitable title cannot on any sound principle be made to depend upon the exercise by the trustee of an election whether

he will or will not execute the alleged trust. In such a case there is no trust in the sense in which the term is used in jurisprudence. There is simply an honorary and imperfect obligation to carry out the wishes of the donor which the alleged trustee cannot be compelled to perform, and which he has no right to perform contrary to the wishes of those legally or equitably entitled to the property, or who have succeeded to the title of the original donor. The existence of a valid trust capable of enforcement is consequently essential to enable one claiming to hold as trustee to withhold the property from the legal representatives of the alleged donor. A merely nominal trust, in the performance of which no ascertainable person has any interest, and which is to be performed or not as the person to whom the money is given thinks fit, has never been held to be sufficient for that purpose.

It is contended, however, that charitable uses and trusts are not subject to the general rules of law upon this subject, and that the bequest now under consideration is of that class. The distinguishing features of this class of trusts as administered in England from an early period were, that they might be established through trustees, who might consist either of individuals or a corporation; and in the case of individual trustees, they might hold an indefinite succession and be self-perpetuating, and the funds might be devoted in perpetuity to the charitable purposes indicated by the donor, while private trusts were not permitted to continue longer than a life or lives in being, and twenty-one years and a fraction afterwards. The persons to be benefited might consist of a class, though the individual members of the class might be uncertain. The scheme of the charity might be wanting in sufficient definiteness or details to admit of its practical administration, and in such cases a court of equity would order a reference to a master in chancery to devise a scheme for its administration which should as nearly as possible conform to the intentions of the founder of the charity, and thus was called into operation what was known as the *cy-pres* doctrine. These charitable trusts were regarded as matters of public concern, and were enforceable by the attorney-general, although in many cases the court would compel their performance without his intervention at the instance of a town or parish, or of its inhabitants, or of an individual of the class intended to be benefited, such as one of the poor or maimed, etc. In a comparatively recent case argued in this court, many instances of ancient charities were

cited which had been enforced by the court of chancery in England, such as *Cooke's Charity*, decided A. D. 1552, whereby the testator ordered the purchase of lands and the erection of a free grammar school; *Bond's Charity*, decided A. D. 1553, in which the testator's will, dated in 1506, directed that there should be established a bead-house at Bablock, and there should be built a chapel, and therein one mass to be said on Sunday, and therein to be ten poor men and a woman to dress their meat and drink, the priest to be a Brother of Trinity guild and Corpus Christi guild, etc.; *Howell's Charity*, decided 1557, whereby the testator directed his executors to provide a rent of four hundred ducats yearly, forever, to be appropriated each year to promote the marriage of four orphan maidens, honest and of good fame.

This trust appears to have been enforced in chancery upon a bill filed by certain orphan maidens in behalf of themselves and others. We were also referred to numerous other charities for the support of the poor, for erection of alms-houses, hospitals, maintaining school-masters, keeping churches in repair, and other similar purposes. In the case of *Bond's Charity*, cited above, a license was granted by King Henry VII., in 1508, to the testator's son and others, to grant lands to support a priest to sing mass, and twelve poor men and one woman to say prayers and obsequies for the king, the brothers and sisters of the guild, and for their souls, and especially for the soul of the testator, Thomas Bond, in the then newly erected chapel at Bablock. It appears that religious or pious uses were, when the Roman Catholic religion prevailed in England, recognized as charities. In 1434, Henry Barton devised to the rector of St. Mary's and the church-wardens and their successors, certain lands at a perpetual rent payable to the guild of Corpus Christi, etc., so that said rector of St. Mary's and his successors, or their parish priests, when they should say prayers in the pulpit of the church, should pray for the souls of Richard Barton, the testator's father, of Diocnesia, his mother, and for the souls of their children and all the faithful deceased, and in case they should neglect to do so for two days after the proper time, that the master and wardens of said guild, etc., should levy a distress upon said lands for twelve pence by way of penalty, and retain such distress until such prayers should be said. This property appears to have been afterwards seized by the crown under the statute of chauntries (1 Edw. VI.), and granted by Edward

VI. to one Stapleton, but the rector, etc., of St. Mary's having re-entered, it was made to appear in a litigation between them and the successors in interest of Stapleton that no prayer for souls had been made, nor had the rents of the premises been devoted to any manner of superstitious use within the space of six years and more next before the first year of the reign of King Edward VI., since which time the rents and profits had been employed by the parson and church-wardens of the parish in good uses and purposes. The case was tried in 22 & 23 Elizabeth, and the parish was allowed to retain the land for general charitable purposes.

The purposes for which charities were established in England were so numerous and varied, and the learning contained in the books on that subject is so vast, that it would be futile to attempt to go into it in detail, or to do more than briefly refer to their history, so far as is necessary to determine whether the English doctrine of charitable uses and trusts, as distinguished from private trusts, governed by the general rules of law, still has any place in the jurisprudence of this state. The statute of 1 Edward VI., A. D. 1547, known as the statute of chauntries, recited that a great part of superstition and errors in Christian religion had been brought into the minds of men by reason of their ignorance of their true and perfect salvation, through the death of Jesus Christ, and by devising vain opinions of purgatory, and masses to be done for those who are departed, which doctrine is maintained by nothing more than by the abuse of trentalles, chauntries, and other provisions for the continuance of such blindness and ignorance; that the amendment of the same, and converting them to good and godly uses, such as the erection of grammar schools, the education of youth, and better provision for the poor, cannot in the present Parliament conveniently be done, nor be committed to any person than to the king, who, by the advice of his most prudent council, can and will most wisely alter and dispose of the same. It then recites the act of 37 Henry VIII., for the dissolution of colleges, chauntries, etc., and enacts that all colleges, free chapels, and chauntries not in the actual possession of the late or present king (with certain specified exceptions), and all their lands and revenues are declared to be in the actual seisin and possession of the present king, without office found, and that all sums of money, etc., which, by any conveyance, will, devise, etc., have been given or appointed in perpetuity towards the maintenance of

priests, anniversaries, or obits, be vested in the king. Certain colleges, free chapels, and chauntries, such as those within the universities of Oxford and Cambridge, and others specified in the statute, were exempted from its provisions, but the king was empowered to alter the chauntries in the universities.

In this manner property which had been devoted by the donor to uses which had come to be regarded as superstitious were, through the king, put to charitable uses which were deemed lawful, and this policy was carried out by many decrees of the court of chancery. The statute of 39 Elizabeth, A. D. 1597, authorized persons owning estates in fee-simple during twenty years next ensuing the passage of the act, by deed enrolled in the high court of chancery, to found hospitals, houses of correction, alms-houses, etc., to have continuance forever, and place therein a head and members, and such number of poor as they pleased; and such institutions were declared to be corporations, with perpetual succession. It will be observed that this was but a temporary act, which gave power only for twenty years next ensuing its passage to found the chauntries mentioned. This statute also contained a provision, entitled "An act to reform deceits and breaches of trust touching lands given to charitable uses," which recited that divers institutions had been founded, some by the queen and her progenitors, and some by other godly and well-disposed people for the charitable relief of poor, aged, and impotent people, maimed soldiers, schools of learning, orphans, and for other good, charitable, and lawful purposes and intents, and that lands and goods given for such purposes had been unlawfully converted to the lucre and gain of some few greedy and covetous persons; and then proceeds to provide for the issue of commissions out of chancery to inquire into those wrongs, and decree the observance of the trusts according to the intent of the founders thereof. This statute was followed by that of 43 Elizabeth, chapter 4, "to redress the misemployment of lands, goods, and stocks of money heretofore given to charitable uses." This act is known as the statute of charitable uses, and was at one time, together with that of 39 Elizabeth, regarded as the foundation of the law of charitable uses and of the jurisdiction of chancery in cases of charities. But the reports of the record commission, established in 1819, have disclosed that the jurisdiction had been exercised and charity laws administered by the courts of chancery from a much earlier period. The act, however, throws light upon

what were at the time considered and recognized as charitable uses, for they are enumerated in the preamble as follows, viz.: the relief of the poor, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and schools in universities, the repairs of bridges, ports, havens, causeways, churches, scabanks, and highways, the education and preferment of orphans; the maintenance of houses of correction, the marriage of poor maidens, the aid of young tradesmen, handicrafts men, and persons decoyed, the relief or redemption of prisoners or captives, the aid of poor persons in the payment of taxes. The act then provides for the issuing of commissions by the lord chancellor of England or the chancellor of the duchey of Lancaster, and the redress of breaches of trust, as in the statute 39 Elizabeth.

In this enumeration of charitable uses there is none which would cover the present case; and indeed under the statute of chauntries and other statutes prohibiting superstitious uses, it would not have been recognized in England as valid as a charity or otherwise. But assuming, as perhaps we ought to assume, that before gifts for the support of priests, chauntries, etc., came to be regarded as superstitious uses, they were within the principles of charity, and that they became illegal only by virtue of the statutes against superstitious uses, in this state, where all religious beliefs, doctrines, and forms of worship are free, so long as the public peace is not disturbed, the trust in question cannot be impeached on the ground that the use to which the fund was attempted to be devoted was a superstitious use. The efficacy of prayers for the dead is one of the doctrines of the Roman Catholic church, of which the testator was a member; and those professing that belief are entitled in law to the same respect and protection in their religious observances thereof as those of any other denomination. These observances cannot be condemned by any court, as matter of law, as superstitious, and the English statutes against superstitious uses can have no effect here: Const. U. S., amendment, art. 1; Const. N. Y., art. 1, sec. 3.

If in other respects the bequest was, by the law of England, valid as a "charitable" use, and the English doctrine of charitable uses prevails in this state, the objections to its validity on the ground of indefiniteness of the trust, perpetuity, and the absence of an ascertainable beneficiary, can be overcome. Otherwise, they must prevail, at least so far as relates to the absence of a beneficiary, which is sufficient to dispose of the

case without reference to the other points. We will therefore treat the bequest as a charitable use.

The principal cases in this state in which the doctrine of charitable uses has been discussed are: *Williams v. Williams*, 8 N. Y. 527; *Owens v. Missionary Society*, 14 Id. 380; 67 Am. Dec. 160; *Beekman v. Bonsor*, 23 N. Y. 298; 80 Am. Dec. 269; *Downing v. Marshall*, 23 N. Y. 366; 80 Am. Dec. 290; *Levy v. Levy*, 33 N. Y. 97; *Ross v. Ross*, 4 Abb. App. 108; *Bascom v. Albertson*, 34 N. Y. 584; *Burrill v. Boardman*, 43 Id. 254; 3 Am. Rep. 694.

These cases were argued by counsel of eminent ability, and in the arguments and opinions display a depth of learning and thoroughness of research which render it useless to attempt a discussion of the question here as an original question, or to do more than summarize the main points upon which the arguments turned, and ascertain how the case stands upon those authorities. So lately as the case of *Burrill v. Boardman*, 43 N. Y. 254, 3 Am. Rep. 694, the question was argued as still an open one, and that case was decided on the ground that the trust was valid, without resorting to the doctrine of charitable uses. Comstock, J., in a note to the eleventh edition of Kent's Commentaries (vol. 4, p. 305, note 2), states that the essential requisites of a valid trust are,—

1. A sufficient expression of an intention to create a trust;
2. A beneficiary who is ascertained or capable of being ascertained; that the appointment or non-appointment of a trustee of the legal estate is not material; that if the trust or beneficial purpose be well declared, and if the beneficiary is a definite person or corporation, capable of taking, the law itself will fasten the trust upon him who has the legal estate, whether the grantor, testator, heir, or next of kin, as the case may be; and that outside of the domain of charitable uses, no definiteness of purpose will sustain a trust if there be no ascertained beneficiary who has a right to enforce it. And in delivering the opinion of this court in *Beekman v. Bonsor*, 23 N. Y. 310, 80 Am. Dec. 269, the same learned judge says that the joint authority of the cases of *Williams v. Williams*, 8 N. Y. 525, and *Owens v. Missionary Society*, 14 Id. 380, establishes the propositions,—1. That a gift to charity is maintainable in this state, if made to a competent trustee, and if so defined that it can be executed, as made by the donor, by a judicial decree, although it may be void, according to general rules of law, for want of an ascertained beneficiary; 2. That in other

It is claimed that the trust now under review is not void, according to the general rules of law, for want of a defined beneficiary, because the trust is for the purpose of having prayers offered in a Roman Catholic church to be selected by the executors. It is contended that this is, in effect, a gift to such Roman Catholic church as the executors shall select, inasmuch as the money to be expended for the masses would, according to the usage, be payable to the church or churches where they were to be solemnized, and therefore, as soon as the selection is made, the designated church or churches will be the beneficiary or beneficiaries, and entitled to the payment; that the trust is, therefore, in substance, to pay the fund to such Roman Catholic church or churches as the executors may select; and that a duly incorporated church, capable of receiving the bequest, must be deemed to have been intended. Passing the criticisms to which the assumptions contained in this proposition are subject, and considering the trust as if it had been in form to pay over the fund to such Roman Catholic church as the executors might select, to defray the expense of offering prayers for the dead, the objection of indefiniteness in the beneficiary would not be removed. The case of *Power v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 550, is relied upon by the respondents as supporting their claim. In that case the bequest was of a fund to the executors in trust, to be divided by them among such Roman Catholic charities, institutions, schools, or charities in the city of New York as a majority of the executors should decide, and in such proportions as they might think proper. The opinion of the court by Miller, J., holds that, giving full force and effect to the rule that the object of the trust must be certain and well defined, that the beneficiaries must be either named or capable of being ascertained within the rules of law applicable to such cases, and that the trusts must be of such a nature that a court of equity can direct their execution, and making no exception in favor of charitable uses, the bequest should be upheld as coming within the general rule; that the clause designates a certain class of objects of the testator's bounty, to which he might have made a valid, direct bequest, and that by conferring power upon his executors to designate the organizations which should be entitled to participate, and the proportion which each should take, he did not impair the legality of the provision, so long as the organizations referred to had an existence recognized by law, and were capable of taking, and

could be ascertained; that the evidence showed that at the time of the execution of the will, and of the testator's death, there were in the city of New York incorporated institutions of the class referred to in the will, and that a portion of these had been designated by a majority of the executors; that none but incorporated institutions could lawfully have been selected, and that even if the executors had failed to make a selection or apportionment, the court would have had power to decree the execution of the trust, there being no difficulty in determining what institutions came within the class described by the testator. It must be observed that in the case cited, the beneficiaries were confined to Roman Catholic institutions of a certain class in the city of New York. These were necessarily limited in number. By 1 Revised Statutes, 734, section 97, it is provided that a trust power does not cease to be imperative when the grantee has the right to select any and exclude others of the persons designated as the objects of the trust; by section 99, that when the terms of the power import that the estate or fund is to be distributed between the persons designated in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons, in exclusion of the others; by section 100, that if the trustee of a power, with the right of selection, shall die, leaving the power unexecuted, its execution shall be decreed in equity for the benefit equally of all the persons designated as objects of the trust; and by section 101, that where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be exercised, its execution shall devolve on the court of chancery.

Regarding these provisions as declarations of general rules applicable to all trust powers and governing trusts of personal as well as real property, the decision in *Power v. Cassidy*, *supra*, in no manner infringes upon the rule that the designation of a beneficiary entitled to enforce its execution is essential to the validity of a trust, and the only point as to which the correctness of that decision is open to any doubt is, whether, in fact, the beneficiaries in that case were sufficiently defined and capable of ascertainment to enable a court of equity to enforce the trust in their behalf. The view taken in respect to that point was certainly very liberal, but the court has in subsequent cases repeatedly announced that the decision was not to be extended, and it is evident that without a material extension it cannot be made to cover the present case. Here, if

the church or churches from among which the selection is to be made are to be regarded as the beneficiaries, they are not limited, as in *Power v. Cassidy, supra*, to a Roman Catholic church or churches in the city of New York, but include all the Roman Catholic churches in the world. No one church or the churches of any particular locality can claim the benefit of the bequest. In this respect the case at bar is analogous to that of *Prichard v. Thompson*, 95 N. Y. 76, where the bequest was of a sum of money to the executors to be distributed by them "among such incorporated societies organized under the laws of the state of New York or the state of Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable or educational uses," as the executors or the survivors of them might select, and in such sums as they might determine. This bequest was held void because of the indefiniteness of the designation of the beneficiaries. The opinion was written by the same learned judge who delivered the opinion in *Power v. Cassidy, supra*, and by him distinguished from that case on the ground that in *Power v. Cassidy, supra*, the class of beneficiaries was specially designated and confined to the limits of a single city and to a single religious denomination, so that each one could readily be ascertained, and each had an inherent right to apply to the court to sustain and enforce the trust; while in the case at bar every charitable and educational institution within two states was included. This case (*Prichard v. Thompson, supra*) also establishes that the power to the executors to select the beneficiary or beneficiaries does not obviate the objection of the omission of the testator to designate them in the will, unless the persons or corporations from among whom the selection is to be made are so defined and limited that a court of equity would have power to enforce the execution of the trust, or in default of a selection by the trustee, to decree an equal distribution among all the beneficiaries.

This discussion has proceeded in answer to the claim that the church or churches where the masses were to be solemnized were the intended objects of the testator's bounty and the beneficiaries of the trust; but the correctness of that position is by no means conceded. It is, however, not necessary to discuss it. If the bequest had been of a sum of money to an incorporated Roman Catholic church or churches, duly designated by the testator and authorized by law to receive such bequests for the purpose of the solemnization of masses, a dif-

ferent question would arise. But such is not this case. The bequest is to the executors in trust, to be by them applied for the purpose of having prayers offered in any Roman Catholic church they may select.

It has been argued that the absence of a beneficiary entitled to enforce the trust is not fatal to its existence, where the trustee is competent and willing to execute it, and the purpose is lawful and definite; that it is only where the trustee resists the enforcement of the trust that the question of the existence of a beneficiary entitled to enforce it arises. I have not found any case in which this question has been adjudicated, or the point has been made, and it does not seem to be presented on this appeal. The case now before us arises on a demurrer by the defendant Alcock, one of the executors, to the complaint, on the ground that it shows no right in the plaintiffs.

The complaint alleges that the defendant Alcock, together with Frederick Smyth, were named as executors in the will; that the defendant Alcock did not qualify, and has never acted as executor or as trustee of the alleged trust sought to be created by the third clause, nor participated in any form in carrying out the same, but that his co-executor, Frederick Smyth, has taken possession of the whole estate as such executor and trustee. Smyth is not a party to this appeal. It comes up on the demurrer of Alcock alone, and there is nothing in the complaint to show that he is willing to execute the trust, but on the contrary, it shows that he has in no manner acted or qualified himself to act therein. But aside from these considerations, I do not think that the validity or invalidity of the trust can depend upon the will of the trustee. If the trust is valid, he can be compelled to execute it; if invalid, he stands, as to personal property undisposed of by the will, as trustee for the next of kin, and the equitable interest is vested in them immediately on the death of the testator, subject only to the payment of his debts and the expenses of administration. When a trust is attempted to be created without any beneficiary entitled to demand its enforcement, the trustee would, if the trust property were in his possession, have the power to hold it to his own use without accountability to any one, and contrary to the intention of the donor, but for the principle that in such a case a resulting trust attaches in favor of whoever would, but for the alleged trust, be equitably entitled to the property. This equitable title cannot on any sound principle be made to depend upon the exercise by the trustee of an election whether

charitable purposes, in all of which are to be found limitations upon the amount of property to be held by such societies, thus indicating a policy to confine within certain limits the accumulation of property perpetually appropriated, even to charitable and religious objects; that the absolute repeal of the statute of Elizabeth and of the mortmain acts was wholly inconsistent with the policy thus indicated, unless it was intended to abrogate the whole law of charitable uses as understood and enforced in England. The opinion then refers to the course of legislation in this state following the repeal of the English statutes authorizing corporations for charitable, religious, literary, scientific, and benevolent purposes, and in all cases limiting the amount of property to be enjoyed by them. This legislation is claimed to disclose a policy differing from the British system, and absolutely inconsistent with the supposition that uses for public or indefinite objects and of unlimited duration can be created and sustained without legislative sanction.

Since the case of *Williams v. Williams*, *supra*, decided thirty-five years ago, there has been no adjudged case in this court which supports a charitable gift on the principles enunciated by Judge Denio in pronouncing that decision. Of course this observation applies only to the indefinite charity which the case included, and not to the gift in favor of a religious corporation. After the decision of that case the struggle in this court for the overthrow of charitable uses began in the case of *Owens v. Missionary Society*, 14 N. Y. 380, 67 Am. Dec. 160. The opponents of such trusts had for their justification the repeal in 1788 in this state of all the British statutes which upheld such trusts in England, and the substitution of a charity system maintained by our statute laws in the form of corporate charters, containing by legislative enactment power to receive, hold, and administer charitable gifts of every variety known in the practice of civilized communities, and our statute of uses and trusts, defining the trusts which may lawfully be created. This statute has been held binding on the courts, although of course it ceases to operate when the legislature charters a corporation for a charitable purpose with power to take and hold property in perpetuity for such purpose. From the case of *Owens v. Missionary Society*, 14 N. Y. 380, 67 Am. Dec. 160, through the cases of *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290, *Levy v. Levy*, 33 N. Y. 97, *Bascom v. Albertson*, 34 Id. 584, *Burrill v. Boardman*, 43 Id. 254,

3 Am. Rep. 694, and *Holmes v. Mead*, 52 N. Y. 332, decided in 1873, the struggle was continued, and the announcement definitely made, in the latest of those cases, that the controversy was closed by the adoption of the principles enunciated in the said last-mentioned case. In *Williams v. Williams*, *supra*, Judge Denio, whose great learning and ability are universally acknowledged, maintained, as the basis of his conclusion in favor of charitable trusts as the law of this state, that they came to us by inheritance from our British ancestors, and as part of our common law. That particular postulate being finally overthrown, and the British statutes having been repealed at the very origin of our state government, we should be a civilized state without provision for charity if we had not enacted other laws for ourselves. But charity, as a great interest of civilization and Christianity, has suffered no loss or diminution in the change which has been made. The law has been simplified, and that is all. Instead of the huge and complex system of England, for many generations the fruitful source of litigation, we have substituted a policy which offers the widest field for enlightened benevolence.

The proof of this is in the great number of charitable institutions scattered throughout the state. It is not certain that any political state or society in the world offers a better system of law for the encouragement of property limitations in favor of religion and learning, for the relief of the poor, the care of the insane, of the sick and the maimed, and the relief of the destitute, than our system of creating organized bodies by the legislative power, and endowing them with the legal capacity to hold property which a private person or a private corporation has to receive and hold transfers of property. Under this system many doubtful and obscure questions disappear, and give place to the more simple inquiry whether the grantor or deviser of a fund designed for charity is competent to give, and whether the organized body is endowed by law with capacity to receive and to hold and administer the gift. In *Williams v. Williams*, *supra*, in maintaining a gift for pious uses to an incorporated religious society, Judge Denio assigned the reasons which have been universally approved since that time; and they are summed up by saying that charitable limitations of property, in favor of corporations competent by statute law to hold them, are valid or invalid on the same grounds as other limitations of property between natural persons, and are referable to the general system of law which

governs in the ordinary transactions of mankind. From his reasoning in the other branch of the case before him, it appears that he had not reached the conclusion established in the later cases, namely, that with us charity is found in our corporation laws, general and special, which have been extended so as to embrace the purposes heretofore known and recognized as charitable, and which are continually extending and improving so as to meet the new wants which society in its progress may develop.

As the result of the foregoing views, the judgment of the supreme court at general term should be reversed, and that of the special term affirmed.

CHARITABLE USES, WHAT REQUESTS TO, SUSTAINABLE: *Hove v. Williams*, 60 Am. Rep. 226, and note 230-236; *Power v. Cassidy*, 35 Id. 550; *Johnson v. Hollisfeld*, 58 Id. 596, and note; *Webster v. Morris*, 57 Id. 278; *Stonestreet v. Doyle*, 40 Id. 731; *Haines v. Allen*, 41 Id. 555; *County of Henepin v. Brotherhood of Gethsemane*, 38 Id. 298, and note 300-303; *Beckman v. Bonser*, 80 Am. Dec. 269, and note; *Owens v. Missionary Society*, 67 Id. 160.

RELIGIOUS USES. — Devises and bequests to religious or charitable uses are prohibited in many of the states, unless made at a certain designated time prior to the decease of the testator. Bequests of the character under consideration in the principal case fall within the operation of these statutes: *Rhymer's Appeal*, 39 Am. Rep. 736, and note 738-741.

MOEBUS v. HERRMANN.

[106 NEW YORK, 329.]

PERSON ON FOOT HAS RIGHT TO CROSS STREET wherever he pleases.

DRIVER OF CARRIAGE MUST BE WATCHFUL not to injure persons on foot, elsewhere as well as at the cross-walks.

NEGLECTANCE. — CHILD OF IMMATURE YEARS is not held to any greater degree of care than might reasonably be expected of one of his age.

NEGLECTANCE. — DUTY TO LOOK UP AND DOWN A STREET BEFORE ATTEMPTING to cross the track of a railroad does not, as a matter of law, attach to one who is about to pass from one side to another of a city street.

Samuel D. Morris, for the appellant.

Roderick, for the respondent.

By Court, DANFORTH, J. The jury have found that the child was not careless, and that the defendant's driver was negligent. If there is evidence to support these findings, the only circumstance which distinguishes this case from *Murphy v. Orr*, 96 N. Y. 14, is that the child whose conduct is now in question was not on the cross-walk. A person on foot has, however, a

right to cross the street where he pleases, and the inquiry is the same, whether, under the circumstances in any given case, he does so with due caution. So with the driver. He was bound to be watchful at all points, elsewhere as well as at the cross-walk; and had he been so, the jury might well have said, from the evidence, he would have seen the child in season to have prevented the collision. He was sitting on a high seat, the view was unobstructed, and from it he could see "all over the street," but he testifies that he did not see the child "until the shaft knocked him down." It is probable he did not see him at all, for the evidence from other witnesses is that he drove on, not checking his horse nor heeding the cries of the by-standers, until, after going seventy-five feet or thereabouts, he was forcibly stopped by a person who had seen the occurrence.

It also appears that during the intervening time the horse was moving at a slow trot, the driver having the reins in his left hand, while with his head turned to the right, i. e., away from the child, he was looking backward and conversing with a fellow-servant who was driving a similar wagon belonging to the defendant. The grade was ascending, and it is in evidence that the wagon could have been stopped before going the length of the horse, and the child saved before the wheels reached him. The driver either saw the child and recklessly drove over him, or failed to see him because of inattention. His own statement to one who said, "For God's sake, how did you come to run over the child?" was, "I could not help it, because I could not see him," permits the latter as the more charitable inference, but he was none the less the cause of the accident. The child was less than seven years old, and therefore had not reached an age at which infants are generally supposed to be of full discretion or capable of crime of which laches and neglect are but degrees: Pen. Code, secs. 18, 718, subd. 1. But the case was given to the jury as one in which he was bound to exercise care in attempting to cross, and to look and see if he could do so safely, the court saying, "The rule of vigilance applies to children as well as to adults, 'but' that a child of immature years, whilst bound to exercise care, is held to no higher degree of forethought than you could expect of its age"; and again, "If you say the child did what an ordinarily careful child would have done, then it is not negligence"; and at the request of defendant's counsel, he charged that it was as much the duty of the boy to look out

for vehicles while crossing the street as it was for the driver to see that he did not come in contact with any one"; also, that "if the boy failed to adopt the means known to him to be effective in protecting him against danger, and was injured thereby, the plaintiff cannot recover." No exception was taken to the charge, nor is it open to any. The propositions on which the case was made to turn were formulated with due regard to the preservation of every legal right of the defendant: *Thurber v. Harlem etc. R. R. Co.*, 60 N. Y. 335; *Byrne v. New York Central etc. R. R. Co.*, 88 Id. 620; *Dowling v. New York Central etc. R. R. Co.*, 90 Id. 670. Portions of the appellant's argument, however, rest upon testimony of the child, that while playing in the streets and crossing them, he "would, if he saw a wagon coming, wait until it passed." The learned counsel for the defendant then said: "You did not think about looking this day when you got hurt, did you?" and the witness replied, "No, sir." "You had always before that?" "Yes, sir." These were leading questions, and how far they elicited the conscious experience of a child not then seven years of age was for the jury. But being asked, "How were you looking?" answered, "Straight ahead." There is other evidence to the same effect.

The court, therefore, did not err in refusing to charge the jury, at the defendant's request, propositions which assumed as their foundation that the child used no vigilance and did not look. The duty imposed upon a wayfarer at the crossing of a street by the track of a railroad, to look both ways, does not as a matter of law attach to such person when about to cross from one side to the other of a city street. The degree of caution he must exercise will be affected by the situation and surrounding circumstances. In the former case, there is obvious and constantly impending danger not easily or likely to be under the control of the engineer; in the latter, the vehicles are managed without difficulty, and injuries are infrequent. The distinction is recognized in *Wendell v. New York Central etc. R. R. Co.*, 91 N. Y. 420, cited by the appellant, and the observations of the learned judge who delivered the opinion in that case show that the traveler is not subject to the same rules of conduct in these various situations.

The appellant fails to show error, and the judgment appealed from should be affirmed.

FOOT-PASSENGERS HAVE RIGHT TO USE CARRIAGE-WAY AS WELL AS SIDEWALK, and walking in carriage-way is not *prima facie* negligence: *Coombs v.*

Parrington, 42 Me. 332; *Boss v. Litton*, 5 Car. & P. 407, cited in note to *O'Malley v. Darn*, 73 Am. Dec. 406. Foot-traveler has no priority of right over vehicles in a city: *Belton v. Baxter*, 13 Am. Rep. 578; they have right at street-crossing in common, each equally with the other: *Barker v. Savage*, 6 Id. 66.

DUTY OF FOOTMAN ATTEMPTING TO CROSS STREET TO LOOK ALONG THE STREET IN BOTH DIRECTIONS. — A failure to do this will be contributory negligence: *Barker v. Savage*, *supra*; *Belton v. Baxter*, 54 N. Y. 245; *Cotton v. Wood*, 8 Com. B., N. S., 571. Foot-passenger attempting to cross street in front of vehicles which he sees approaching cannot recover for injury sustained by coming in contact with one of them: *Belton v. Baxter*, 13 Am. Rep. 578.

BLOODGOOD v. AYERS.

[108 NEW YORK, 400.]

WATERCOURSE. — WATER FLOWING IN NO DEFINED CHANNEL, and the course of which can be traced only by the deeper green of the grass which it moistens, does not constitute a watercourse.

SPRING WHOSE WATERS FLOW UNDERGROUND, CONCEALED, and the place of whose flow is a matter of uncertainty, belongs to the land-owner, and the rules to watercourses and their diversion do not apply.

PERCOLATING WATERS, UNLESS FLOWING IN NATURAL CHANNELS and between defined banks, may be lawfully intercepted by him through whose land they flow.

James B. Olney, for the appellant.

Sidney Crowell, for the respondent.

By Court, FINCH, J. The general term reversed the decision of the trial court mainly upon a single proposition which was founded upon undisputed evidence. A spring, or at least a reservoir, of water existed upon plaintiff's land, disclosing itself at the surface about twenty feet from the dividing line between the parties. The water from that reservoir followed depressions in the land across plaintiff's meadow to the road. It ran in no defined channel having natural banks, but flowed over the sod almost wholly without breaking it, following the lowest levels, and sometimes spreading out over an acre or more. Its route could be traced by the deeper green of the grass which it watered, but it proved no obstruction when that came to be cut, for the evidence is that the plaintiff mowed across it habitually as if it were not there. He himself said, in answer to the inquiry whether he could see the current, that in a wet time "you can see it a good ways," but in a dry time "you can see it may be two rods, but any one who did not know there was a spring there would not notice." When asked on cross-exami-

nation whether there were any banks to what he called the stream, he could not say that there were; and at the inquiry if there was a channel, was evidently puzzled; and saying there was no ditch cut, and then that he cut out a furrow, answered the question, four times repeated, by saying that he did not know how to answer it; and the inquiry being pressed once more, replied, "Of course there is a channel where the water flows." When asked the width of the channel, he replied: "There are so many different channels, I don't know how to get at it; the water covers a couple of acres of my meadow." The next witness for plaintiff had seen the water run across the meadow during a freshet, but could not say as to any other time; while a third witness, pressed to describe an obvious channel, said only, "The course the water did take through, you could see by the grass." The plaintiff's sons described this flow somewhat stronger, so far as the use of the words "bed" and "stream" were concerned, but without at all changing the facts. On the part of the defense, it was shown that when water was visible on the meadow it was in times of freshet, when the water-shed of twenty or thirty acres above poured rain or melting snows down the depression described. Very probably some portion of the water crossing the meadow came by percolation through the earth from defendant's spring above; but, granting that, it seems to us difficult to say from the evidence that there was a watercourse across the plaintiff's land within the definition of that term which we have heretofore adopted: *Barkley v. Wilcox*, 86 N. Y. 147; 40 Am. Rep. 519.

But the general term put their conclusion upon another ground growing out of some further facts. Upon defendant's premises, and something over a hundred feet from plaintiff's line, there was a living spring which came up out of the earth, and was carried by a short leader to a trough which had long served as a watering-place for the stock of defendant and previous owners. At that trough, or within a few feet of it, all the waste or surplus water sank into the ground and disappeared. What became of it was in no manner obvious to the senses until by digging and experiment a probability was established. About a hundred feet from the spring, and within perhaps twenty feet of plaintiff's line, water appeared upon the surface, sometimes seen to be in motion towards a sluice under the fence arranged for the passage of surface water mainly, or in part at least. At that sluice the water, except in times of freshet, again disappeared, but came to the surface about

twenty feet on plaintiff's side of the line, and at the point where his spring or reservoir was established. His experiments, which he details, make it strongly probable that by percolation or subterranean currents more or less of the water of defendant's spring reached the plaintiff's spring or reservoir, but the fact, if it be one, is established only as the result of inference or reasoning. In this state of affairs, the defendant carried the waters of his spring to his house for domestic uses, and so, it is claimed, intercepted the supply of plaintiff's reservoir, and for that alleged wrong this action was brought.

The general term held that it could not be maintained, and we are of the same opinion. No stream or watercourse ran from the spring. The source from which it came, and the flow of its waste or surplus, were alike under ground, concealed, and matters of speculation and uncertainty. Such a spring belongs to the owner of the land. It is as much his as the earth or minerals beneath the surface; and none of the rules relating to watercourses and their diversion apply: *Broadbent v. Ramsbotham*, 34 Eng. L. & Eq. 553; *Raustron v. Taylor*, 33 Id. 435; *Village of Delhi v. Youmans*, 45 N. Y. 362; 6 Am. Rep. 100; *Goodale v. Tuttle*, 29 N. Y. 466; *Ellis v. Duncan*, 21 Barb. 234; *Barkley v. Wilcox*, 86 N. Y. 147; 40 Am. Rep. 519. The only exception established by the authorities is that of certain underground streams or rivers which are known and notorious, and flow in a natural channel between defined banks. A few such exceptions are admitted to exist, and others may occur; but outside of these, sub-surface currents or percolations are not governed by the rules and regulations respecting the use and diversion of watercourses, and they may be intercepted or diverted by the owner of the land for any purpose of his own. The case first above cited resembles the present one in the feature that the action was to prevent the interception and diversion of certain sources of supply reaching a watercourse known as Longwood Brook. One of these was a swamp or wet piece of ground, which the opinion describes as "merely like a spring, so to speak, fixed on the side of a hill"; and of the subterranean courses communicating with the swamp, which certainly existed, it was deemed a sufficient answer that they were "not traceable so as to show the water passing along them ever reaching Longwood Brook." Another source of supply was described as a stream welling out of the ground at a depth of about two feet, which flowed into a receiving basin three feet square, used as a watering-place. In those respects it

resembled the spring in the present case, but unlike that, the surplus and waste, instead of disappearing in the ground, followed ditches and depressions in the surface until it reached the brook. Both supply sources were intercepted and diverted, and a right of action therefor denied,—as to the first, on the ground that the subterranean currents were concealed, and not traceable; and the second, upon the distinct proposition that the owner might intercept or stop them before they reached a natural watercourse. In *Village of Delhi v. Youmans*, *supra*, it was said that the owner of land might lawfully intercept percolations or underground currents. The reasons and justification of the doctrine are well stated in *Acton v. Blundell*, 12 Mees. & W. 324. They are, that as the water does not flow openly in the sight of the owner of the soil under which it passes, there is no ground for implying consent or agreement between the adjoining proprietors, which is one of the foundations on which the law of surface-streams is built; that a different rule would enable a lower proprietor to prevent the upper owner from using the water in his own soil, and expose him to loss and danger in making improvements on his own land; and a further reason is found in the indefinite nature of the right claimed, and the great extent of obligation which would be incurred.

The law in other states is in accordance with the views here expressed: *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511; *Greenleaf v. Francis*, 18 Pick. 117; *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; *Roath v. Driscoll*, 20 Conn. 533; 52 Am. Dec. 352; and the rule is strongly stated in Angell on Watercourses, c. 4, sec. 114, as being that “the owner of land on which a spring issues from the earth has a perfect right to it against all the world except those through whose land it comes, and has a right to it even as against them until it comes in conflict with their enjoyment of their own property.” The proposition, while very broadly stated, and somewhat open to criticism, embodies the substance of the prevailing doctrine as to the right of the owner to intercept and divert underground currents and percolations for his own uses without responsibility to a lower proprietor.

The judgment of the general term should be affirmed, and judgment absolute rendered for the defendants, with costs.

NATURAL WATERCOURSE, DEFINITION OF: *Burkley v. Wilcox*, 40 Am. Rep. 519; *O'Connor v. Fond du Lac etc. Ry Co.*, 38 Id. 753; *Gibbs v. Williams*, 37 Id. 241, and note 248; *Earl v. De Hart*, 72 Am. Dec. 395, and note; see also

note to *Martin v. Jett*, 22 Id. 125. Surface water flowing through a ravine which ordinarily is dry does not form a watercourse: *Lessard v. Strata*, 51 Am. Rep. 715.

PERCOLATING WATER COLLECTED AND RUNNING IN DEFINED CHANNEL AS PROPERTY: *Cross v. Kitts*, 58 Am. Rep. 558; *Sadler v. Lee*, 42 Id. 62.

LAND-OWNER HAS NO ABSOLUTE RIGHT TO UNALTERED NATURAL DRAINAGE or percolation to and from his neighbor's land: *Bassett v. Salisbury Mfg. Co.*, 82 Am. Dec. 179.

LAND-OWNER MAY DIG WELL ON HIS OWN FIELD, and thereby drain his neighbor's, unless he does so maliciously: *Acton v. Stundell*, 12 Mees. & W. 224. This has been followed by the current of authorities, both English and American: See cases cited in note to *Sweet v. Cutts*, 9 Am. Rep. 284. But he cannot cut off the supply of percolating water from his neighbor's spring through malice, and without justifiable purpose: *Greenleaf v. Francis*, 18 Pick. 117; *Wheatley v. Baugh*, 25 Pa. St. 528; *contra, Chatfield v. Wilson*, 28 Vt. 49. Inferior proprietor has no right to uninterrupted flow of water from unknown subterranean stream which flows out from his land: *Haldeman v. Bruckhart*, 84 Am. Dec. 511, and note. It is held in Nevada that a spring cannot be diverted to the injury of a prior appropriator of the water, to whom it naturally comes through a creek by percolation from the spring: *Strait v. Brown*, 40 Am. Rep. 497.

JONES v. JONES.

[108 NEW YORK, 415.]

DIVORCE CANNOT BE GRANTED IF PARTIES HAVE CEASED TO BE HUSBAND AND WIFE, though they were such at the commencement of the suit.

DECREES OF DIVORCE IS BAR TO FURTHER PROCEEDINGS TO DISSOLVE SAME MARRIAGE, though in a suit commenced prior to that in which the divorce was granted.

JUDGMENT OF ANOTHER STATE MAY BE IMPEACHED FOR WANT OF JURISDICTION over the person or subject-matter. If rendered without jurisdiction, it is not a judgment.

DECREES OF DIVORCE AGAINST NON-RESIDENT IS VOID IF BASED ON SERVICE of process on defendant made beyond the state in which the decree is entered. The contract of marriage cannot be annulled by judicial sanction without jurisdiction over the person of the defendant.

DIVORCE — MARRIAGE RELATION IS NOT RES WITHIN STATE of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending.

WAIVER OF OBJECTION TO VALIDITY OR SERVICE OF PROCESS DOES NOT RESULT from going to trial on the merits after the objection has been properly made, and has been overruled by the court.

DEFENDANT WHO GOES INTO STATE AFTER SERVICE ON HIM of process in another state in which he resides, and objects to such service on him, and, after such objection is overruled, answers and goes to trial upon the merits, becomes bound by the statute of the first-named state; and where such statute declares that his so answering is equivalent to an appear-

ance in the action, and dispenses with the service of a citation, a judgment against him is valid, both in the state where rendered, and in that in which he resided when the process was served.

SUIT for divorce, brought by William G. Jones, against his wife, Lula. She pleaded, by supplemental answer, a decree of divorce entered in her favor in the state of Texas during the pendency of the present suit. The plaintiff's bill was dismissed.

Edwin B. Smith, for the appellant.

W. W. Badger, for the respondent.

By Court, ANDREWS, J. This action was begun in May, 1882, by publication of the summons, but before it was tried the defendant had obtained a decree of divorce in Texas, in a suit commenced by her in that state against her husband, this plaintiff, by the filing of a petition July 28, 1882, and the service on the husband, a resident of New York, at the city of New York, of a copy of the petition and of the citation in the action, which decree was by supplemental answer in this action, pleaded as a defense thereto, and this defense having been sustained by the court below, the plaintiff has appealed to this court.

It appears from the record that the parties, then being residents and citizens of this state, were married in the city of New York in 1875. They lived together until 1878, when they separated, and the wife went to the house of her parents in the city of New York, where she remained until January, 1882, when she removed with her parents to the state of Texas, where she has remained from that time. By the laws of Texas a divorce may be granted for cruel treatment and other causes than adultery, and an action may be brought therefor by a person who has been a *bona fide* resident of the state for six months prior to the commencement of the action. The petition filed by the present defendant in the action in Texas alleged that she was a *bona fide* inhabitant and citizen of Texas, and had continuously resided there for more than six months next preceding the filing of the petition; that the parties had married in 1875, and that the petitioner was compelled to leave her husband in 1878, on account of his cruel treatment, and that she had since lived separate and apart from him. The petition alleged in detail the circumstances of the conduct of the husband, and prayed for a citation to the defendant, and for a decree of divorce in favor of the peti-

tioner, and that she should be awarded the custody of the child of the marriage. The citation, together with a certified copy of the petition, was personally served on the husband in the city of New York, September 7, 1882. On the 1st of December, 1882, the husband, then being in Texas, through his attorney filed an answer to the petition, in which, after protesting that the court had no jurisdiction of his person, and that he appeared for the purpose of the motion only, moved to quash the service of the citation and notice, on the ground, among others, that the service was defective, and not sufficient in law to give the court jurisdiction. This was followed by a special plea to the jurisdiction, special exceptions to the petition, and a general denial of the allegations therein. On the 2d of December, 1882, the wife filed an amended petition, alleging, in addition to the matters stated in the original petition, that the husband, in April, 1882, in Texas, falsely charged her with unchastity, using indecent and opprobrious language towards her. The husband on the 6th of December, 1882, filed an amended answer, protesting, as before, that the court had no jurisdiction of his person, and containing special pleas and a general denial, as in the first answer. On the same day the court overruled the husband's motion to quash the service of the citation and notice, and he excepted. On May 4, 1883, the husband filed a second amended answer, still protesting, etc., against the jurisdiction, and moved for a continuance of the case until the next term, to enable him to prepare for trial. The motion was granted, and the case was tried before a jury at the December term, 1883, and upon their finding judgment of absolute divorce was rendered for the plaintiff. The husband appealed therefrom to the supreme court of Texas, where the judgment was affirmed.

The case turns upon the validity of the Texas judgment, and that depends upon the point whether the Texas court had jurisdiction to render it, so as to entitle it, under the constitution and laws of the United States, to be regarded in this state as a valid and conclusive adjudication dissolving the marriage. The right to maintain an action for divorce in this state presupposes the existence of the relation of husband and wife: 2 R. S. 144, sec. 38; Code Civ. Proc., sec. 1756. If the Texas judgment is a binding adjudication here, clearly the complaint was properly dismissed, because when the case came on for trial there was no marital bond, and no relation of husband and wife existing between the parties. It

makes no difference that the action in this state was first commenced. If the Texas court had jurisdiction, the case is simply one of concurrent jurisdiction in the courts of two states, and the judgment first rendered dissolving the marriage concludes the question in the court of the other jurisdiction. The validity of the Texas decision is assailed on the ground that the courts in that state never acquired jurisdiction over the person of the defendant. If this contention is well founded, it is conclusive against giving any effect to the Texas decree. The judgment of another state may be impeached for want of jurisdiction of the person or subject-matter when it comes in question in our courts. It is an elementary principle that no court can lawfully adjudge rights of persons or property in the absence of jurisdiction; and it is firmly settled that a judgment of the court of another state is binding here only so far as the court rendering it had jurisdiction. It is not protected, under the constitution and laws of the United States, from attack for want of jurisdiction. If rendered without jurisdiction, it is not a judgment, but a mere arbitrary prescription, without force as a judicial proceeding in another forum: *Borden v. Fitch*, 15 Johns. 121; 8 Am. Dec. 225; *Starbuck v. Murray*, 5 Wend. 148; 21 Am. Dec. 172; *Kerr v. Kerr*, 41 N. Y. 272; *Thompson v. Whitman*, 18 Wall. 461. In the determination of the question whether the Texas court acquired jurisdiction of the person of the defendant in the action, it must be conceded at the outset that the service of the citation upon the defendant here, who at the time was a resident and citizen of New York, owing no allegiance to the state of Texas, was utterly void and ineffectual as a means of giving the courts of Texas jurisdiction of the defendant. The process of courts run only within the jurisdiction which issues them. They cannot be served without the jurisdiction, and courts of one state cannot acquire jurisdiction over the citizens of another state, under statutes which authorize a substituted service, or which provide for actual service of notice without the jurisdiction so as to authorize a judgment *in personam* against the party proceeded against. This question has recently been considered in several cases in this state, with a fullness of argument and illustration which leaves nothing to be said, and it is sufficient to refer to the decisions: *Kerr v. Kerr*, *supra*; *Hoffman v. Hoffman*, 46 N. Y. 30; 7 Am. Rep. 299; *Hunt v. Hunt*, 72 N. Y. 217; 28 Am. Rep. 129; *People v. Baker*, 76 N. Y. 78;

32 Am. Rep. 274; *O'Dea v. O'Dea*, 101 N. Y. 23. It cannot be doubted, therefore, that the Texas court did not acquire jurisdiction of the defendant in the action by the service of the citation here, or that if the defendant had remained silent, taking no notice of the proceeding, no valid judgment could have been rendered against him. The contract of marriage cannot be annulled by judicial sanction any more than any other contract *inter partes*, without jurisdiction of the person of the defendant. The marriage relation is not a *res* within the state of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending: *Folger, J., Hunt v. Hunt, supra; Cheever v. Wilson*, 9 Wall. 108; *O'Dea v. O'Dea, supra*.

But notwithstanding the ineffectual proceeding to acquire jurisdiction of the defendant by the service of notice in this state, it was nevertheless competent for the defendant, by a general appearance in the action, or other equivalent act, to submit to the jurisdiction of the Texas court, and thereby bind himself by the judgment pronounced. Jurisdiction of the person may be acquired by consent, although not of subject-matter; and it is well settled that a general appearance of a defendant in an action is equivalent to personal service of process. It is claimed that the defendant, by appearing in the Texas court and putting in an answer, and proceeding to trial on the merits, and subsequently appealing from the judgment, waived the defective service of process, and gave jurisdiction of his person, notwithstanding his appearance in the first instance was for the special purpose of objecting to the jurisdiction, and the subsequent proceedings on his part were accompanied with a protest against the jurisdiction. In *Avery v. Slack*, 17 Wend. 85, it was held that a party who appeared and objected to the validity of process did not waive the objection by answering and going to trial on the merits after his objection had been overruled. The principle has been applied in a great variety of cases, and there is substantial uniformity in the decisions to the effect that a party not properly served with process, so as to give the court jurisdiction of his person, does not waive the objection or confer jurisdiction by answering over and going to trial on the merits after he has ineffectually objected to the jurisdiction, and his

objection has been overruled: *Harkness v. Hyde*, 98 U. S. 436; *Steamship Co. v. Tugman*, 106 Id. 118; *Warren v. Green*, 50 Mich. 301; *Dacey v. Green*, 4 Denio, 245; *Walling v. Beers*, 120 Mass. 548.

It is contended, however, that the error in overruling the objection to the jurisdiction, where the party subsequently answers over and proceeds to trial on the merits, can only be corrected by a direct proceeding on error or appeal, and that the judgment, when the party has appeared and gone to trial on the merits, cannot be assailed collaterally for want of jurisdiction. Most of the cases which declare the doctrine that an answer and trial on the merits does not preclude a party who has objected to the jurisdiction from subsequently insisting that the court had no jurisdiction of the person, were cases on appeal or error. The principle upon which the doctrine proceeds is, that a party who has objected to the jurisdiction, and whose objection has been overruled, is not bound, as was said by Harlan, J., in *Steamship Co. v. Tugman*, *supra*, "to desert the case, and leave the opposite party take judgment by default." It is difficult to see why a party proceeding under such circumstances should be permitted to raise the question on error; and not be permitted to assail the judgment collaterally in another state, where the judgment is set up as a binding adjudication. The court does not acquire jurisdiction over the person by deciding that it has jurisdiction. If the acts of the defendant do not constitute a legal waiver of the objection, or a submission to the jurisdiction, so as to preclude raising the question on error in the state where the judgment is rendered, how can the same acts preclude the party from raising the question in another state in answer to the judgment?

But passing this question, we think the judgment of the Texas court became and is a binding adjudication on the defendant therein, for the reason that the defendant, by going to Texas and filing an answer in the action, became bound by the statute law of the state prescribing the effect of that proceeding; and that by the Texas law the filing of an answer by a defendant is an appearance and submission to the jurisdiction. The statutes of Texas (art. 1234) authorize a non-resident defendant to be brought in by service of notice out of the state, and when so served, he is required to appear and answer in the same manner as if he had been personally served with a citation within the state. By article 1242, "the filing

of an answer shall constitute an appearance of the defendant so as to dispense with the answer and service of the citation upon him."

It is clear that a state cannot, by a statute, give jurisdiction to its courts over a citizen of another state not served with process within the jurisdiction, and who does not appear in the action; at least a judgment rendered pursuant to such a statute, upon substituted service, would be void in every other jurisdiction. But, as was said by Parker, C. J., in *Bissell v. Briggs*, 9 Mass. 464, 5 Am. Dec. 88, a citizen of a state going into another state owes a temporary allegiance to that state, and is bound by its laws, and is amenable to its courts. The defendant in the Texas action was not bound to appear. He could stand aloof, and so long as he did so could not be affected by the proceeding. But he chose to avail himself of the right given by the laws of Texas to file an answer and contest the claim of the plaintiff. He went within the jurisdiction, and was represented by attorneys there. He voluntarily filed his answer after first seeking to dismiss the case for want of jurisdiction over his person. The effect of this proceeding was declared by statute to be equivalent to an appearance in the action, and to dispense with the service of a citation. The defendant was bound by the consequences which the statute affixes to that proceeding. He cannot invoke the general rule that an answer on the merits does not waive an objection to jurisdiction because the statute in this case had intervened, and of this statute the defendant had notice.

We have reached the conclusion, for the reasons stated, that the Texas judgment is a valid and binding adjudication. There is no reason to regret this result. The present plaintiff had a full opportunity to be heard and to present his defense in that proceeding, and availed himself of it. He appealed from the judgment, which was affirmed by the highest jurisdiction of the state. The litigation was, we think, conclusively ended by the final decree.

The judgment should be affirmed.

DECREE OF DIVORCE AGAINST NON-RESIDENT. — The principal case contains the startling assertion that a decree of divorce is not valid unless the defendant is within the jurisdiction of the court by which it was rendered, or voluntarily submits himself to such jurisdiction, and that the marriage relation is not a *res* within the state of the party invoking the jurisdiction of the court. A very large percentage of the suits for divorce brought in the United States have been commenced in a state wherein the plaintiff resided,

and of which the defendant was a non-resident; and the services of summons in such cases have been made beyond the state, and generally by some mode of constructive service authorized by the laws of the state in which the suit was brought. Unless the marriage relation is a *res*, existing and being within the state where the plaintiff resides, so that the judgment dissolving it may be treated as a judgment *in rem*, conclusively establishing his *status*, as against all persons, then, there is no resisting the conclusion that the final decree is utterly void for want of jurisdiction over the person of the defendant; and many thousand people must be to-day living as bigamists, who have procured decrees of state courts, in conformity to state statutes, purporting to dissolve the previous marriages. What is said in the principal case on this subject, though manifestly the deliberate conclusion of the court, was not absolutely essential to its decision. It is, however, in entire harmony with the previous case of *People v. Baker*, 32 Am. Rep. 274, where the determination of the question was necessary, and may be regarded as finally settling the law for the state of New York.

Elsewhere, so far as we can ascertain, a different rule prevails, — one under which the judgment is regarded as operating *in rem*, and conclusively establishing the *status* of the parties. If the plaintiff is domiciled in good faith in the state in which he sues, he seems to carry with him the marriage relation as a *res*, and to be competent, by his suit and such service of process on the non-resident spouse as the statute may prescribe, to submit that *res* to the jurisdiction of the court: *Freeman on Judgments*, secs. 581, 584; *Tolen v. Tolen*, 21 Am. Dec. 742, and note 747-752; note to *Hamover v. Turner*, 7 Id. 206-209; *Jenness v. Jenness*, 87 Id. 335.

BRICE v. BAUER.

[108 NEW YORK, 423.]

ONE WHO KEEPS DOGS IS BOUND TO HAVE THEM UNDER HIS OBSERVATION AND INSPECTION, or under the observation and inspection of some person selected by him.

KNOWLEDGE OF SERVANT OR AGENT THAT DOG IN HIS CARE IS DANGEROUS is equivalent to knowledge by his principal.

IF DOG IS KEPT FOR PROTECTION TO PREMISES, the purpose for which he is kept charges his master with knowledge that he is of fierce and dangerous character.

MASTER OF DOG IS ANSWERABLE TO PLAINTIFF INJURED BY SUCH DOG on his own premises, where, after being kept chained for the protection of the owner's premises, the dog is suffered to escape therefrom, and to attack and wound the plaintiff.

EVIDENCE. — CONVERSATION BETWEEN PLAINTIFF AND DEFENDANT, WHEREIN LATTER OFFERED AND FORMER DECLINED a sum of money as compensation for injuries inflicted on him by defendant's dog, is admissible in evidence in favor of the plaintiff.

EVIDENCE THAT SUM OF MONEY WAS OFFERED AS COMPROMISE is admissible as evidence in favor of the plaintiff, unless the offer, when made, was stated to be confidential or without prejudice.

ACTION to recover compensation for injuries inflicted on plaintiff by a dog belonging to the defendant. The answer

was a general denial, and an averment to the effect that the plaintiff first assaulted the dog, and the latter acted in self-defense. There was a motion for a nonsuit, on the ground of want of evidence of defendant's ownership of the dog, or of the vicious character of the latter. The motion was denied, and the jury gave a verdict for plaintiff.

Joseph S. Ridgway, for the appellant.

A. Simis, Jr., for the respondent.

By Court, DANFORTH, J. That the plaintiff was very seriously injured by the unprovoked and persistent attack of the dog, is not denied. Indeed, no evidence was given upon the trial showing, or tending to show, the slightest foundation for the affirmative defense set up in the answer. It is alleged, however, by the defendant, that the evidence failed to show either, — 1. That the dog was owned or harbored by the defendant; or 2. That the dog was vicious or accustomed to bite; or 3. That the defendant had knowledge of such propensities. The last objection was not made at the trial; but upon all points, we find quite enough evidence in the record to support the conclusion of the court below.

The dog was a cross between a mastiff and a blood-hound or a Newfoundland; in color, dark brown, or between black and brown; of an unusually large size, solid, and heavy, having a short, thick neck, and was, in fact, very ferocious. He came upon the plaintiff's premises in the evening, attacked and bit certain pigs which were gathered there, and only desisted from doing so when, seeing the plaintiff, he turned upon him, "went for his throat," which the plaintiff protected by his arms; but in spite of resistance, the dog threw him upon the ground, bit him "seven times on one arm, and five on the other," and kept his hold in spite of the plaintiff's struggles and every effort on the part of neighbors, who, hearing the plaintiff's cries, had come to his assistance, until one, having a gun, shot the dog dead as he was making again for the plaintiff's throat. He had before bit the defendant's coachman, one Robinson, and his wife. After he was killed, his body was thrown into the street, and was there seen and identified as a dog belonging to the defendant. One witness, a workman employed by defendant, described the dead dog; and being asked to give the appearance of the dog before that time seen by him at defendant's, said: "The same appearance

exactly; the same in color, hair, and size." Being asked: "You don't know whether it was the same dog or not?" said: "I could not swear positively, but it looked like the same dog." The dog he saw at defendant's was, at the time, chained up in his stable, and being asked "whether you know anything about his disposition," said, "He looked to be vicious to me." Another witness speaks of the dog as once owned by himself, and afterwards "around" defendant's, "probably from a year to fifteen months." Asked, "The dog that Mr. Bauer [defendant] had this length of time at his place, did you previously own him?" answered, "Yes, sir." Asked, "What is your best impression as to whether the dog lying in the road was the same dog that was in Mr. Bauer's place?" said, "I judge it was the same dog, to the best of my belief." Asked, "How was that dog kept at Mr. Bauer's place,—chained?" said, "When I saw him he was chained up in the yard." Again he testified that he saw him in defendant's yard "three or four times," each time before December, and "always chained up."

The defendant in his own behalf testified that he had not seen the dead dog, but that while he kept always "half a dozen dogs," they were always in chains day and night; "at night tied out to the buildings, in the daytime in the house," "never unchained." He, however, said that he did not "attend to them personally," having in his employ a dozen men, Robinson among others. He had not heard that any of his dogs had been killed or were missing, or that Robinson had been bitten by any dog. Robinson was not called. The evidence of identity was as good as could be expected, and whether the dog was one harbored or owned by the defendant was a question which the jury might reasonably be expected to be able to answer. The defendant was properly called upon for proof, and it seems plain that some of his servants, whose duty to his dogs made them familiar with their number and location, might have supplied better evidence, if the facts warranted it, than he was able to give to the jury.

I think the evidence actually in the case tends to establish that the dog complained of was the defendant's dog, and that the dog was of a ferocious and vicious disposition. Does it also tend to establish knowledge of that disposition on the part of the defendant? In *Baldwin v. Casella*, L. R. 7 Ex. 325, it is said "all dogs may be mischievous, and therefore a man who keeps a dog is bound either to have it under his own obser-

vation and inspection, or if not, to appoint some one under whose observation and inspection it may be, and that person's knowledge is the knowledge of the owner." In the case before us, Robinson was one of the servants to whose care the dog was intrusted, and Robinson was himself bitten by him before the plaintiff suffered. It is not material that the fact was not communicated to the master. Again, if the dog was the defendant's dog, the very purpose for which the defendant kept him charges him with knowledge of his character, and he is therefore chargeable with negligently keeping him, although it had not appeared that he had actually bitten another person before he bit the plaintiff: *Worth v. Gilling*, L. R. 2 Com. P. 1. In that case the court say: "The defendants admitted that the dog was purchased for the protection of their premises. Unless of a fierce nature, he would hardly have been useful for that purpose." In *Buckley v. Leonard*, 4 Denio, 500, an action for damages for injuries inflicted by a dog, it appeared, among other things, "that for the most part the defendant had kept his dog chained up in the daytime, and in his store nights"; and the defendant having had a verdict, it was reversed, the court saying, aside from proof that the defendant had notice of the dog's disposition, "the fact that he usually in the daytime kept him confined, and in the night kept him in his store, is strong evidence that he was fully aware that the safety of his neighbors would be endangered by allowing him to go at large."

The case of the defendant, therefore, is that of one who has in his possession and under his control an animal, dangerous unless reasonable precautions are taken to prevent injury to third persons. In such case it is obvious the injury must have occurred by his neglect, and for the consequences he should be held responsible: *Muller v. McKesson*, 73 N. Y. 195; 29 Am. Rep. 123.

A point is submitted by the appellant to the effect that the court erred in admitting evidence of a conversation between the plaintiff and defendant after the injury and before the commencement of the action. It appears that the defendant called the plaintiff to his office and inquired whether he "was the man bit by the dog." Plaintiff said, "Yes," and now testifies, "He asked me what I was going to do about this case; I said I did n't know; that he knew best, so we had a few words talk; 'Well,' he said, 'I'll give you five dollars a week, and pay the doctor's bill'; so I made him answer back that that

was too little to support my family, and then I came out; my arm was punishing me bad, and I could not stand the pain; he said, 'I suppose you will sue me?' I said, 'I suppose so, too'; he said then he and I would have to fight it out the same as the dog and I had fought." Defendant's counsel moved to strike out the answer, assigning no ground. It was not error to deny the request. The conversation was sought by the defendant, and entered upon without reservation. It does not appear that the offer to pay was in compromise of any dispute between the parties. The disagreement was in reference only to the amount, and the transaction might well be regarded a tacit admission of liability. In such a case even the offer of a sum by way of compromise is held to be admissible, unless stated to be confidential or made without prejudice: *Wallace v. Small*, 1 Moody & M. 446; *Thompson v. Austen*, 2 Dowl. & R. 358. In this instance there was no caution of that kind, nor anything from which it could be inferred that the offer was made by way of sacrifice or concession for the sake of peace, or in settlement or compromise of a disputed claim.

We think the case was one proper for the jury, and that no error was committed by the trial court. The judgment appealed from should therefore be affirmed.

OWNER OF DOG IS ANSWERABLE for injuries inflicted by him upon another person, if the owner knew of his propensity to bite: *Evans v. McDermott*, 60 Am. Rep. 602, and note; *Laverone v. Mangiante*, 10 Id. 269, and note; but defendant is not answerable when nothing has happened to charge him with notice of the vicious propensities of the animal: *Smith v. Donohue*, 60 Id. 662.

WHAT SUFFICIENT TO CHARGE OWNER WITH NOTICE OF VICIOUS PROPENSITIES OF HIS DOG: *Godeau v. Blood*, 38 Am. Rep. 751, and note; *Rider v. White*, 22 Id. 600; *Mann v. Wetland*, 81 Pa. St. 243.

LIABILITY OF OWNER OF TRESPASSING ANIMALS: *Townsend v. R. R. v. Munger*, 49 Am. Dec. 239, and note 248-273.

JENNINGS v. VAN SCHAICK.

[108 NEW YORK, 580.]

NEGLECTANCE.—PERSON HAS RIGHT TO ASSUME THE SAFETY OF A SIDEWALK, though he knows that vaults and coal-chutes are common, under and adjoining such walks; and he is not called upon to give attention to his steps, until in some manner warned of danger. He has a right to assume that such vaults and chutes are either covered or guarded.

LESSNER TO CONSTRUCT OPENING IN SIDEWALK DOES NOT EXCUSE the leaving such opening uncovered and unguarded.

UNGUARDED OPENING IN SIDEWALK IS NUISANCE, though a license or permission to make the opening may have been granted by the municipality.

TENANT, AND NOT LANDLORD, IS ANSWERABLE, when the latter has safely and properly built a coal-vault under or adjoining the sidewalk, with an opening to the surface by permission of the municipality, and the former, while in the exclusive occupation of the property, carelessly leaves the coal-hole open, whereby some one is injured.

LANDLORD IS ANSWERABLE WHERE OPENING IN SIDEWALK IS LEFT UNGUARDED BY JANITOR in his employ, who has general charge of the premises, and of such opening, though the building was rented to tenants in flats and apartments, and the janitor was also employed by them to deliver coal to their rooms.

ACTION by plaintiff to recover for injuries suffered from falling into an open and unguarded coal-hole in defendant's sidewalk. Verdict of judgment for plaintiff.

A. H. Stoiber, for the appellant.

Jeroloman and Arrowsmith, for the respondent.

By Court, FINCH, J. The plaintiff fell into an open coal-hole left uncovered and unguarded in a crowded city street. She had a right to assume the safety of the sidewalk, and so was not called upon to give attention to her steps, until in some manner warned of danger. Undoubtedly she knew that vaults and coal-chutes were common under and adjoining the sidewalks, and that through the ordinary openings coal was deposited in such vaults. But she had a right to assume that they were securely covered, or if left open, were guarded by some one to give warning, or by the crib or box prescribed by the city ordinance. Neither protection was provided in the present case. It was said that loose coal lay around the opening, and its presence should have warned the plaintiff of danger. In a crowded street it might not be observed in time to avoid a fall, but she swears no such sign of possible peril was present, and though contradicted, we must take the verdict of the jury as settling the question of fact in her favor. Somebody, therefore, was responsible for the injury. It does not

appear that the defendant, who owned the premises, had ever obtained from the municipal authorities any formal license or permission to construct the opening in the sidewalk, but such authority was a reasonable inference from an acquiescence of eighteen years without objection from the city. Assuming, however, that authority for the construction had been granted, the duty of safe covering and of protection when open remained, and if not performed, the unguarded opening became at once a wrong and a nuisance. Where an owner builds a coal-vault under or adjoining the sidewalk, with an opening to the surface by the permission of the municipality, and constructs it in all respects safely and properly, and then rents the premises to a tenant who takes the entire possession and occupation, the landlord reserving no control, and the tenant in his use of the property carelessly leaves the coal-hole open, whereby some one is injured, it is the tenant, and not the landlord, who is liable, since the latter has neither created nor maintained a nuisance, nor been guilty of any negligence or wrong. But that is not this case. The building was rented in flats or apartments. The owner remained in control to some extent, and hired and employed a janitor to take care of the premises. He controlled the halls and some portion of the basement, and especially the coal-vaults, in one of which was stored the coal for the building, and in the other that for the tenants. The coal for the building was for the use of the janitor and the engineer. The cover to the sidewalk opening was held in its place, and so made safe by a chain fastened underneath. When this coal was delivered, the janitor took the ticket and unfastened the chain so that the cover could be removed. His employment by the tenants was to deliver the coal to their rooms. To open the coal-chute and allow it to be received was his duty as janitor, under his employment by the owner. That duty he neglected to perform properly, and permitted the cover to be removed without the least attention to the safety of those passing by. There was thus enough in the case to make the owner responsible for the injury. The evidence permitted an inference by the jury that the landlord controlled the use, and did not admit the inference involved in the requests to charge, which were refused, that the tenants employed the janitor to open the cover and see to the delivery. Roberts said his employment by Dannat, the tenant, was to deliver coal to his rooms, and the effort to make him say differently failed.

The exceptions relied upon by the appellant were mainly involved in two propositions of the defence: the one, that the action was not founded upon a wrong, as charged by the court; and the other, that the jury were at liberty to find from the evidence that the janitor was the servant of the tenant in the use and management of the coal-hole, and not of the defendant.

We have assumed that from long use and acquiescence the consent of the municipal authorities to the construction of the coal-vault and its aperture should be inferred, and as the structure was not, in and of itself, a nuisance. But the consent of the city is conditioned upon certain modes of use, and if the opening is left unguarded, it becomes at once a trap and a nuisance. No consent to leave it open and unprotected can be possibly claimed; and so the act is a positive wrong on the part of the person or individual leaving it open, and without warning to the public, either by some one guarding it, or by a box or crib placed over it as required by the city ordinance. The court, therefore, did not err in saying that the action was founded upon a wrong, and in treating the open and unprotected coal-hole as a nuisance.

Thereupon the question arose, Who was guilty of the wrong and responsible for the nuisance? and that ended in the inquiry, Who controlled the use of the coal-hole? The janitor controlled it beyond question. He occupied the basement, and had the care of whatever about the house was for the common convenience of the tenants. If the cover on the sidewalk was so made that it could be opened by anybody from the outside, maliciously or accidentally, the construction was faulty. But that apparently was not the case, and the janitor himself scarcely denies that he loosened the chain and allowed it to be opened. He was the servant of the owner, put there to control and care for the premises. Until some evidence was given to change that relation, the owner alone was responsible for the wrongful management of the coal-hole. We discover no such evidence. The janitor testified that "the coal-hole in question here was used for the tenants"; that he was employed by some of the tenants to "deliver coal to" their rooms or apartments; and that answer, being unsatisfactory, was followed by a very leading question, viz.: "To see that it was delivered in the house?" which the witness answered by saying, "I didn't take it in that consideration." None of the evidence of the witness tended to show that this coal-hole was

put under the control or care of any one or all of the tenants; and the requests to charge that the jury might find that it was in the exclusive use of the tenants, and so the landlord was not liable, and that if they found that what the janitor did "in regard to the receipt, delivery, or removal of the coal" was for the tenant, Mr. Dannat, "and not for or in the service of the defendant," then the defendant is not liable, were properly refused. There was no evidence to justify such finding by the jury. Admitting that it was no part of the janitor's duty to "assist" in putting in or receiving coal for the tenants, it by no means follows that the opening and closing of the cover and its general control did not devolve upon him as the servant of the owner. The landlord, through his janitor, retained the general possession of the house, and had not absolutely parted with its control. It remained his duty to care for the sidewalks, to remove the snow, and keep them safe, and in no respect had he shifted that duty upon those occupying rooms or apartments in the building. He never transferred, and they never accepted, any such duty or obligation. It attached to his ownership, and could only be removed by a complete transfer of the possession, which left no power of control in him. For these reasons, we think no error was committed on the trial.

The judgment should be affirmed, with costs.

STREETS, RIGHT OF LOT-OWNERS TO OBSTRUCT: *Callanan v. Gibnan*, 1 Am. St. Rep. 831, and note 840-844.

STREETS, LIABILITY OF LOT-OWNER FOR INJURIES resulting from leaving open and unguarded a hole in a sidewalk: *Barry v. Terhildsen*, 1 Am. St. Rep. 55.

BURNHAM v. COMFORT.

[108 NEW YORK, 535.]

RULE OF ADEMPMENT IS NOT APPLICABLE TO DEVISES of real estate.

ADEMPMENT IS EXTINCTION OR SATISFACTION OF LEGACY by some act of the testator, which indicates either a revocation, or an intention to revoke the bequest.

BEFORE DECLARING THAT ADEMPMENT HAS TAKEN PLACE, the mind of the court should be wholly satisfied as to the meaning of the testator's act.

REVOCATION OF SPECIFIC DEVISE OF REAL PROPERTY MAY ARISE ONLY from the alteration or alienation of testator's estate during his lifetime, or by some writing executed with all the formalities required for a valid will. Hence a devisee of real estate is entitled thereto, notwithstanding she received from the testator in his lifetime a sum of money, and executed

a receipt therefor, which stated that it was received as her part of the testator's estate "up to this time, and all such other property as he may accumulate up to his decease."

ACTION to recover a tract of real estate. The defendant claimed the real estate under a devise thereof contained in the will of her father, Oliver Comfort. The plaintiff insisted that such devise had been revoked by a payment of five hundred dollars, made to the defendant by her father, and the receipt then executed by her and taken by him, and that plaintiff was entitled to the property as residuary devisee. Judgment for defendant.

Gabriel L. Smith, for the appellant

J. A. Reynolds, for the respondent.

By Court, GRAY, J. The appellant contends that a devise of real property to the respondent was satisfied by the payment to her in the testator's, her father's, lifetime, of a sum of money, and for which she gave a writing in the following form:—

"Received of Oliver Comfort five hundred dollars, which money I receive as my part of my father's estate up to this time, and all such other property as he may accumulate up to his decease. In witness whereof I have hereunto subscribed my name."

"Dated Southport, May 14, 1864," and signed "Harriet Burnham, in presence of Lawrence Lain."

By testator's will, made prior to that date, he had devised to his brother certain lands for life, and after his death to this daughter. His residuary estate testator gave to his son Oliver, this appellant. Testator died some fifteen years after the receipt was taken from his daughter, and there is no evidence of any revocation or alteration of his will, or of any part thereof, having been made by other will or codicil, or instrument executed with the formalities of a will. It was found as a fact below, and it is conceded here, that this payment by testator to his daughter was intended to be in lieu of the devise to her in the will, and that it was so accepted by her at the time.

The question is thus squarely presented, whether a satisfaction of the devise in the will to the daughter was effected. If we should hold that such was the effect of the transaction between the father and daughter, we must hold that it operated

as a revocation of the will to the extent of the provisions affecting the daughter's estate thereunder. We think such a proposition to contravene the spirit, if not the letter, of the provisions of the Revised Statutes of this state applicable to wills, and that it lacks support in principle as it does in authority.

The rule of ademption is predicable of legacies of personal estate, and is not applicable to devises of realty: Story's Eq. Jur., sec. 1111; 2 Williams on Executors, 5th Am. ed., 1202; 1 Roper on Legacies, 365; *Davis v. Boucher*, 3 Youngs & C. Ch. 397; *Langdon v. Astor's Ex'rs*, 16 N. Y. 34. Ademption is the extinction or satisfaction of a legacy by some act of a testator, which is equivalent to a revocation of the bequest, or indicates the intention to revoke; and the rule is applied where the testator is a parent of the legatee, or stands in *loco parentis*. The question of its application is made to depend upon the declared or presumed intention of the donor: *Langdon v. Astor's Ex'rs*, *supra*. The danger of creating an intention from the facts is ordinarily great enough to require in each case that the mind of the court should be wholly satisfied as to the meaning of the testator's act. In the present case, had the testamentary gift been a legacy of personal property, we should say that no doubt could exist as to what was intended by testator at the time of the transaction. We see no reason, however, for the application of any such rule to devises of real property. During a testator's lifetime, his will is, of course, inoperative and ineffectual, and only upon his death does it have any legal operation. The writing which testator took from his daughter was not an agreement in any sense binding upon him, nor was it one which insured to appellant's benefit. Appellant was no party to it, and no consideration moved from him for its execution. The question is not such as would arise by reason of a transaction between the respondent, as the legatee, and appellant, as the residuary legatee, by which she had transferred or released to him her interest under her father's will in due form. After the writing had been delivered, the daughter may have been precluded from asserting her right to recognition in her father's will; but the father was at liberty either to give legal effect to the transaction by changing his will and revoking the provisions in his daughter's favor, or to reconsider any previously existing intention of altering his provision for her. Although he survived the transaction fifteen years, he did not change his will; and the presumption of a subsequent change of inten-

tion on his part from any motive may be entertained without doing any violence to our ideas of strict justice.

But a deeper principle underlies the consideration of this question, in the effect to be given to our statutes governing the making of wills. A specific devise of real property may be revoked by alteration or alienation of the estate during testator's life: *Livingston v. Livingston*, 3 Johns. Ch. 154; *McNaughton v. McNaughton*, 34 N. Y. 201; but we fail to see any other mode of effecting such revocation without running counter to those provisions of the statutes which declare what acts shall revoke or alter a will in writing: 3 R. S., Banks's 7th ed., 2286, 2288. Those provisions do not contemplate a revocation or alteration of any part of a will, or of any previous devise, except by some other will in writing, or some writing of the testator declaring such revocation or alteration, and executed with the same formalities with which a will is required to be executed: Sec. 42. And they do contemplate a revocation of a devise of property, previously devised by testator, to be operated, where the testator's interest in such property has been altered, but not wholly divested, by some conveyance, settlement, deed, or other act of the testator, only when the instrument by which the alteration of testator's interest is made declares the intention that it shall operate as a revocation of such previous devise, or its provisions are wholly inconsistent with the terms and nature of such previous devise: Secs. 47, 48. Thus the statute explicitly declares that where a will is not wholly or in part revoked or altered by some other will or writing, executed with like formalities, a previous devise of property is only to be deemed revoked by some alteration of testator's interest in the property devised, evidenced by some conveyance or instrument, either declaring the alteration to be a revocation, or wholly inconsistent with the nature of the previous devise.

In these provisions I think I see ample reason for refusing our sanction to the introduction of a doctrine, which, while if applicable at this day to legacies of personal property, can work no especial prejudice to rights of property in such application, yet in its application to devises of real property might work great mischief and tend to endanger the safety of titles which depend for their security upon the conduit of a testamentary devise. The reason for refusing to extend the application of the principle of satisfaction to devises of real estate, which was assigned in the case of *Davys v. Boucher*, 3 Younge

& C. Ch. 397, was that to so extend it would repeal that provision of the statute of frauds which applies to the revocation of wills of real estate.

The sixth section of the English statute of frauds, 29 Car. c. 2, sec. 3, provided that devises in writing of lands, etc., should be revocable by some other will or codicil, or writing declaring the same, or by destruction by testator's act; and that all such devises should remain in force unless so destroyed, or unless altered as mentioned, by will, codicil, or writing, witnessed in form. The subsequent passage of chapter 26 of 2 Victoria placed the revocation of wills of personality upon the same footing as wills of realty: 1 Williams on Executors, 106, 107, 130, 131. There is a sufficient likeness in the English statute to ours to make the reasoning applicable here.

A rule of law which has heretofore been sanctioned and relied upon, which is in unison with the spirit and with the sense of our statute, and which offers a safe rule of property, is rather to be followed than to be departed from for reasons moving from the circumstances of a particular case. Reference to adjudged cases in the courts of other states only serves to confirm us in the views we have expressed: *Clark v. Jetton*, 5 Sneed, 229; *Allen v. Allen*, 13 S. C. 512; 86 Am. Rep. 716; *Weston v. Johnson*, 48 Ind. 1.

The judgment should be affirmed.

EARL and PECKHAM, JJ., dissented.

ADemption OF LEGACIES: See note to *Hansbrough's Ex'r v. Hess*, 37 Am. Dec. 667-671.

ADVANCEMENTS: See note to *Miller's Appeal*, 80 Am. Dec. 559-565.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

HARRIS COUNTY v. CAMPBELL.

[68 TEXAS, 22.]

COUNTY EMPLOYING ONE TO DO CERTAIN WORK, and accepting it, going into possession, and using it after it is finished, is liable for the reasonable value of the work, though not performed strictly according to the contract.

ASSIGNMENT OF PART OF CHOSE IN ACTION for valuable consideration is good in equity, and may be made either by direct transfer, or by an order drawn upon the particular fund. *Contra* at common law, so as to give the assignee a right of action upon it.

ASSIGNMENT OF PART OF CHOSE IN ACTION, by an order supported by a sufficient consideration, but not drawn against a particular fund, is not enforceable against the debtor, even in equity.

ASSIGNEE OF PART OF DEBT ACQUIRES RIGHT OF ACTION in equity against the debtor; and not only a lien upon the fund, but a property in the fund itself; and he may bring in all the parties in interest, and force the payment of the obligation, and the distribution of the proceeds among those entitled to it; and the parties who have established claims against the fund are entitled to be paid therefrom in the order of the respective dates at which their rights were respectively fixed.

W. C. Oliver, for the appellant.

W. P. Hamblen, for Mitchell & Co., Dumble, and Campbell.

Fisher and Kirlicks, for the intervenor, Keller.

By Court, **GAINES, J.** On the seventeenth day of September, 1884, P. H. Campbell entered into a contract with Harris County, through the proper authorities, to put inside blinds in the court-house of that county. The price agreed upon was

\$1,398. He claimed to have completed his contract, which the county denied, on the ground that the blinds put in by him were not in accordance with the terms of the agreement. During the progress of the work the county paid him \$500, but the commissioners' court finally rejected his claim for the balance of \$898. In October, 1884, he gave an order upon the county judge of the county in favor of one De Waul for \$150, which was subsequently transferred to Herman Keller. On the 9th of December, 1884, Campbell also drew an order for \$600 in favor of Mitchell & Co., directed "to the county commissioners of Harris County," payable out of the amount due him for putting blinds in the court-house, and in the same instrument expressly transferred to the payees for a valuable consideration a sufficient amount of his claim against the county to pay said sum. On the third day of January, 1885, he gave a like order and transfer to George Dumble for \$150. On the eleventh day of March, 1885, Hildebrand & Co., having an account against Campbell for the blinds furnished him by them, and which he had put in the court-house under his contract, delivered an attested copy thereof to the county judge in order to secure the benefit of the provision of article 3176 of the Revised Statutes. A notice of the presentation of this account was given to the original contractor by the authorities, and he gave no notice that it was disputed by him.

Campbell brought suit against Harris County for the use of himself and of Mitchell & Co. and of Dumble, and made Hildebrand & Co. parties defendant. Keller intervened, setting up his claim to a part of the sum sued for. The case was submitted to a jury, and resulted in a verdict and judgment against the county for the balance of the contract price for putting in the blinds, in favor of Hildebrand & Co. for the amount of their claim, and in favor of Mitchell & Co. and Dumble for the remainder of the judgment against the county, after satisfying Hildebrand & Co.'s debt, to be divided between them in proportion to the amount of their respective claims, and that Keller take nothing by his plea of intervention. From this judgment all the parties except Hildebrand & Co. have appealed to this court.

We think the county of Harris has nothing to complain of in the proceedings of the court below. The evidence was conflicting upon the question whether the contract was complied with or not, and this court cannot undertake to say, from inspection of the written agreement under the testimony adduced,

that it was not. It was a question for the jury, and one upon which their verdict is decisive. But it is assigned, in substance, that the court erred in charging the jury that if they found that the contract had not been complied with, and yet if they found that Campbell had done the work for the county, and the county had accepted the work, or gone into possession of and used the blinds, then they should find for the plaintiff for the reasonable value of the blinds. The charge, abstractly considered, is certainly correct, and we think it was warranted by the evidence. It does not appear when the work was finished, but plaintiff testified it was completed according to contract.

W. C. Anders, who was county judge during 1885, testified that the orders were presented and were rejected by him, or by the commissioners' court, because the work was not then completed. The last order was given in January of that year, and it may be inferred from this testimony that the blinds were then unfinished. But the work was evidently begun long before, and if the blinds were a foot too short, as is claimed, the authorities of the county must have known it; yet we have no evidence of any notice to plaintiff that they would be rejected, except from the witness Ellis; who testified he told him they would not be received, but whose authority to do so does not appear, and from E. B. Hamblen, formerly county judge, who stated that he told Campbell the blinds would not be received when it was discovered they were too short, but that he went out of office before anything was done about it. The blinds remained in the court-house, and were used, and not rejected by any formal order of the commissioners' court until June, 1885. We think this evidence amply warranted the charge of which complaint has been made by the county. We find no error in the judgment prejudicial to the defendant county.

But as between the conflicting claimants of the fund, some serious questions arise. Did Mitchell & Co. and Dumble acquire any right to any part of this fund by their respective orders and transfers from plaintiff Campbell? Did De Waul, who assigned to Keller, acquire any? And if so, are these claimants to be postponed until Hildebrand & Co. are satisfied? It is well settled that at common law a chose in action cannot be assigned in part, so as to enable the assignee of such part to bring suit upon it. The reason of the rule is, that it is unjust to the debtor to permit the creditor to split

up the debt, and thereby subject him to more than one suit for its collection. Following the analogy of this rule, there are authorities which hold that such a transfer does not even convey an interest in equity, unless it be assented to by the debtor himself. The leading case supporting this proposition seems to be *Mandeville v. Welch*, 5 Wheat. 277, in which this doctrine was enunciated, but which was a suit at law, and consequently did not involve this question. Since all the claimants of a fund or debt may be made parties to a suit in equity, the reason of the rule does not apply to cases of equitable cognizance; and where one has agreed, for a valuable consideration, that another shall have a part of a debt due to him from a third party, and has accordingly made a transfer of such part, justice manifestly requires that the agreement should be enforced, when it can be done without prejudice to the debtor. Accordingly, it now seems to be held by the great weight of authority that an assignment of a part of a chose in action, for a valuable consideration, is good in equity, and that it may be made either by direct transfer, or by an order drawn upon the particular fund: *Goldman v. Blum*, 58 Tex. 630; *Caldwell v. Hartuppee*, 70 Pa. St. 74; *Hall v. City of Buffalo*, 2 Abb. App. 301; *Brill v. Tuttle*, 81 N. Y. 454; 37 Am. Rep. 515; *Moody v. Kyle*, 34 Miss. 506; *Field v. Mayor of New York*, 6 N. Y. 179; 57 Am. Dec. 435; *Burn v. Carvalho*, 4 Mylne & C. 690; *Row v. Dawson*, 1 Ves. Sen. 331; *Ex parte South*, 3 Swanst. 392.

In support of this doctrine, we have the very decided opinion of recent text-writers of very high authority: See 1 Daniels on Negotiable Instruments, sec. 23, p. 25; 3 Pomeroy's Eq. Jur. 291, sec. 1280, and note 1 on page 292. Mr. Parsons, in his work on bills and notes, seems to admit that this is the rule in courts of equity: 1 Parsons on Bills and Notes, 334, 335. Such is also the opinion of Judge Story, who delivered the opinion of the court in *Mandeville v. Welch*, *supra*: 1 Story's Eq. Jur., sec. 1144.

Both the order of Mitchell & Co. and that of Dumble contained an express transfer of so much of the fund due from the county as was required to pay them respectively; and it follows from what we have said that in our opinion they became the owners, at the dates of the orders respectively, of the respective parts of the debt so assigned.

The case of the intervenor Keller is different. The draft transferred to him by De Waul is supported by a considera-

tion, but is not expressly drawn upon the fund in question. An order expressly for part of a particular debt is a transfer of such portion, because it shows a manifest intention to assign to the payee the sum so ordered: 1 Daniels on Negotiable Instruments, sec. 23. But this cannot be said when there is nothing in the instrument to show that it is made payable out of any particular fund, and it is therefore held that such an order is not an assignment: *Phillips v. Stagg*, 2 Edw. Ch. 108; *Harrison v. Williamson*, 2 Id. 430; *Winter v. Drury*, 5 N. Y. 525; see also *Brill v. Tuttle*, *supra*. It is not necessary for us to decide whether or not the intention of the parties to make the order payable out of the debt to become due from the county could be shown by parol evidence and by the circumstances of the case. It is sufficient to say that it was not shown on the trial below, and that the court did not err in instructing the jury to find against intervenor Keller. It may be remarked, however, that Campbell testified that after he gave the order to De Waul, he paid him twenty-five dollars upon it, which would seem inconsistent with the idea that an assignment was intended.

We have seen that the debt of defendants Hildebrand & Co. is a claim for material furnished to Campbell to enable him to complete his contract with the county; that the account was attested and presented as required by the statute then in force, and was admitted to be just by Campbell. But in *Horton v. Frank*, 51 Tex. 401, and *Loonie v. Frank*, 51 Id. 406, it is held that this statute does not give the subcontractor a lien upon the property, but a right to fix a liability from the owner to him for his debt, not, however, to exceed the amount then due on the original contract. Mr. Pomeroy says when a part of a debt is assigned, the assignee acquires a right of action in equity against the debtor, and not only a lien upon the fund, but a property in the fund itself: 3 Pomeroy's Eq. Jur., sec. 1280, p. 292.

There are cases not going to this extent, but we think it the better doctrine, and well supported by authority. No reason is seen why one having a right to a part of a debt should not be permitted in courts of equitable cognizance to bring in all the parties at interest, and force the payment of the obligation and the distribution of the proceeds among those entitled to it. The assignments were made to Mitchell & Co. and Dumble, and the county had notice before Hildebrand & Co. filed their account. It is a necessary deduction, therefore, from

the principles just laid down, that the latter have no claim against the county until the assignees above named had been fully paid. If at the time they sought to fix the liability of Harris County it owed Mitchell & Co. and Dumble the amount of their respective claims, it did not owe the same money to the original contractor; in other words, it was entitled to a credit on its debt to him to the amount of their respective claims.

Hildebrand & Co. were entitled to a judgment against their co-defendant, the county, for the balance that remained after paying the claims of Mitchell & Co. and Dumble respectively; and because they had a judgment for payment of their claim in full, the judgment will be reversed.

It is to be remarked, further, that the parties who established claims upon the fund were entitled to be paid therefrom in order of the respective dates at which their rights were respectively fixed. The equitable rule applies, that the first in time is the first in right.

The cases of *Lindsay v. Price*, 33 Tex. 280, and of *Kaigler v. Frank*, 36 Id. 305, have been considered in determining the questions we have had before us, and we have not found the points there decided in conflict with the propositions laid down in this opinion. There are, however, doctrines announced in the argument of these cases to which we do not assent.

Because of the error we have pointed out, the judgment is reversed, and the cause remanded.

ASSIGNMENT OF PART OF DEMAND. — The rule as promulgated in the principal case is sustained by an unbroken line of authorities, and the opinion of eminent text-writers clothed in so nearly the same language that the multiplication of cases and of words can hardly be deemed necessary. The doctrine is thus tersely announced in *Hutchinson v. Simon*, 57 Miss. 629, by Chalmers, J., after stating the undisputed rule as it obtains in courts of law: "That the assignment of a portion only of a particular debt or fund is invalid, and not enforceable against the debtor without an express assent and assumption on his part. . . . Such is undoubtedly the rule in courts of law, for the sufficient reason that it would subject the debtor to a multiplicity of suits at the instance of each assignee of separate portions of the debt; and as the original creditor would be no party to those suits, and might thereafter, upon a suit brought by himself for the whole debt, deny the assignments, it would be impossible, in a court of law, to protect the rights of all the parties. This reason does not apply to courts of equity, and the law ceases with the reason upon which it is founded. Such assignments are good in equity, and may be there enforced." In an elaborate opinion by Peters, J., on the subject, the question is thoroughly discussed, numerous cases cited, and the same result reached, in *Exchange Bank v. McLeon*, 73 Mo. 498; 40 Am. Rep. 383. Another well-considered case, terminating in the rule as above enun-

ciated, is that of *James v. City of Newton*, 142 Mass. 368; 56 Am. Rep. 692. Equally as well a considered case, citing many authorities sustaining this rule, is *First National Bank v. Kimberlands*, 16 W. Va. 555. Among the many authorities supporting the doctrine thus laid down may be cited *Field v. Mayor etc. of New York*, 57 Am. Dec. 435, and note 441; *Grain v. Aldrich*, 99 Id. 423; *Fordyce v. Nelson*, 91 Ind. 447; *Caldwell v. Hartupce*, 70 Pa. St. 74; *Risley v. Phoenix Bank*, 83 N. Y. 318; 38 Am. Rep. 421; *Daniels v. Meinhard*, 53 Ga. 359; *Elheridge v. Vernoy*, 74 N. C. 800; *Lapping v. Duffy*, 47 Ind. 51; *Bowser v. Hadden etc. Co.*, 30 N. J. Eq. 171; *Gardner v. Smith*, 5 Heisk. 256; *Des Moines v. Hinkley*, 62 Iowa, 637; *Cassidy v. Lattner*, 31 Minn. 239; *Wick v. Pugh*, 92 Ind. 382; *Christmas v. Russell*, 14 Wall. 69; *Triet v. Child*, 21 Id. 441; *Pugh v. Porter*, 112 U. S. 737; 2 Story's Eq. Jur., sec. 1044; 1 Daniel's Negotiable Instruments, sec. 22, 23; 3 Pomeroy's Eq. Jur., sec. 1280; *Brice v. Bannister*, L. R. 3 Q. B. D. 569; *Ex parte Moss*, 14 Id. 310; *Perceval v. Dunn*, L. R. 29 Ch. 128.

The following are the leading cases generally cited and relied upon as decisive of the rule that the assignee of part of a demand or chose in action cannot enforce his claim in an action at law, unless there has been an acceptance on the part of the debtor: *Mandeville v. Welch*, 5 Wheat. 277; *Gibson v. Cooke*, 20 Pick. 15; 32 Am. Dec. 194; *Robbins v. Bacon*, 3 Greenl. 343; *Tieman v. Jackson*, 5 Pet. 580, 597; *Wilson v. Carson*, 12 Md. 54; *Thomas v. Rock Island etc. Mining Co.*, 54 Cal. 578; *Moore v. Gravelot*, 3 Ill. App. 442; *Burnett v. Crundall*, 63 Mo. 410; *Beardles v. Morgner*, 73 Id. 22; and in a late case the rule has been applied as between master and servant, it being held that an employer is not bound to recognize a partial assignment of his employee's future earnings: *Carter v. Nichols*, 58 Vt. 553. In equity, however, the consent of the debtor is not necessary to the enforcement of the demand: *First National Bank v. Kimberlands*, 16 W. Va. 555; *James v. City of Newton*, 56 Am. Rep. 692. In the latter case the rule is well stated. It is there said: "In equity there may be, without the consent of the debtor, an assignment of part of the entire debt. It is conceded that as between assignor and assignee there may be such an assignment. The law that if the debtor assents to the assignment in such a manner as to imply a promise to the assignee to pay to him the sum assigned, then the assignee can maintain an action, rests upon the theory that the assignment has transferred the property in the sum assigned to the assignee, as the consideration of the debtor's promise to pay the assignee, and that by this promise the indebtedness to the assignor is *pro tanto* discharged. It has been held by courts of equity, which have hesitated to enforce partial assignments against the debtor, that if he brings a bill of interpleader against all the persons claiming the debt or fund, or parts of it, the rights of the defendants will be determined and enforced, because the debtor, although he has not expressly promised to pay the assignee, yet asks that the fund be distributed or the debt paid to the different defendants according to their rights as between themselves. In many jurisdictions courts of equity have gone further, and have held that an assignment of a part of a fund or debt may be enforced in equity by a bill brought by the assignee against the debtor and assignor while the debt remains unpaid. . . . But some courts of equity have gone still further, and have held that after notice of a partial assignment of a debt a debtor cannot rightfully pay the sum assigned to his creditor, and if he does, that this is no defense to a bill by the assignee."

Mr. Pomeroy says: "The doctrine that the equitable assignee obtains, not simply a right of action against the depositary, mandatary, or debtor, but an

equitable property in the fund itself, is carried out into all of its legitimate consequences. Thus the assignee may not only recover the money from the original depository, the drawee, but may pursue it or its proceeds under any change of form, as long as it can be certainly identified, into the hands of third persons who may have acquired possession of it from the depository as volunteers, or with notice of the assignee's prior right. The fund in this respect resembles a fund impressed with a trust": 3 Pomeroy's Eq. Jur., sec. 1280. The assignment must be based upon a valuable consideration, and when the order is drawn upon part of a particular fund or debt, it creates an equitable assignment of such fund or debt *pro tanto*, and though not accepted, may be enforced in equity, but such fund or debt must have an actual or potential existence, or the draft will be inoperative. Still, it is only necessary to make the assignment valid in equity that the particular fund or debt should have a potential existence, and when the order on its face does not clearly show what fund or debt is drawn upon, parol evidence is admissible to show that it was drawn upon a particular fund or debt, and was intended as an equitable assignment: *First National Bank v. Kimberlands*, 16 W. Va. 555, 590, 592. This rule is clearly and fully stated by Rapallo, J., in *Brill v. Tuttle*, 81 N. Y. 454-457, where it is said: "There can be no doubt as to the rule that where, for a valuable consideration from the payee, an order is drawn upon a third party, and made payable out of a particular fund then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund, and the drawee is bound, after notice of such assignment, to apply the fund, as it accrues, to the payment of the order, and to no other purpose, and the payee may, by action, compel such application; it is equally well established that if a draft be drawn generally upon the drawee, to be paid by him in the first instance, on the credit of the drawer, and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund, out of which the drawee is subsequently to reimburse himself for such payment, or a particular account to which it is to be charged, will not convert the draft into an assignment of the fund, and the payee of the draft can have no action thereon against the drawee unless he duly accepts. In all cases, therefore, in which a particular fund to accrue *in futuro* is designated in the draft, and the language is ambiguous, the turning-point is, whether it was the intention of the parties that the payment should be made only out of the designated fund, when or as it should accrue, or whether the direction to the drawee to pay was intended to be absolute, and the fund was mentioned only as a source of reimbursement, or as an instruction as to book-keeping." This rule is supported by numerous authorities, among them *Moody v. Kyle*, 34 Miss. 506; *Richardson v. Lightcap*, 52 Id. 508; *Kahnweiler v. Anderson*, 78 N. C. 133; *Alger v. Scott*, 54 N. Y. 14; *Olafin v. Kimball*, 52 Vt. 6; *Pough v. Porter*, 112 U. S. 737; 3 Pomeroy's Eq. Jur., sec. 1280; 1 Daniels on Negotiable Instruments, sec. 23. Any writing which clearly appropriates the debt or fund to a person will in equity be deemed an assignment. No particular form is necessary: *Bower v. Hadden etc. Co.*, 30 N. J. Eq. 171; 2 Story's Eq. Jur., sec. 1047; *Risley v. Phoenix Bank*, 83 N. Y. 318; 38 Am. Rep. 421. But a mere promise, even of the clearest and most solemn kind, to pay a debt out of a particular fund is not an assignment of part of the fund, even in equity: *Christmas v. Russell*, 14 Wall. 69. It was held, however, in *Risley v. Phoenix Bank*, *supra*, that an oral assignment for a valid consideration of a portion of a debt was valid and binding in equity. While the courts in Pennsylvania have recognised the rule that a partial

assignment of a contract between individuals may be enforced in equity, still it has been there held that where a municipality is a party to the contract, it is not bound to recognize or pay partial assignments of the claim against it, either with or without notice, on the ground that it should not be subjected to the embarrassments, responsibilities, and costs of adjudicating contracts to which it is not a party: *Appeals of Philadelphia*, 86 Pa. St. 179; *Geist's Appeal*, 104 Id. 351. On the other hand, it has been held in the same state, though not by a court of last resort, that an order by a contractor on the city to pay a certain portion of the amount due him to another, after acknowledgment on the part of the city, will be held in equity as an equitable assignment: *Phoenix Iron Co. v. City of Philadelphia*, 11 Phila. 203. The following authorities: *Scott v. Porcher*, 3 Mer. 652; *Wallwyn v. Coutts*, 3 Id. 707, 708; *Acton v. Woodgate*, 2 Mylne & K. 492; *Garrard v. Landerdale*, 2 Russ. & M. 451; *Glegg v. Rees*, L. R. 7 Ch. 71; *In re Freshfield*, L. R. 11 Ch. 198, -- would seem to establish the English rule to be, that in case of assignments of a part of a specific fund or debt in the hands of a third person, or owing by him, his assent is not necessary to constitute it a good equitable assignment. But the assignment, appropriation, or order, until assented to, expressly or impliedly, by the assignee, is not an absolute assignment, and may be revoked by the assignor.

COLLINS v. McCARTY.

[68 TEXAS, 150.]

WHERE LEGAL TITLE TO LAND IS VESTED IN TRUSTEE for the benefit of a *cestui que trust*, the statute of limitations will run against the former, and when a complete bar as to him, the *cestui que trust* will be barred, though she labored under the disability of coverture at the time that the adverse possession constituting the bar commenced. This rule does not apply to guardians and administrators, to the prejudice of wards and heirs.

STATUTE OF LIMITATIONS DOES NOT RUN AGAINST TRUSTEE, when a claim is set up through him as against the *cestui que trust*; nor can it affect the rights of a person laboring under disability when the action arose, if at that time the legal title was in him, though the control of the property was intrusted to another; nor does it apply to a case where the cause of action arose from any breach of duty or trust on the part of the trustee, other than the mere failure to sue within the period of limitation.

Cooper and Estes, for the appellant.

A. W. De Berry, for the appellee.

By Court, WILLIE, C. J. This cause is submitted upon an agreed case. It is an action of trespass to try title, brought by the appellant, Mrs. Collins, against several defendants, to recover two thirds of 1,280 acres of land, originally granted to Wiley V. Collins, as assignee of Stephen Wingate. The pleas relied on by the defendants were the statutes of limitations of three and five years. Judgment upon these pleas was rendered in favor of all the defendants but one, and from that

judgment the plaintiff appeals. The agreed case admits that the successful defendants fully established everything necessary to entitle them to recover under the five years' plea, provided the statute could run during that time so as to bar a suit by Mrs. Collins for the land in controversy. The appellant contends, however, that she was not barred, because, at the time the possession of the defendants under which they prescribe commenced, she was under the disability of coverture. The appellee replies that she was barred, notwithstanding the coverture, because, at the time the cause of action accrued, the legal title to the land was held by a trustee for the benefit of Mrs. Collins; that the statute commenced to run against him and completed its bar during his trusteeship, and limitations having run against him, it barred also all right of action on the part of his *cestui que trust*. This issue between the parties presents the only question in the case.

The facts are, that on the twenty-seventh day of April, 1858, Wiley V. Collins, the original patentee of the land, and then and still the husband of the appellant, made a conveyance of it to Albert N. Mills, in trust for the benefit of the appellant. The deed recited that the grantor had used property of his wife to the value of two thousand five hundred dollars in payment of his individual debts, and that he wished to vest in her the land described as a compensation for the sum thus used, believing it to be worth about two thousand five hundred dollars; and "as a husband [could] cannot convey directly to his wife," therefore he conveyed to said Mills the said land, to hold in trust for the sole use and purpose of conveying the same to his said wife whenever she should request the same. The conveyance was made by the trustee to Mrs. Collins, March 2, 1885, which was some months after the commencement of this suit.

That this conveyance vested the legal title in Mills for the sole use and benefit of Mrs. Collins, cannot be doubted; and it is also apparent from the agreement that everything necessary to complete the bar of the statute, as against a person not under disability, occurred during the time the legal title rested in him.

The question for decision in this cause is for the first time before this court, though it has been passed upon by the courts of many of our sister states, and their reports show great uniformity of decision upon the subject. It is almost universally held that when suit by the trustee is barred, the right of the

cestui que trust to sue is also gone, though he may have been under disability at the time the cause of action arose: *Wingfield v. Virgin*, 51 Ga. 139; *Wilmerding v. Russ*, 33 Conn. 67; *Williams v. Oley*, 8 Humph. 563; 47 Am. Dec. 632; *Molton v. Henderson*, 62 Ala. 426; *Smilie v. Biffle*, 2 Pa. St. 52; 44 Am. Dec. 156; *Long v. Cason*, 4 Rich. Eq. 60; *Crook v. Glenn*, 30 Md. 56; Wood on Limitation, sec. 205.

In Mississippi a contrary doctrine was announced in *Bacon v. Gray*, 23 Miss. 140, by a divided court, and has been adhered to ever since in that state. But one authority is cited in support of the views of the majority of the court in that case, viz., *Allen v. Sayer*, 2 Vern. 368, and that decision seems in conflict with the views of the same court in the subsequent case of *Earl v. Countess of Huntington*, found referred to in a note to the case of *Wych v. East India Company*, 3 P. Wms. 309. Whether the two cases can be reconciled or not upon the ground that they arose upon different facts, as has been attempted by some law-writers, is not important, as the doctrine sought to be deduced from the case of *Allen v. Sayer*, *supra*, by the Mississippi court has not met with the sanction of any other American court, so far as we can discover. In some states, however, it is held that the suit of an heir or a ward will not be barred, though the administrator or guardian could not maintain the action by reason of the lapse of time. In others, these parties are placed upon a footing with trustees appointed by deed, and their failure to sue in proper time bars the right of action in those whose property they are managing, though these be under disability. In reference to this, it is sufficient to say that in our own state it is held that the heir or ward under disability is not deprived of his action by any neglect on the part of the administrator or guardian to bring suit within due time: *Lacy v. Williams*, 8 Tex. 182; *Hanks v. Crosby*, 64 Id. 483.

However much the courts of other states may differ upon this point, they have almost universally agreed that the position of a trustee under deed is different from that of a guardian or administrator, the trustee holding the legal while the *cestui que trust* holds the equitable title; whereas the heir or ward holds the legal title, subject only to the right of the administrator or guardian, to control the estate for the benefit of all parties interested in it or its administration: *Wingfield v. Virgin*, *supra*; *Ladd v. Jackson*, 43 Ga. 288.

This distinction is recognized by this court in the case of

Hanks v. Crosby, supra, though its sequence that the *cestui que trust* is barred when the trustee is barred, though an heir or ward could not be prejudiced by the laches of the administrator or guardian, is not authoritatively announced.

This would seem, however, to be a natural deduction; for to debar the owner of the equitable title from a right of action, the legal title must be fully barred. This cannot be effected except through the laches of the one in whom that title is fully vested. The neglect of an administrator or guardian to bring suit in proper time cannot therefore prejudice the title of the ward or heir who is under disability, and against whom therefore, the statute of limitations cannot run. But when the full legal title is vested in a trustee, to be held for the sole use and benefit of another, and subject to no other consideration except that it shall be conveyed to such other person on demand, when suit by the grantee is barred, the full legal title is barred, and according to well-established principles, the legal estate being barred, the equitable estate is also. Whether there may not be sound reasons for an opposite doctrine, we shall not pause to consider. The principle seems thoroughly embedded in the jurisprudence of this country; and being supported by reasoning which is persuasive of its correctness, we feel disposed to give it our sanction and keep within the line of the authorities. But it cannot be extended beyond the case made, and those to which the principles announced are precisely applicable. It does not, of course, apply to cases where a claim is set up through the trustee, as against the *cestui que trust*, or those claiming under the latter.

It cannot affect the rights of a person laboring under disabilities when the cause of action arose, if at that time the legal title existed in him, though the control of the property was intrusted to another, nor to a case when the cause of action arose from any breach of trust on the part of the trustee other than the mere failure to sue within the period of limitation.

Other exceptions might be named, but it will be time enough to pass upon them when demanded by some case under decision.

Even as thus guarded, the doctrine may operate harshly upon parties peculiarly within the protection of courts of equity; but it is not the only case in which such parties are made to suffer from the neglect or misconduct of the trustee to whom their interests have been confided by persons seeking

to provide for their welfare. But as was said in the case of *Herndon v. Pratt*, 6 Jones Eq. 334: "If by reason of neglect on the part of trustees, *cestuis que trust* lose the trust fund, the remedy is against the trustees; and if they are irresponsible, it is the misfortune of the *cestuis que trust*, growing out of the want of forethought on the part of the maker of the trust under whom they claim."

We think the appellant's suit was at the time it was begun barred as to the parties in whose favor judgment was rendered below, and the judgment is affirmed.

STATUTE OF LIMITATIONS, WHEN BAR against the trustee, is also a bar as against the *cestui que trust*: *Bryan v. Weems*, 65 Am. Dec. 407, and note 413; *Mason v. Mason*, 83 Id. 172; note to *Miles v. Thorne*, 99 Id. 398.

STATUTE OF LIMITATIONS, WHEN DOES NOT RUN as between trustee and *cestui que trust*: *Miles v. Thorne*, 99 Am. Dec. 384, and extended note 389-390.

TRAMMELL AND COMPANY v. MOUNT.

[68 TEXAS, 210.]

MECHANIC'S LIEN IS NOT DEFEATED when delivery of the material at the building is defeated by the act or direction of the owner. If he directs that the material be delivered at some other place, or after it is prepared, and nothing remains to be done by the material-man but to take it to the building, the owner violates his contract and refuses to receive it, he cannot thus defeat the lien.

MECHANIC'S LIEN, THOUGH NOT FIXED BEFORE RECORD of the contract or bill of particulars, when it is fixed, relates back to the time when the work was performed or the material furnished, and takes precedence of all claims to the property improved which have fastened upon it since that time.

PARTY ALLOWING WITNESS TO TESTIFY without being sworn thereby waives any objection to it on that account.

WHERE PROPERTY SUBJECT TO MECHANIC'S LIEN is sold under attachment, after which the lien is foreclosed, the surplus, if any, after satisfying the lien, should be paid to the purchaser under attachment, and not to the original owners.

Cowan and Posey, and S. H. Cowan and G. S. Jones, for the appellants.

By Court, WILLIE, C. J. The appellee sued the firm of Lawson, Smith, & Co. to recover an amount alleged to be due him from that firm, on account of a contract, in which, for a specific sum, the appellee agreed to furnish the work and material necessary to build for the appellants four stone walls

of a house of dimensions specified in the contract. He also prayed for the foreclosure of a mechanic's lien upon the improvements made by him, and the lots upon which they were situated. The firm of Thomas Trammell & Co. were made defendants, under an allegation that they claimed some kind of interest in the property.

Judgment was rendered for the plaintiff for the sum of \$1,361.20, and foreclosing a lien upon the lots and premises concerning which the contract was made. The sheriff was ordered to sell these as under execution, satisfy this lien and costs out of the proceeds of sale, and pay the remainder to the defendants Lawson, Smith, & Co. From this judgment the defendants Thomas Trammell & Co. have appealed to this court.

The facts are: Lawson, Smith, & Co. entered into a verbal contract with Mount, in which the latter agreed to build the walls of a stone house for Lawson, Smith, & Co., furnishing all the labor and material necessary for that purpose, and to finish the work in ninety days from January 12, 1884, they to pay him therefor two thousand three hundred dollars, in such sums as he might need from time to time to carry on the work, and the remainder at its completion. Mount commenced work, and had provided a large quantity of stone, some of which had been used in building the walls, and the remainder fully prepared to use in this way, when Lawson, Smith, & Co. notified him that they were unable to comply with their part of the contract, and Mount was forced to quit work. This was on the 8th of March, 1884; and on the 18th of the same month Trammell & Co. had an attachment levied upon the lots upon which the stone house was in the course of being built, and they were subsequently sold in satisfaction of the attachment lien, and bought in by Trammell & Co. On the 24th of March, 1884, Mount filed with the county clerk, and had recorded, a bill of particulars of the work done and material furnished by him, and its value, and had a duplicate served upon the defendants Lawson, Smith, & Co.

It was developed by the evidence that about four hundred perches of the stone included in the bill of particulars did not enter into the structure of the walls, and that it was not delivered upon the premises; but that it was prepared for use in the building, and kept one mile and a half from the place where the walls were being built. It is claimed by the ap-

pellants that for this material, and the work done upon it, the appellee has no lien upon the premises. According to the testimony, the work done upon this stone cost \$1.50 per perch; and it is for this amount that the lien is claimed.

Our statute says that any person, or firm, lumber dealer, artisan, or mechanic, who may labor or furnish material to erect any house or improvement, shall have a lien upon such house, etc., and shall have a lien upon the lot or lots necessarily connected therewith to secure payment for labor done, lumber, material, machinery, or fixtures, and tools furnished for construction or repairs. If, therefore, the labor on the stone, which was not delivered at the place where the walls were being built, was furnished for their construction, the mechanic's lien attaches to the property subjected to it by the judgment below, unless it was necessary to the lien that this stone should have actually entered into the construction of the walls. It is held by some authorities that the lien cannot exist unless the material, for the furnishing of which it is sought, has actually gone into the improvement of the property for which it was intended: *Hunter v. Blanchard*, 18 Ill. 318; 68 Am. Dec. 547; *Taggard v. Buckmore*, 42 Me. 77; *Schulenberg v. Prairie Home Institute*, 65 Mo. 295. By others it is held that if the material is delivered at or near the building, it is sufficient: *Eeslinger v. Huebner*, 22 Wis. 682; *Neilson v. Iowa Eastern R'y Co.*, 51 Iowa, 190; 33 Am. Rep. 124; *Beckel v. Petticrew*, 6 Ohio St. 247. And by others the lien is upheld, though the material be not delivered at or near the building, and never enters into its construction: *Hinchman v. Graham*, 2 Serg. & R. 170, and authority cited. We are inclined to adopt the latter view in cases where the delivery at the building, is prevented by the act or direction of the owner. If he directs, for his own convenience, that the material be delivered at some other place, or after it is prepared, and nothing is left to be done by the material-man but to take it to the building-spot, the owner violates his contract and refuses to receive it, it seems that justice dictates that, through his own conduct, the owner should not defeat the lien. The language of the statute does not require such a delivery, nor does it require that the material should actually enter into the construction of the improvement. To furnish material for the construction of a house, and to furnish materials which enter into its construction, are very different things. To give our statute the latter construction is to strain its words beyond

their usual meaning, and this should not be done for the purpose of depriving mechanics and others of the protection which the statute was evidently intended to give them. We rather incline to a liberal construction in their favor.

We have heretofore held that a delivery to the owner, no matter at what distance from the building, transfers the title to the material: *Fayan v. Boyle Ice M. Co.*, 65 Tex. 324. It gives the owner of the building complete ownership and control over it; and it would be unjust to place it in the power of the person to whom it was delivered or furnished, to defeat a lien upon his property through his own wrong in appropriating it to other purposes than those for which it had been furnished. The law did not, certainly, intend to leave it to the owner to say whether the material-man should have his lien or not, but to compel the lien when the latter had done all that was required of him, though the owner should attempt to defeat it.

The present is a strong case in favor of the mechanic. He made a contract to construct the stone-work of a house for a given sum. The parties with whom he contracted failed to perform their part of the contract, and forced him to quit work. Had he completed the work, he would have been entitled to the full sum agreed on, and to enforce a lien to collect it. Under the law, when compelled to desist from the work, he was entitled to a *pro rata* recovery. Why should he not enforce his lien to the same extent? The law gave him a lien as an incident to the contract. Everything that he did in the performance of that contract was necessarily done towards the construction of the building, and as necessarily carried with it a right to the lien. In the nature of things, much of the work had to be done away from the building. If the contractor had been permitted to go on with his contract, it would have entered into the improvement he had agreed to make. If forced by the owners to stop before he could place the work in the building, it would not change its character. It was still work done under a contract for constructing the walls, and as such should carry with it a lien upon the building. The owner was not thereby relieved from the liability to pay for the work done, and his liability under the contract carried with it the mechanic's lien.

We think the plaintiff was entitled to his lien for all work done up to the time Lawson, Smith, & Co. defaulted in their contract, including the work done upon stone which was not

carried to the premises where the building was being constructed. This ruling leaves the ownership of the stone in Lawson, Smith, & Co., and renders it subject to their debts.

There is nothing in the objection that the items of the bill of particulars were not dated. All had dates attached to them except one, and it was made apparent by the bill itself that this was done during the continuance of the contract.

The lien of a mechanic, though not fixed before record of the contract or bill of particulars, when it is fixed relates back to the time when the work was performed or the material furnished, and hence takes precedence of all claims to the property improved, which have been fastened upon it since that time. This is the effect of the previous decisions of this court: *Huck v. Gaylord*, 50 Tex. 580; *Fagan v. Boyle Ice Mfg. Co.*, 65 Id. 331. The registration does no more than preserve a lien which exists already. There was no error in overruling the motion for a new trial. The appellants allowed the witness to give his testimony without being sworn, and thereby waived any objection to it on that account.

But there was error in ordering the surplus proceeds over and above enough to satisfy the plaintiff's debt and costs to be paid to Lawson, Smith, & Co. The appellants were the owners of the equity of redemption by reason of their purchase at the attachment sale, and as such entitled to that portion of the proceeds of the sale which represented that equity. The equities of the plaintiff and the appellants were before the court for adjustment, and it should have decreed out of the proceeds of sale to the plaintiff enough to pay his debt and costs, and to appellants, who were owners of the property, subject to the plaintiff's lien, whatever balance might remain. The judgment will be refused at the costs of the appellee, so as to decree to the appellants this surplus of the proceeds. In all other respects it is affirmed.

MECHANIC'S LIEN ATTACHES FROM WHAT DATE: *Monroe v. West*, 79 Am. Dec. 524, and note 529; *Rees v. Ludington*, 80 Id. 741; *Williams v. Chapman*, 65 Id. 669, note 672.

MATERIAL, WHETHER MUST GO INTO BUILDING to secure mechanic's lien: *Chapin v. Peress etc. Paper Works*, 79 Am. Dec. 263 and note 274.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY v. DUNHAM.

[68 TEXAS, 231.]

TEXAS STATUTE IMPOSING LIABILITY UPON RAILROAD COMPANY for injuries done to stock, unless the railway is fenced, does not apply to such places as public necessity or convenience requires should be left unfenced, such as the streets of a city or town, depot or contiguous grounds, crossings of highways, and other such places; but when injury happens at or in such place, the burden of proof is on the company to show that they are relieved of the statutory duty; when this is done, it is only liable for negligence.

IN ABSENCE OF PROOF OF NEGLIGENCE OF RAILROAD COMPANY injuring stock running at large at a depot in the settled part of a town where the company could not fence its track, as public necessity required it to be left open, the company is not liable.

IN ACTION AGAINST RAILROAD COMPANY FOR INJURY TO STOCK running at large in a town, evidence is admissible to show that the stock, under the law, was not allowed to run at large, as the company may presume a compliance with such law by the owner of the stock, and is excused from exercising such care as is exacted, when animals are permitted to run at large. When no such law exists, the company is liable for want of ordinary care; when such law does exist, it is liable only for gross negligence.

WHERE RAILROAD IS OWNED BY ONE COMPANY AND LEASED TO ANOTHER, without authority, both are liable for injury wrongfully committed by the lessee; the one because of its actual operation of the road, and the other because, without legislative permission, it could not transfer its franchise temporarily, so as to release itself from liability for the acts or defaults of its lessee.

Edmunds, for the appellant.

By Court, WILLIE, C. J. The appellee was the owner of a valuable sow and brood of pigs which he allowed to run at large in the town of Cotulla, La Salle County. While trespassing upon the track of appellants at their depot in Cotulla, they were struck by the engine of a train, and the sow killed and one of the pigs injured. This suit was brought to recover damages for the injury; and the district court, to which the cause had been removed by appeal from a justice's court, rendered judgment in favor of the appellee for \$42.50, and from that judgment this appeal is taken.

The plaintiff proved facts tending to show that the injury was caused by the engine and cars of the defendant, and that the railroad was not fenced at the place where it happened, gave evidence of the amount of damages he incurred thereby,

and rested his case. The defendant proved that the accident occurred at its depot grounds within the town of Cotulla; that the town was then built up on both sides of the track; and if the railroad was fenced there, it would create a great inconvenience to the public, as they could not then pass without difficulty from one part of the town to the other. No proof of negligence of any character was proved against the appellants, the plaintiff relying solely upon their failure to fence their track as conclusive upon that point.

During the trial the defendants offered in evidence certain proceedings of the county court of La Salle County, showing that stock was by law prohibited from running at large in precinct number 1 of that county, which embraced the town of Cotulla. Upon objection of plaintiff, these proceedings were excluded from the jury, and to this action the defendants reserved a bill of exceptions.

At the time this suit was tried below, the case of *International and Great Northern R. R. Co. v. Cocks*, 64 Tex. 151, had not been published in our reports, and doubtless had not come to the knowledge of the learned district judge who presided at the trial, or he would have followed the principles there declared by this court. We then held that "the general terms of our statute imposing a liability on railway companies for injuries done to animals, unless their railways are fenced, do not apply to such places as public necessity or convenience require should be left unfenced, such as the streets of a city or town, depot and contiguous grounds, the crossings of highways, and other like places." These principles are supported by the numerous decisions cited in the opinion made upon statutes similar to our own, and constitute the settled law of our state upon this subject.

It was, however, said in that case that when an injury "occurs within the limits of a town or city, it rests with the railway company to show that the place at which the animal entered was one which under the law it was not permitted to fence." The corporation of a town or city often embraces territory which is not used by the public differently or to a greater extent than the same character of land in the country. To fence the road at such places would not interfere with the public convenience, and as to these places there is no reason why the railroad company should not comply with the statutory requirement. The burden of showing that the company is relieved from its statutory duty is thrown upon it, and

when this is established, it is liable only in the event that the injury has resulted from the want of ordinary care.

In this case the injury occurred at the depot of the appellants, and within the settled portion of the town, where the companies could not have fenced their track, as public necessity required that it should be kept open; and no proof having been made that the injury occurred from want of ordinary care on the part of the appellants, judgment should have gone in their favor. The court should have charged the jury in accordance with the principles herein announced; and because this was not done, and the judgment is against the law and the evidence, it must be reversed.

We think, too, that the court should upon another trial, if requested, admit evidence showing that stock was not, under the law in existence when the injury for which this suit was brought occurred, allowed to run at large in the town of Cotulla. Railroad companies are entitled to presume that every person will comply with the law which forbids the owner to allow his animals to run at large. Hence they are excused from the exercise of such care as is exacted of them when animals are permitted to run at large. When there is no such law, they are liable for the want of ordinary care; where there is such a law, they are liable only for gross negligence. The evidence is therefore important in determining the degree of negligence for which the appellants may be responsible: *International and Great Northern R. R. Co. v. Cocke, supra*.

The evidence does not inform us as to why this action was brought against the two railroad companies appellant. There was no point made below as to the ownership of the road, and it might be presumed that the road and the rolling stock that caused the injury belonged jointly to the two companies. If, however, it should appear that it was owned by one company and leased to the other without special authority from the state, both companies would be liable, the one because of its actual operation of the road, and the other because it could not, without permission of the legislature, transfer its franchise even temporarily so as to release itself from liability for the acts and defaults of its lessee: *Central and Montgomery R. R. Co. v. Morris and Crawford, and Gulf, Colorado, and Santa Fe R'y Co. v. Morris and Crawford*, 67 Tex. 692.

The judgment is reversed, and the cause remanded.

Jord v. Minneapolis etc. Ry Co., 60 Id. 795; *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 239.

RAILROAD COMPANY IS NOT LIABLE for injury to stock wrongfully upon the track, nor need it maintain a fence against such stock: *Chapin v. Sullivan R. R.*, 75 Am. Dec. 237, and note 240.

LIABILITY OF LESSOR AND LESSEE OF RAILROAD for the negligence of the lessee: *Whitney v. Atlantic etc. R. R. Co.*, 69 Am. Dec. 103, and note; note to *Ohio etc. R. R. Co. v. Dunbar*, 71 Id. 295-298; *Singleton v. Southwestern R. R. Co.*, 48 Am. Rep. 574, and note 580.

GRIGSBY v. PEAK.

[68 TEXAS, 285.]

ESTOPPEL. — ONE WHO CONVEYS BY DEED the interest in land allotted to him in partition is not thereby estopped from maintaining repartition proceedings to obtain a larger proportion of the same tract than was set apart to him in the first partition, which was concluded during his infancy, and when his right is based upon a title not adjudicated in the first proceeding.

DOCTRINE OF IMPLIED WARRANTY IN COMPULSORY PARTITION does not apply to one who seeks in repartition to obtain a larger portion of the same tract of land than was set apart to him in the first partition made during his infancy, and when he claims under a title, not adjudicated in the former partition. Such doctrine applies only to the title under which he received his first distributive share.

IMPLIED WARRANTY IN PARTITION. — Partition is based upon the fact, real or supposed, that the parties between whom it is made own the thing partitioned, and it is to protect those who take that which was not owned in common that the rule of implied warranty in compulsory partition is invoked, and it exists only so far as is necessary to give such protection, which may be affected by repartition of that actually owned in common, or by requiring those who received that to compensate the others for the interest they owned before partition.

IMPLIED WARRANTY IN COMPULSORY PARTITION does not carry the same obligation and measure of liability which results from general warranty of title by deed, for on failure of title to land conveyed by deed of general warranty, the vendee would be entitled to recover the purchase-money, with interest, but on failure of title to land set apart to one in partition, such would not be the rule, for the value of the interest in the land owned by such person at the time of partition would compensate him, and would be the measure of recovery.

PARTITION IS NOT MEANS FOR ACQUIRING TITLE, but through it every common owner may seek and acquire the right to the exclusive ownership and possession of a part of that which before was owned by all, and which each co-owner had equal right to own and possess.

Richard Morgan, Jr., and Jeff Ward, Jr., for the appellant.

Stemmons and Field, and Leake and Henry, for the appellee.

By Court, STAYTON, J. The leading facts involved in this case are stated in the cases of *Caruth v. Grigsby*, 57 Tex. 259, and *Grigsby v. Caruth*, 57 Id. 273. Every question but one raised in this case was decided adversely to the appellee in the cases above referred to. The question not decided in the cases mentioned arises on the following facts:—

1. The land of which that in controversy is a part was community property, owned by John Grigsby and his wife, Louisa.

2. John Grigsby died in 1841, leaving nine children, of whom seven were by a former wife, and two (D. B. and Emeline Grigsby) were the children of himself and his wife Louisa.

3. The entire land in controversy in this action, belonging to John and Louisa Grigsby, was partitioned in the probate court having the administration of his estate among his nine children, each one taking an equal share.

4. There was no partition between the estates of John Grigsby and his wife Louisa, and that made purported to be only a partition of the estate of John Grigsby.

5. Louisa Grigsby, having married after his death, had one child by her last husband, who is Maria Louisa Swindle, and a party to this action, to whom, however, nothing was given in the partition to which we have referred, she not being an heir of John Grigsby.

6. After the partition was made, Emeline Grigsby sold the part of the tract set apart to her to the appellee and others, and D. B. Grigsby subsequently sold the part set apart to him to other persons.

From this statement it will be seen that each of the nine children of John Grigsby only inherited from him one eighteenth of the tract of land of which that in controversy is a part, but in the partition made they each received two eightieths of the entire tract partitioned. It will be further seen that D. B. Grigsby and his sister Emeline, as well as the child of their mother by her second husband, each inherited from their mother three eightieths of the land in controversy in this action.

Through the partition of John Grigsby's estate, each of his children by his first wife received double the quantity of land they inherited from him, while D. B. and Emeline Grigsby in that partition only received one half of the land to which they were entitled by inheritance from their father and mother, while the daughter of their mother by her second husband

received nothing at all. This action was brought by D. B. Grigsby to recover two eighteenths of the land described in the petition, same as that partitioned as the estate of his father, while Mrs. Swindle seeks to recover three eighteenths of the same land. The appellee claims nothing except through the conveyance of Emeline Grigsby.

In the case of *Caruth v. Grigsby*, 57 Tex. 259, it was held that the appellant was not precluded by the decree of the probate court, which preferred only to partition the estate of John Grigsby for ascertaining his right to recover on his claim based on inheritance from his mother, on the ground that a party is concluded by a judgment in the right only on which he sues or is sued.

In the case of *Grigsby v. Caruth*, 57 Tex. 269, the court instructed the jury as follows: "You are charged that if you believe from the evidence that Daniel B. Grigsby accepted the portion of the land set aside to him by the probate court of Anderson County, in the attempted partition of the league and labor survey originally granted to John Grigsby, and afterward conveyed it by deed or deeds, referring to such partition as his source of title, he will be concluded as respects the property embraced in the petition, and you will find for the defendant, William Caruth, against the plaintiff, Daniel B. Grigsby."

The facts in that case were such as to involve the same questions and principles as are involved in this, and it has held that the facts embraced in the charge given did not create an estoppel. The decisions in those cases to which we have referred are directly applicable to this, which is but a part of the case in which those decisions were made, severance having been made. Seeing no reason to doubt the correctness of the decisions made in the cases referred to, the questions again presented in this case will not be further discussed.

On the trial of this cause, the court gave the following charge: "If the plaintiff, D. B. Grigsby, was a party to a proceeding in the probate court of Anderson County, in which the land in controversy in this suit was partitioned, and if the said Daniel B. Grigsby was allotted a portion of said land, and if he subsequently accepted a portion of the land so allotted to him, and after he became of age (twenty-one years) sold it, he is bound by the law of implied warranty,—that is to say, the law annexes to such partition a warranty of title from one to the other of the parties or co-tenants in such par-

tion; and the said D. B. Grigsby, not having been disturbed in the possession of or evicted from the portion assigned to him in such partition, cannot recover in this suit; and you will, as to the said D. B. Grigsby, if you find such facts to exist, find a verdict for the defendant." Under this instruction, a verdict and judgment were entered against D. B. Grigsby.

It is now insisted that this charge was incorrect in view of the facts of the case. That a warranty is implied in cases of compulsory partition made between tenants in common, is true: *Ross v. Armstrong*, 25 Tex. Sup. 355. This rule is now made statutory (R. S., art. 2483); but it is unnecessary to consider whether the warranty given by the statute is more comprehensive than was implied before the statute was passed, for be that as it may, this case must be determined upon the principles applicable to the question before the adoption of the Revised Statutes.

In determining the nature and extent of a warranty implied on compulsory partition, it becomes necessary to consider the reasons which gave rise to the implication, and the purposes of justice intended to be subserved by it. Every rule, the outgrowth of long experience and observation, has its reason, and is established for the preservation of rights, and the fair adjustment of conflicting claims and equities existing between man and man; and when the reasons on which a rule is based do not call for its application in a given case, it would be a perversion of justice to apply it.

The reasons which called for an implied warranty in compulsory partition between coparceners at common law apply here to such partitions as may be compulsorily made between any persons who, under the laws of this state, are entitled to have such partitions made, and are thus well stated in the case of *Ross v. Armstrong*, *supra*: "But this implied warranty and condition were, by the common law, confined to a partition made between coparceners, and for the reason, it is supposed, that the right of compulsory partition was given by the common law only to coparceners, and not to joint tenants, or tenants in common, to whom the right was first given by statute. The common law, having given this right in favor of coparceners, deemed it reasonable and just that they should not be placed in a worse condition by the partition (which could be compelled by writ of partition or a bill in chancery) than if they had continued to enjoy their respective interests with-

out a partition; in which case, if suit had been commenced upon a paramount title, all must have been implicated, and in case of recovery, all must have sustained their due proportion of the loss. In order, therefore, that they should not be placed in a worse condition by a compulsory partition, the common law annexed to the partition the implied warranty as a condition for their protection."

Partition is based on the fact, real or supposed, that the persons between whom it is made own the thing partitioned, and if they do so only in part, and the part not so owned in common be set aside to one or more of the supposed owners, then those who receive in partition that part of the thing which was owned in common receive something in which the co-owners had an interest, for which in return those who receive a part not so owned receive nothing. It is to protect those who in partition take that which was not owned in common that the rule invoked in this case has an existence, and it exists only so far as is necessary to give such protection.

Through it protection is given to such persons, through a repartition of that actually owned in common, or by requiring those who received that to compensate the others for the interest they owned before partition. The word "warranty" is an inapt expression when used to indicate the engagement resulting from partition, if it be understood to carry the same obligation and measure of liability which results from a general warranty of title made in a deed by which one person sells and conveys land to another; for the obligations resting on the parties in the two cases are different in some respects.

Whether the implied warranty arising on partition would pass an after-acquired title may well be doubted, for the accession to the property partitioned would entitle the person through whose means by an after-purchase it was acquired to contribution. On failure of title to land conveyed by and with general warranty, the vendee would be entitled to recover from his vendor the purchase-money, with interest, which is supposed to represent the value of the land; but in case of failure of title to land set apart to one in partition, this would not be the rule; for the value of the interest in the land actually owned by such person at the time partition was made, with interest on it, would give to him full compensation, and would be its measure.

If repartition be sought on failure of title to the part set apart to one in such case, the co-owner, whose share failed

through defect in the common title, could only have such proportion of the land actually owned by all at the time of partition as his interest sustained to the entire land that ought to have been partitioned. As an illustration: should two persons, supposing they owned, as tenants in common, in equal shares, one hundred acres of land, cause partition of it to be made, and each have set apart to him fifty acres of the land which they supposed they owned, then on failure of title to the land set apart to one, it would not be his right to have the value of the fifty acres set apart to him, but to have the value of one half of the fifty acres which they did own, or to have repartition of that.

Thus far the implied engagement of the co-tenants would be extended, and no further; while had the transaction been a sale by one to the other, through a deed with general warranty, the engagement would be more extensive.

Partition is not a means for acquiring title, but through it every common owner may seek and acquire the right to the exclusive ownership and possession of a part of that which before partition was owned by all,—which before partition each co-owner had equal right to use and possess.

If the implied warranty existing on compulsory partition be the equivalent of a general warranty made in a deed by which land is sold and conveyed, it would become indirectly a means of acquiring title to something to which none of the parties to an attempted partition had title, and it would extend in its operation further than is necessary to give full protection to the co-owner when title to land received in partition fails.

In the case before us, there has been no failure of title to any part of the land which belonged to the estate of John Grigsby that was set apart to any one of his children in the attempted partition. No one of his heirs is called upon to surrender any part of the land which such heir inherited from him, though they may be compelled to submit to a repartition of the land, of which partition was attempted to be made. If the doctrine of implied warranty, as invoked in this case, has application, it applies, as between all parties to the attempted partition, between the children of John Grigsby by his first and second wives as well as between the children of each wife. Is such a rule necessary for the preservation of any right any of the parties may have had before the partition was attempted? We think not.

The right of each of the children of John Grigsby, by his

first wife, to one eighteenth of the land in controversy is as full and complete as it ever was, and is not controverted. By virtue of what process or on what consideration can they claim to have the quantity of land which they inherited doubled? There is no efficacy in an implied warranty resulting from an attempted partition which can work such an effect.

D. B. Grigsby, having received one half the quantity of land that he inherited from his father and mother, now seeks to recover only the residue to which he is entitled by inheritance from his mother; and the defendant now before us claims through his sister, who had equal right with himself. Under this state of facts, the implied warranty given in partition cannot be made to operate any divestiture of right D. B. Grigsby may have through inheritance from his mother. To permit him to recover what he was entitled to at the time partition was attempted deprives no persons of what they were entitled to; and it would be singular indeed, when the decree through which the partition was attempted was not sufficient of itself to bar his right to recover what he owned at the time it was entered, if its indirect effect—an implied warranty—could have such operation.

The charge complained of should not have been given.

It appears that the person through whom the appellee claims was a sister of D. B. Grigsby, entitled, if the attempted partition fairly represented the value of the several parts of the land set apart to the several children, to more land than she received and sold; and in disposing of the case, we deem it proper to say that we see no good reason why the appellee, and all other persons similarly situated, may not be fully protected by having the land which they bought from Emeline Apsly, *nee* Grigsby, set apart to them in the final partition which the plaintiffs ask shall be made of all the land which is described in the petition, if this can be done without detriment to other persons.

If, without the attempted partition, the vendor of the appellee had sold the particular tract which she did sell, under the rules well settled in this state, as elsewhere, the vendee would be entitled to have the particular land bought by him given to him in partition, if this can be done without prejudice to others interested in the entire land. Justice requires that this should be done if possible.

The appellee has severed from the other defendants, but this furnishes no sufficient reason why he should not have the relief

- suggested. The right of the parties may be determined in this proceeding in severance, and the ultimate adjustment of equities be made on final partition of the land described in the plaintiff's pleading.

For the error noticed, the judgment of the district court against D. B. Grigsby will be reversed, and the cause remanded.

ESTOPPEL BY WARRANTY IN PARTITION DEED as between joint owners: *Mitchell v. Petty*, 98 Am. Dec. 777; *Walker v. Hall*, 86 Id. 432; *Deane v. Willcutt*, 66 Id. 369.

WARRANTY IN PARTITION DEED, effect and extent of: *Saunders v. Cator*, 47 Am. Dec. 608, and note 618.

PARTITION PROCEEDINGS DO NOT DECIDE TITLE: *McBain v. McBain*, 86 Am. Dec. 478 and note 482.

GULF, COLORADO, AND SANTA FE RAILWAY COMPANY v. TRAWICK.

[68 TEXAS, 314.]

IN TEXAS A RAILROAD COMPANY MUST RECEIVE AND TRANSPORT LIVE ANIMALS as other property, and after receiving, it becomes an insurer of them, as in case of other property which it is bound to transport, against loss from any cause except the act of God, the public enemy, the act of the owner, or the vicious propensities or inherent character of the animals themselves. This liability cannot be limited by special contract, even as to matters to which it might legally contract at common law.

RAILROAD COMPANY, AS COMMON CARRIER OF ANIMALS, may by contract limit its liability for loss by stipulating that the shipper shall not maintain an action against it for damage after forty days shall have elapsed from the time when the cause of action arose, though such time is shorter than that named in the statute of limitations. Such contract is valid if founded upon sufficient consideration, and reasonable in its terms.

Matthews and Wood, for the appellant.

Peeler, for the appellee.

By Court, STAYTON, J. This action was brought by the appellee to recover damages for injury to cattle in course of transportation from Navasota to Lampasas, for cattle alleged to have been lost through a defective stock-pen at the place of shipment, and cost of passage for himself, he alleging an agreement to give him passage free of charge other than that made for transporting the cattle, and that the train on which his

cattle were left Navasota without him, through the negligence of the employees of the appellant. The cattle were shipped under a special contract, as it is claimed, at a rate lower than the regular rate.

By this contract the appellant sought to make its liability only that of a private carrier, and to release itself from liability for any delay in receiving, shipping, or transporting the cattle, or for injury to them, caused otherwise than through fault or negligence of its officers, agents, or employees.

It attempted to bind the shipper to accept such cars as the company might furnish for transportation of the cattle, and to relieve the carrier from liability for loss resulting from heat, suffocation, or other ill effects caused by the animals being crowded in the cars, or on account "of being injured by burning of hay, straw, or other material used by the owner for feeding the stock, or otherwise, and all risk of damage which may be sustained by reason of any delay in such transportation, whether occasioned by any mob, strike, or threatened violence to person or property, from any source, to track or yards, and all risk of escape or robbery of any portion of said stock, or of loss or damage from any other cause or thing not resulting from the willful negligence of the agents of the carrier."

It attempted to bind the shipper to load, unload, and reload the stock at his own risk, and at his own risk to feed, water, and attend to them while in stock-yards, on the cars, and at feeding and transfer points; and it further attempted to impose upon the shipper the duty of seeing that the stock was securely placed in the cars the carrier might furnish, and so to fasten the cars as to prevent the escape of animals therefrom. It also provided that laborers furnished by the carrier to load and unload the stock should be deemed the employees of the shipper; and that "as a condition precedent to his right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station-agent, before said stock is removed from its place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock."

The statutes of this state provide that "railroad companies and other common carriers of goods, wares, and merchandise for hire, within this state, on land, or in boats or vessels on the

waters entirely within the body of this state, shall not limit or restrict their liability, as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid": R. S., art. 278.

That railroads are common carriers is determined by the constitution and laws of this state, as well as by the nature of the business in which they are engaged, is not an open question, and their duties, obligations, and liabilities resulting from this public character attach when animals are tendered or received for transportation, as fully as do they in reference to other classes of property tendered or received for transportation.

As has been correctly said: "The law has introduced by implication into every contract for the carriage of goods an exception to the carrier's liability in cases where the loss to them, whilst in his charge, has been occasioned by the act of God or of the public enemy, or by their own decay from an inherent infirmity, or by the fault of the owner himself, so it has, from the necessity and justice of the case, introduced an exception in favor of the carrier of live-stock of accountability for its loss or injury resulting from its own uncontrollable vicious propensities, and the damages incident to its carriage from its inherent natural character": Hutchinson on Carriers, 222.

Under the statute of this state, a railway company must receive and transport live animals as other property, and after receiving, it becomes an insurer of them, as in the case of other property which it is bound to transport, against loss from any cause except the act of God or of the public enemy, the act of the owner, vicious propensities or inherent character, or, as it is sometimes termed, the "proper vice" of the animals. This is the liability imposed upon the common carrier by the common law, and the statute declares that the "liabilities of carriers in this state shall be the same as prescribed by the common law": R. S. 277. Such being "their liability as it exists at common law," the declaration of the statute that they "shall not limit or restrict their liability as it exists at common law in any manner whatever," and that "no special agreement made in contravention of the foregoing provisions of this article shall be valid," deprives such carriers of the

right to limit their liability by contract, even as to matters in reference to which they might legally contract under the common law.

The common-law duties and liabilities, and not those duties and liabilities as they may be affected by contracts lawful under the common law, are the duties and liabilities of common carriers under the statutes of this state, and they cannot be restricted or limited by any contract or agreement whatsoever in cases to which the statute is applicable. The rule may seem a harsh one, but be that as it may, the legislature of this state has established it, and courts have no power or right to refuse to enforce it, or to place a construction on the statute which its language does not authorize.

The duties and liabilities imposed on common carriers are inseverable. A failure of duty resulting in loss to the shipper fixes liability; and if, by contract, duties imposed by the common law may be dispensed with, then a restriction or limitation of the common-law liability would necessarily follow to the extent to which duty existing without contract might be dispensed with by it: *Missouri Pacific R'y Co. v. Harris*, 67 Tex. 166. The carriage, in this case, was wholly within this state, and the statute is directly applicable to it.

The special contract, in so far as we have given in substance its terms, was invalid, and therefore cannot shield the appellant from any liability that would have existed had it not been made.

The contract further provides as follows: "It is further hereby and herein expressly provided and mutually agreed that no suit or action against this company, for recovery of any claim by virtue of this contract, shall be sustained in any court of law or chancery, unless such suit or action shall be commenced within forty days next after the damage shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid forty days, the lapse of time shall be taken and deemed conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

If this clause of the contract, within the meaning of the statute, does not limit or restrict the liability of the carrier as it exists at common law, it must determine the right of the shipper to maintain this action, unless it contravenes some rule founded on public policy.

By "liability as it exists at common law," we understand

to be meant such state and degree of legal responsibility as the common law fixes upon the carrier under a given state of facts. The word "limit" ordinarily means to fix the extent of the subject to which it is applied, rather than to fix the duration of time within which a right, growing out of the subject, may be enforced; and as used in the statute, may mean no more than that the carrier shall not relieve himself, by contract, from obligation to make such full compensation for breach of duty as the common law would impose under the facts in the given case. The word, however, ordinarily has much the same signification as the word "restrict"; but the inference arising from the use of both words in connection and in relation to the same subject is, that they were not used as exact equivalents.

The word "restrict" means "to restrain within bounds"; and as used in the statute, in connection with the carrier's liability, before declared, was evidently used to prohibit the carrier from so contracting as to make his liability to depend on facts other than such as would fix liability under the settled rules of the common law.

In case of contract, the facts made necessary by it to the existence of legal obligation become restraints or restrictions on legal liability, if, in the absence of contract, liability, under the settled rules of the common law, would be fixed by the existence of facts other than made requisite to liability by the contract.

The statute fixes the boundaries of fact which will impose liability on the carrier, by making it to depend on the facts sufficient to create it under the rules of the common law; and a contract which, if given effect, would defeat liabilities thus arising would be invalid.

A contract, however, which does not in any way, if given effect, defeat the complete vestiture of the right to recover from a common carrier for a breach of duty that at common law would give it, does not operate as a restriction on the common-law liability of the carrier, even though it may require the assertion of that right by action at an earlier period than would be necessary to defeat it through the operation of the ordinary statutes of limitation.

In the case before us, so much of the contract as sought to limit or restrict the liability of the carrier as it exists at common law being invalid, the liability of the carrier was fixed; and under the terms of the contract, the shipper might have

enforced it by action at any time within forty days after he sustained injury. The statutes of this state only forbidding such contracts as would limit or restrict the common-law liability of carriers, we see no reason why contracts executed upon sufficient consideration, and reasonable in character, looking only to the time within which such liability may be enforced, should not be held valid. There is no rule of the common law which forbids such contracts.

In England, and in many of the states in this Union, in which there are not statutes forbidding the making of contracts limiting or restricting the carrier's common-law liability, it has been held that even contracts having such effect were valid, if reasonable in character.

Under the statutes of this state, such contracts, whether reasonable or not, can have no standing; for the simple reason that the common-law liability of the carrier, and not the liability as the carrier might fix it by contract under the common law, is, by the statutes of this state, imposed on the carrier.

The classes of cases to which we have referred illustrate, however, the fact that, in the absence of statutory prohibition, carriers may make contracts reasonable in their nature.

It has been held in many cases that a carrier may make a contract which will relieve him from liability for loss or injury to property received for transportation, unless claim be made within a named period after the loss occurred: *Express Co. v. Caldwell*, 21 Wall. 264; *Dawson v. Railway Co.*, 76 Mo. 516; *Southern Express Co. v. Hunnicutt*, 54 Miss. 566; 28 Am. Rep. 385; *United States Express Co. v. Harris*, 51 Ind. 127; *Westcott v. Fargo*, 61 N. Y. 551. In these cases, the periods within which claim was required ran from five to sixty days; and under the facts of the cases, the periods were deemed reasonable.

It has been held in many cases in which contracts had been made between persons other than carrier and shipper, by which a period shorter than that prescribed by the statutes of limitation had been fixed within which actions must be brought, or the right to do so barred, were valid: *Riddlebarger v. Insurance Co.*, 7 Wall. 389; *Insurance Co. v. La Croix*, 35 Tex. 249; Ward on Limitation, 80; Greenhood on Public Policy, 505. In the notes given by these elementary writers, cases are fully cited. The unequal position of the carrier and shipper, and the public nature of the carrier's business, fur-

nish the grounds on which their right to contract as to them seems proper, in the absence of a statute regulating the matter, ought to be denied, and the only grounds on which the reasonableness of their contracts ought to be inquired into. As the statutes of this state do not forbid the making of contracts prescribing a time after which a fixed liability shall not be enforced by action, it seems to us that the only inquiry which can be made in reference to such contracts, when executed upon sufficient consideration, is, Are they reasonable?

The injuries complained of occurred on May 3 or 4, 1884, and this action was not instituted until the 11th of November following. The run from Navasota to Lampasas required less than twelve hours; the plaintiff resided at and reached Lampasas on the evening of the 4th of May, 1884, and had means promptly to ascertain the extent of the injury, and no reason is shown why the action was not sooner brought. The defendant pleaded the failure to bring the action within the time prescribed by the contract as a bar to it, and the sufficiency of this defense was questioned by a demurrer, which the court overruled. This would indicate that the court was of the opinion that the answer set up a good defense, and that the time within which the contract required the action to be brought was reasonable. It seems to us, under the facts of this case, that these conclusions were correct.

The court was asked to give an instruction as to the effect of the failure of the plaintiff to institute an action within the time prescribed by the contract, and this was refused, notwithstanding the court had failed to give any charge bearing on that defense.

We are of the opinion that a charge should have been given upon that subject, and for the failure of the court to do so, its judgment will be reversed, and the cause remanded.

LIABILITY OF CARRIER OF LIVE-STOCK, and power to limit liability: *Agnew v. Steamer Contra Costa*, 87 Am. Dec. 87, and note; *Smith v. New Haven etc. R. R. Co.*, 90 Id. 166, and note; *Bette v. Farmers' etc. Co.*, 91 Id. 460, and note; *Mynard v. Syracuse etc. R. R. Co.*, 27 Am. Rep. 28, and foot-note; *Georgia R. R. v. Spears*, 42 Id. 81, and foot-note; *Moulton v. St. Paul etc. R'y Co.*, 47 Id. 781, and foot-note; *McFadden v. Missouri etc. R'y Co.*, 1 Am. St. Rep. 721, and note.

WALET v. HASKINS.

[68 TEXAS, 418.]

ONE IS GUILTY OF LACHES, and cannot maintain an equitable action to cancel a sheriff's deed to his land executed under an alleged voidable judgment against him, when he has waited eleven years to begin his action, during which time the courts were open to him, he was chargeable with notice of the deed, and in possession of all the evidence relied upon to support the action.

LACHES. — ONE WHO IS CHARGEABLE WITH NOTICE of all the facts, and waits eleven years to begin his action to cancel a sheriff's deed to his land, executed under a judgment claimed to be voidable, cannot excuse his laches on the ground that four years were spent in diligent search for the title deeds, as they are not necessary to the maintenance of the suit. He need not establish his title in the proceeding, as the adverse party claims under him and through the deed which he seeks to cancel.

LACHES AND NEGLECT ARE ALWAYS DISCOURTEAGED IN EQUITY, which always refuses relief to stale demands. When a party has slept upon his rights for a great length of time, nothing will call the court into activity but conscience, good faith, and reasonable diligence.

LACHES. — ONE WHO HAS KNOWLEDGE of the facts, and waits ten or eleven years to begin an action to set aside a sheriff's deed to his land, cannot excuse his laches by showing that he was in possession a part of the time, as the suit could be brought as well when he was in possession as when he was not. Possession does not give him any better standing than if he had been ousted by the adverse party. The laches affects him in the one case as much as in the other, and while his possession gives notice to his adversary that he claims the land, it does not give notice that he will assert the claim by suit to cancel an interfering deed.

McLeary and Barnard, for the appellants.

J. A. and N. O. Green, and Lawhon and Browne, for the appellees.

By Court, WILLIE, C. J. This suit was before this court on a former occasion, and is reported in 63 Tex. 213. The case was then reversed in favor of the present appellees, because the court below ruled out the sheriff's deed under which the appellees claimed, and because certain testimony as to the payment of taxes by Mrs. Haskins was excluded, and also because the court refused to charge the jury that ten years would bar a suit to cancel a sheriff's deed.

It was held that the plaintiff could not recover in the state of the case then presented to this court, whether his action was to be treated as one of trespass to try title, or as a suit in equity to cancel a deed and remove clouds from title. If an action of trespass to try title, he could not recover because he was collaterally attacking a sheriff's deed, which was not void, but, under the proof, voidable; if a suit to remove the cloud

caused by the deed, he could not succeed because more than ten years had elapsed since the right to sue accrued, and no excuse for the delay had been alleged and proved. When the cause was remanded, Walet amended his petition to meet the decision of this court upon the question of stale demand, alleging certain reasons and excuses for not commencing his suit at an earlier day. Upon a demurrer to the amended petition, the court below held these excuses insufficient, and the plaintiff, refusing further to amend, the cause was dismissed. From this judgment of dismissal the present appeal is taken.

It is admitted by the appellant that he has no ground for reversal unless his petition has alleged some sufficient excuse for his delay in bringing the action, all other questions having been settled by the former decision. As to this matter the petition showed that before and down to the seventh day of May, 1867, the plaintiff was the owner of the land in controversy. On that day it was sold under an execution against the plaintiff in favor of H. H. Brockman and others, and was purchased by the ancestor of the appellees. Facts are alleged in the petition tending to show that this sale was voidable at the suit of the plaintiff.

This suit was commenced in 1881, more than ten years after the adoption of our state constitution. As reasons why it was not begun earlier, the plaintiff stated that at the time the judgment under which the execution sale took place was rendered he resided in Louisiana, and that he did not know that the judgment had been rendered against him, nor that the land had been levied on and sold to Haskins till some time in the year 1877. It seems that Walet had, in 1857, brought suit against Brockman and Buckman for damages for cutting timber off of this land; but that two years afterwards his attorney abandoned the suit, and he employed another firm of lawyers to take charge of it. That this firm having also abandoned the cause, and removed to California in 1866, as the plaintiff learned a long time afterwards, it was dismissed for want of prosecution, and the execution under which the land was sold was for the costs adjudged against the plaintiff upon the dismissal of the suit. The plaintiff alleged that he had diligently inquired and corresponded with the clerk and sheriff of Karnes County, where the land lay, and other persons, concerning the result of said suit, from the end of the war down to 1877, without avail. He came to Texas in February of that

year, and took possession of the land, and held it till ejected by the appellees in 1881. He had paid taxes on the land all the time through his agents, and had received no intimation that any other person claimed it.

When the appellant came to Texas in 1877, he soon ascertained from the records of Karnes County all about the sale of his land, but was told by an attorney—whom he proposed to employ to have the sheriff's deed canceled—that he could do nothing towards this without the original title papers. The plaintiff then details with great particularity his search for his deeds amongst the papers of the attorneys who had been previously employed by him in reference to the land, which shows considerable diligence in attempting to find them. After a search of several years, they were found in the possession of the widow of one of those attorneys, in 1881, and this suit was immediately commenced.

The above are substantially the excuses offered by Walet for not bringing this suit within proper time, and we think the bare statement of them is enough to show that they are insufficient. Whilst it is shown that the attorneys last employed to represent him in his suit against Brockman *et al.* abandoned his cause without his knowledge, it appears that he had agents who paid the taxes on his land, and who must have known the condition of the title. It further appears, too, that the entire proceedings under which the appellees claim title were on record in Karnes County, and open to inspection.

The plaintiff was chargeable with notice of what occurred in court in reference to a suit which he himself had instituted and prosecuted for years. His absence from the state did not relieve him from the necessity of following up his case. If he trusted it to attorneys who abandoned the suit, it was his misfortune, and the appellees should not suffer for this misplaced confidence on his part. The very fact that his frequent letters, making inquiry about the suit, met with no answer, was a circumstance tending to make him suspect that all was not right in reference to the litigation. It is not shown that he wrote to the parties who were paying taxes for him; but it is shown that notwithstanding he received no answers from his attorneys and the clerks and other parties to whom he did write, he rested quietly for the space of many years, content that the case should take care of itself, and aware of the almost certainty that under the circumstances it would be dismissed.

When he did, after the lapse of ten years, come to Texas to look after this land, his only diligence was in looking up his title deeds, for whose possession by him there was no special necessity. He could have brought this suit as well without as with them. He could doubtless have proved their contents by other evidence,—at least, it is not shown that he could not; but if he could not have done so, there was no necessity for him to offer in the case a single title paper. The deed which he seeks to cancel was one conveying his own title to Haskins. The latter claimed under him, and there was no necessity for his establishing his own title in this proceeding. Yet the appellant spent almost four years in a search for papers which could not profit him in the least. Nothing is alleged throughout the entire petition tending to show that the appellees or their ancestor threw any obstacle in the way of the plaintiff's commencing suit, or did anything towards concealing their claim, or the evidence that would overthrow it. "Equity always refuses relief to stale demands. When a party has slept upon his rights for a great length of time, nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Laches and neglect are always discountenanced": *Smith v. Clay*, 4 Brown Ch. 640; *Amb. 645*, as reported in note to *Delarame v. Browne*, 3 Brown Ch. 639. The reasons for this statutory rule are well illustrated in the present case.

The grounds upon which Walet sought to set aside the deed to Haskins were inadequacy of price, accompanied by unfairness in making the sale. Any circumstance tending to show that the land sold for a reasonable price, or that the sale was fairly made, would naturally rest only within the knowledge of witnesses who might die or remove beyond the jurisdiction of the court, and the purchaser be deprived of their testimony, should the delay in bringing the suit be unreasonable.

It certainly was against equity and good conscience to allow him, when he was charged with notice of the deed that clouded his title, and was apparently in possession of all the evidence he could ever obtain to set aside the deed, and the courts of the country were open to him, to wait till sufficient time had expired to bar his suit, and the evidence of his adversary had been probably lost by the lapse of years, and then institute a suit to clear his title of this adverse claim. The fact that he took possession of the land in 1877 does not affect the case. A suit to remove clouds may be brought when plaintiff is

in possession as well as when he is not. The fact that he is in possession does not, in our state, give him any better standing in court than if he had been ousted by the opposite party: *Thompson v. Locke*, 66 Tex. 383. The equitable defense of lapse of time affects him as much in the one case as in the other, in a suit of this character. His possession gives notice to the opposing claimant that he claims the land, but not that he will assert the claim by a suit to cancel an interfering deed. It is evidence rather of an intention to act on the defensive in a suit at law than to proceed as a complainant in a court of equity. Time continued to run in favor of the appellees, as well after Walet's possession as before, so far as the suit to cancel the deed was concerned; and more than eleven years having elapsed from the acceptance of the constitution to the commencement of the suit, the action was barred, and the court correctly sustained the demurrer.

The judgment is affirmed

LACHES AS BAR TO RELIEF: *Smith v. Thompson*, 54 Am. Dec. 126, and note 130-134; *Drinkard v. Ingram*, 73 Id. 250, note 253; *Walker v. Emerson*, 73 Id. 207.

WHERE PARTY, WITH FULL KNOWLEDGE of the facts, neglects for nineteen years to assert his equities, with no sufficient excuse for the delay, his laches will bar relief: *Castner v. Walrod*, 25 Am. Rep. 369; note to *De Cardova v. Smith*, 58 Am. Dec. 144.

EQUITY DISCOUNTENANCES STALK DEMANDS: *Strimpher v. Roberts*, 57 Am. Dec. 606, note 618; *De Cardova v. Smith*, 58 Id. 136, note 144. And nothing will call the court into activity but conscience, good faith, and reasonable diligence: *Germantown etc. Ry Co. v. Fuller*, 100 Id. 546.

SANSOM v. MERCER.

[68 TEXAS, 488.]

MANDAMUS WILL NOT LIE TO REVIEW the act of an officer, when the duty he is called upon to perform requires the exercise of an act of judgment on his part.

MANDAMUS. — UNDER TEXAS STATUTE, PROVIDING MANNER in which the territorial limits of an incorporated city may be diminished by election upon application of the mayor, he is required to determine two facts in order to justify him in making the order for the election: 1. That there is a surplus of territory over the limit prescribed by the statute; 2. That at least fifty qualified voters of that territory have signed that petition. If there is any dispute as to the existence of these facts, his function is discretionary, and he cannot be compelled by *mandamus* to order the election. But if no such controversy exists, or these facts are admitted in any way, his discretion ceases, his act is purely ministerial,

his duty becomes absolute, and he can be compelled by *mandamus* to perform it.

CONSTITUTIONAL LAW.—TEXAS STATUTE, PROVIDING MANNER in which the territorial limits of an incorporation may be diminished by election, is not invalid because it does not direct the manner in which the election shall be held; for as it is made a part of the title of the Revised Statutes relating to elections, it will be presumed that it was intended that the election should be held in the same manner as other elections provided for in that title.

MANDAMUS.—UNDER TEXAS STATUTE, PROVIDING that the limits of an incorporated city may be diminished by election, upon proper petition to the mayor, the qualified voters and petitioners of the territory sought to be excluded have a direct interest, and may maintain *mandamus* against the mayor to compel the performance of a purely ministerial act on his part.

GENERAL DENIAL IN MANDAMUS PROCEEDINGS should be treated as a nullity, and entitles plaintiff to judgment on his pleadings, without proof. Defendant must plead either a special denial to the allegations of the writ, or by way of confession and avoidance.

SPECIAL ANSWER IN MANDAMUS PROCEEDING IS INSUFFICIENT, should be treated as a nullity with or without demurrer, and entitles plaintiff to judgment on the pleadings without proof, when it sets up no fact constituting any legal excuse on the part of defendant for a failure to perform a ministerial act, but merely states that he refused to perform it upon full consideration and advice of counsel.

Crane and Ramsey, and King, for the appellant.

Poindexter and Padelford, for the appellee.

By Court, GAINES, J. The territorial limits of the city of Alvarado, in Johnson County, are more than a mile in diameter. Appellees and some eighty other persons claiming to be qualified voters of so much of the territory of the city as lies outside of a circle described from its center by a radius of the length of half a mile, in accordance with the act of the legislature, approved April 14, 1883, presented to appellant, as mayor of the corporation, a petition that so much of the corporate limits as was not embraced in such circle be declared no longer a part of such city, and that he order an election for that purpose.

The mayor having refused, appellees brought this suit to compel him. Upon the final hearing, the peremptory writ of *mandamus* was awarded, and he has appealed to this court.

It is assigned,—1. That the court erred in overruling the exceptions to the petition; and it is now insisted that the act which appellant was called upon to perform involved discretion and judgment on his part, and that, therefore, the writ of *mandamus* does not lie to compel him. The petition for the

writ alleges that eighty-one persons signed the original application to the mayor to order the election, and that they were qualified voters of the territory sought to be excluded. It also averred that appellant, "without any legal excuse, and without giving any reasons for his action, refused and failed to order said election."

It is well settled that if the duty an officer is called upon to perform requires the exercise of an act of judgment on his part, his decision is not subject to be revised by a proceeding for a writ of *mandamus*: *Ewing v. Cohen*, 63 Tex. 483; *Bledsoe v. International R. R. Co.*, 40 Id. 554; *Arberry v. Beavers*, 6 Id. 457; 55 Am. Dec. 791; *Commissioners v. Smith*, 5 Tex. 471; *Cullem v. Latimer*, 4 Id. 329. And it is apparent that in a proceeding to procure an order for an election under the statute before cited, the mayor is required to determine two facts in order to justify him in making the order for the election: 1. That there is a surplus of territory over the limit prescribed by the statute; and 2. That at least fifty qualified voters of that territory have signed the petition. If there be any controversy as to the existence of these facts, his function is discretionary, and he cannot be compelled to order the election. But taking the facts of the petition to be true, as the demurrer admits, the surplus territory exists, and more than the requisite number of voters have signed the application. In such a case, the discretion of the mayor ceases. The act to be done is purely ministerial. His duty becomes absolute, and he can be compelled to perform it.

The fact that preliminary to his action he must know that there is an excess of territory beyond the statutory requirements, and that the requisite number of voters have signed the petition, does not invest him with the discretion to refuse to order the election, when, as a matter of fact, there is no controversy as to the excess, or as to the number and qualification of the signers. The cases relied upon by appellant do not support the contrary doctrine. We will briefly discuss the two decisions which we think most nearly in point. In *Arberry v. Beavers*, 6 Tex. 457, 55 Am. Dec. 791, the writ was sued out for the purpose of compelling the chief justice of Cass County to count the returns from certain precincts of a special election held in order to determine the location of a county seat. This statement is of itself sufficient to show that the case cited differs materially from this. The chief justice was charged with the duty, under the law, of passing upon the

validity and regularity of the returns. Judge Wheeler, who delivered the opinion, evidently thought that this was a judicial function, and that when the officer had once canvassed the vote and announced the result, his decision was final. But the opinion shows that he was expressing merely his individual views upon the question, and that the case was reversed and dismissed upon the ground that the petition was insufficient, because it did not appear that the complainants were legal voters in the county, and it was not averred distinctly and specifically that the returns they sought to have counted were made in conformity to law.

Chief Justice Hemphill, in an able opinion, dissented from the views of Judge Wheeler upon the main question, but acquiesced in the disposition of the cause on account of the insufficiency of the pleading. The case of *State v. Commissioners*, 8 Nev. 309, is similar in most respects to the case before us; but there, before the petition was considered, a large number of the signers had requested their names to be withdrawn, and the return of the commissioners showed that they considered the application, and determined that it did not contain the number of signatures required by the law. It is evident that the refusal of the writ in that case cannot be deemed a precedent for a refusal in the case before us. On the other hand, the case of *Gibbs v. Bartlett*, 63 Cal. 117, is directly in point, and supports our views. It is to be noted that, though the supreme court of that state sits in two departments, the decision is by the court in bank, and with the concurrence of the full bench.

Under his sixth assignment of error, appellant urges that the law of 1883 is invalid, because it does not direct the manner in which the special election shall be held. But the enactment is made a part of title 17 of the Revised Statutes, and we think it is reasonable to presume that the legislature intended that the election should be held as other elections which are provided for in that title: See arts. 345, 352, et seq.

It is also urged that appellees, in their petition, showed no such interest in the ordering of the election as would authorize them to sue out a writ of *mandamus*; and in support of the proposition, we are cited to the cases of *Turner v. Commissioners*, 10 Kan. 16, and *Bobbett v. State*, 10 Id. 11. But the former case simply decided that a mere voter and freeholder in a township has not a sufficient interest to sustain a *mandamus* to compel the county board to order an election in

such township upon the question of issuing bonds. So the latter holds that the citizens of a county, merely as such, have no such interest in the question as will authorize them to bring a suit to compel the commissioners to order an election for the removal of a county seat. This court has once announced virtually the same doctrine: *Harrell v. Lynch*, 65 Tex. 146. But here we have a different question. The appellees are alleged to be qualified voters in the territory sought to be excluded. Consequently they are males over twenty-one years old, and as such are subject to pay a poll-tax to the municipality: R. S., art. 428. This gives them a direct personal interest in having the territory in which they live excluded from the corporate limits. They are doubtless subject to other burdens and restrictions, from which they would be relieved by a removal of the city limits, but these are not made to appear by the allegations of the petition.

We think the averments of the petition for the writ show that it became the duty of the appellant to order the election, and that his refusal to do so was not because of any doubt as to the sufficiency of the application, but was arbitrary. They very clearly negative the idea that any lawful excuse existed, and must be deemed sufficient under the most rigid rule laid down by the authorities as to the certainty of pleading in suits of this character: *Cullem v. Latimer*, 4 Tex. 331; *Houston etc. R. R. Co. v. Randolph*, 24 Id. 317; High on Extraordinary Legal Remedies, secs. 449 et seq. We conclude that the court did not err in overruling the demurrer and special exceptions to the petition.

But it is also assigned that the court erred in giving judgment for the plaintiff upon the pleadings without hearing evidence. The respondent had filed a general denial, and what purported to be a special answer, which was verified by affidavit. The first question presented is, Can a general denial be deemed a proper pleading in a *mandamus* proceeding under our laws? Our courts have held that such a suit is not to be conducted strictly according to the ancient procedure of the common law, but that at the same time the rules of practice for ordinary actions do not apply. The substantial procedure at common law, so far as it is compatible with our system, has therefore been recognized and adopted in *mandamus* cases; and it is said in *Fitzhugh v. Custer*, 4 Tex. 391, 51 Am. Dec. 728, that "the rules of pleading in cases of *mandamus* are judicious, and should be enforced when not incompatible with statutory

regulations." See also *Cullem v. Latimer*, *supra*. At common law the respondent could not plead a general denial,—he was required to plead specially by distinct traverse of the allegations of the writ, or by way of confession and avoidance: *People v. Salomon*, 46 Ill. 333; *Commonwealth v. Commissioners*, 37 Pa. St. 237; *Commonwealth v. Commissioners*, 37 Id. 277; Bacon's Abridgment, tit. Mandamus, 1. Such being the rule of pleading in these cases, the court below did not err in treating the general denial as a nullity.

Respondent's special answer was also insufficient. The plaintiffs should have demurred, and upon demurrer it should have been stricken out. It sets up no fact which constitutes any legal excuse for his failure to order the election. It does not deny that the petition was presented with the signatures of the eighty-one voters, as alleged in plaintiff's petition, or that the excess of territory exists, as therein averred; but merely states that he rejected the application upon full consideration, and upon advice of counsel. He does not say that there was any question as to the requisite number of qualified signers, or of any doubt as to the surplus territory. This is carefully evaded, and it must be presumed that there was no difficulty as to these facts.

The meaning of the answer is, that because a case may be presented under the statute, which would call for an exercise of judgment on the part of the mayor, the respondent cannot be compelled by *mandamus*. It is held, and we think correctly, that such an answer may be treated as a nullity, with or without a demurrer: *People v. Salomon*, *supra*; *People v. Miner*, 46 Ill. 384; see also Pennsylvania cases cited above. The pleadings of respondent being virtually no answer to the petition, the court did not err in rendering judgment against him without proof. He was in court without an answer, and a judgment, we think, was proper.

We find no error in the judgment, and it is affirmed.

MANDAMUS WILL NOT LIE TO COMPEL the performance of acts of judgment or discretion: *State v. Kirke*, 95 Am. Dec. 314, and note 333; *Miles v. Bradford*, 85 Id. 643, and note 646. But it will lie to compel the performance of ministerial acts: *Pacific R. R. v. Governor*, 66 Id. 673, note 687; *Mott v. Pennsylvania R. R. Co.*, 72 Id. 664; especially when the act or duty is defined by law, and nothing is left to the discretion of the officer: *Arberry v. Beavers*, 55 Id. 791; *Board of Police v. Grant*, 47 Id. 102.

LYON AND GRIBBLE v. LOGAN.

[68 TEXAS, 521.]

MECHANIC'S LIEN. — **FACT THAT STATEMENT** appended to bill of particulars of material furnished, and both recorded, embraces another lot than that on which the buildings are erected, does not affect the material-man's lien on the lot on which the building is erected, and which is embraced in the statement.

MECHANIC'S LIEN WILL BE RESTRICTED to the property on which he has the right to a lien, though he may assert a claim to a lien on other property.

CLAIMING MECHANIC'S LIEN ON MORE LAND than it can lawfully attach to will not vitiate the lien on so much land as it can cover, if that is embraced in the description of the land on which the lien is claimed, unless the claim is intentionally and fraudulently made, and will in some way operate to the injury of the owner or a third person.

PURPOSE OF RECORD OF MECHANIC'S LIEN is to give notice to third persons, and it is only required that the contract recorded shall be accompanied by a description of the lands, lots, houses, and improvements made, against which the lien is claimed.

WHERE STATUTE REQUIRES MECHANIC'S LIEN to be filed and recorded in a book to be kept for that purpose by the county clerk, the fact that the book in which the lien is recorded has been used to record bills of sale does not affect the validity of the record of the lien, if, in fact, the book was the one kept for the purpose of recording all mechanic's liens.

AVERMENTS IN ANSWER WILL COVER WANT of averments in the petition, and on demurrer may be considered.

MECHANIC'S LIEN WILL ATTACH to all the lots, when materials have been furnished under a single contract for buildings erected on two or more contiguous lots owned by the person to whom the materials were furnished. If the owner does not see fit to make separate contracts for the material to be used on each lot, he cannot deny that the lien attaches to all the lots upon which the material was used.

Davis and Garrett, for the appellant

Barrett and Stine, for the appellees.

By Court, STAYTON, J. This action was brought by the appellants to recover from E. R. Logan the value of material alleged to have been furnished by him to Logan, which was used in erecting business houses on lots numbers 1 and 2 in block 6, in the town of Henrietta. They seek also to enforce the lien given to persons who furnish material used in the construction of buildings. The appellees Stine and Eustis were made defendants, as the petition alleges, because they claim or assert some right in the property acquired through Logan since the material was furnished.

The two lots are described in the petition as follows: "Beginning at the northwest corner of said block No. (6) six, thence south 44 feet, thence east 110 feet, thence north 44 feet,

thence west 110 feet to the place of beginning." The petition further alleges that the material was furnished on a verbal contract, and that within the time required by law a copy of the bill showing the particulars of the material furnished was delivered to Logan, and another filed in the office of the clerk of the county court, which was by him recorded in a book kept for the purpose of recording mechanic's liens, and it further alleges that the copy of the bill of particulars so recorded contained a description of the lands on which the houses were erected.

The bill of particulars so recorded was made an exhibit to the petition, and it showed that the lien was claimed on lots 1 and 2 and 4 in block 6, of the original plat of the town of Henrietta; and the clerk's certificate showed that it was recorded "in the records of said county, in volume 1, at pages 162, 163, 164, 165, 166, 167, and 168, Bill of Sale Record."

The answer alleged: "That the said lots numbers 1 and 2, together with the houses erected thereon at the time said materials were contracted for and furnished, were owned by E. R. Logan, and that the lots numbers 3 and 4 in said block number 6, together with said houses erected on said lot number 3, in said block number 6, but stated in said claim of lien to have been erected on said lot number 4 in said block number 6, and that said lots 3 and 4 were owned by W. G. Eustis at said time." The answer further alleges that lots 1 and 2 are not adjoining lots 3 and 4, and that the houses are two separate and distinct buildings.

The pleadings thus standing, the defendants filed demurrers, general and special, at the same time their answer to the merits was filed. The substance of the demurrer was as follows: 1. That the petition was insufficient in law; 2. The petition alleged the material was used in the erection of buildings on lots 1 and 2, block 6, while exhibits A and B, attached to the petition, showed that the material was also used in the erection of a building on lot 4; 3. The bill of particulars was not recorded as the law directs, in a book kept for the purpose of recording mechanics' liens, but in the bill-of-sale book; 4. The lien sought to be foreclosed is a joint lien for the material used in the erection of the houses on lot 4, as well as on lots 1 and 2; 5. The claim of lien and bill of particulars does not show that E. R. Logan was the owner of the property, or the agent of the owner.

These were sustained, and the cause dismissed. The residence of Logan was alleged to be in Kaufman County, and he

filed a sworn plea to the jurisdiction of the court as to himself, in which he denied the existence of a lien.

1. The petition only seeks to foreclose a lien on lots numbered 1 and 2, in block 6; and it avers that the material furnished was used in erecting the only houses on these lots.

The statement appended to the bill of particulars, and recorded, embraced lot number 4, but we do not see that this misdescription of the land on which the houses were erected would affect the appellant's right to a lien on lots numbered 1 and 2, which were embraced in the statement, and especially so in view of the fact that the owner alleges that no house was erected on lot number 4. If the statement had failed to embrace the lands on which the buildings were actually erected, it would be insufficient; but that it claimed a lien on another lot not subject to the lien cannot vitiate it.

The material-man's lien will be restricted to the property on which he has the right to a lien, although he may assert a claim to a lien on other property.

It has, so far as we know, never been held that the claiming of a lien on more land than the lien can lawfully cover will vitiate the lien on so much land as it may lawfully attach to, if that be embraced in the description of the land on which the lien is claimed, unless such a claim was intentionally or fraudulently made, and will in some way operate to the injury of the owner or some third person. The authorities hold such misdescriptions unimportant: *Edwards v. Derrickson*, 28 N.J. L. 39; *Whitenack v. Noe*, 11 N.J. Eq. 321; *Shattuck v. Beardsley*, 46 Conn. 386; *Oster v. Rabeneau*, 46 Mo. 595.

The purpose of the record mainly is to give notice to third persons of the lien, and the statute only requires that the amount or contract recorded "shall be accompanied by a description of the lands, lots, houses, and improvements made, against which the lien is claimed": R. S., art. 3167.

2. The statute requires the contract, or bill of particulars with its accompanying statement, to be filed and "recorded in a book to be kept by the county clerk for that purpose." The petition alleges that this was done, and the fact that the book in which the account and accompanying statement were recorded may have been used to record bills of sale would not affect the validity of the record, if, in fact, the book was the one kept for the purpose of recording all mechanics' liens: *Quinn v. Logan*, 67 Tex. 600. The statute does not provide

his duty becomes absolute, and he can be compelled by *mandamus* to perform it.

CONSTITUTIONAL LAW.—TEXAS STATUTE, PROVIDING MANNER in which the territorial limits of an incorporation may be diminished by election, is not invalid because it does not direct the manner in which the election shall be held; for as it is made a part of the title of the Revised Statutes relating to elections, it will be presumed that it was intended that the election should be held in the same manner as other elections provided for in that title.

MANDAMUS.—UNDER TEXAS STATUTE, PROVIDING that the limits of an incorporated city may be diminished by election, upon proper petition to the mayor, the qualified voters and petitioners of the territory sought to be excluded have a direct interest, and may maintain *mandamus* against the mayor to compel the performance of a purely ministerial act on his part.

GENERAL DENIAL IN MANDAMUS PROCEEDINGS should be treated as a nullity, and entitles plaintiff to judgment on his pleadings, without proof. Defendant must plead either a special denial to the allegations of the writ, or by way of confession and avoidance.

SPECIAL ANSWER IN MANDAMUS PROCEEDING IS INSUFFICIENT, should be treated as a nullity with or without demurrer, and entitles plaintiff to judgment on the pleadings without proof, when it sets up no fact constituting any legal excuse on the part of defendant for a failure to perform a ministerial act, but merely states that he refused to perform it upon full consideration and advice of counsel.

Crane and Ramsey, and King, for the appellant.

Poindexter and Padelford, for the appellee.

By Court, GAINES, J. The territorial limits of the city of Alvarado, in Johnson County, are more than a mile in diameter. Appellees and some eighty other persons claiming to be qualified voters of so much of the territory of the city as lies outside of a circle described from its center by a radius of the length of half a mile, in accordance with the act of the legislature, approved April 14, 1883, presented to appellant, as mayor of the corporation, a petition that so much of the corporate limits as was not embraced in such circle be declared no longer a part of such city, and that he order an election for that purpose.

The mayor having refused, appellees brought this suit to compel him. Upon the final hearing, the peremptory writ of *mandamus* was awarded, and he has appealed to this court.

It is assigned,—1. That the court erred in overruling the exceptions to the petition; and it is now insisted that the act which appellant was called upon to perform involved discretion and judgment on his part, and that, therefore, the writ of *mandamus* does not lie to compel him. The petition for the

writ alleges that eighty-one persons signed the original application to the mayor to order the election, and that they were qualified voters of the territory sought to be excluded. It also averred that appellant, "without any legal excuse, and without giving any reasons for his action, refused and failed to order said election."

It is well settled that if the duty an officer is called upon to perform requires the exercise of an act of judgment on his part, his decision is not subject to be revised by a proceeding for a writ of *mandamus*: *Ewing v. Cohen*, 63 Tex. 483; *Bledsoe v. International R. R. Co.*, 40 Id. 554; *Arberry v. Beavers*, 6 Id. 457; 55 Am. Dec. 791; *Commissioners v. Smith*, 5 Tex. 471; *Cullem v. Latimer*, 4 Id. 329. And it is apparent that in a proceeding to procure an order for an election under the statute before cited, the mayor is required to determine two facts in order to justify him in making the order for the election: 1. That there is a surplus of territory over the limit prescribed by the statute; and 2. That at least fifty qualified voters of that territory have signed the petition. If there be any controversy as to the existence of these facts, his function is discretionary, and he cannot be compelled to order the election. But taking the facts of the petition to be true, as the demurrer admits, the surplus territory exists, and more than the requisite number of voters have signed the application. In such a case, the discretion of the mayor ceases. The act to be done is purely ministerial. His duty becomes absolute, and he can be compelled to perform it.

The fact that preliminary to his action he must know that there is an excess of territory beyond the statutory requirements, and that the requisite number of voters have signed the petition, does not invest him with the discretion to refuse to order the election, when, as a matter of fact, there is no controversy as to the excess, or as to the number and qualification of the signers. The cases relied upon by appellant do not support the contrary doctrine. We will briefly discuss the two decisions which we think most nearly in point. In *Arberry v. Beavers*, 6 Tex. 457, 55 Am. Dec. 791, the writ was sued out for the purpose of compelling the chief justice of Cass County to count the returns from certain precincts of a special election held in order to determine the location of a county seat. This statement is of itself sufficient to show that the case cited differs materially from this. The chief justice was charged with the duty, under the law, of passing upon the

H. D. Prendergast, for the appellant.

R. B. Levy, Jr., for the appellee.

By Court, WILLIE, C. J. The plaintiff below purchased a ticket entitling him to be transported on the defendant's railroad from Longview to Kilgore, a distance of about twelve miles and a half. He boarded the proper train after exhibiting his ticket to the brakeman, who stood at the door, then placed the ticket in his vest pocket, and took his seat in the car. When the conductor came around to collect tickets, the plaintiff felt in his vest pocket for it, but could not find it at the moment. While searching for the ticket he told the conductor that he had a ticket, and that it was somewhere about his clothing, and to wait a minute or so and he would find it and give it to him. The conductor replied impatiently: "If you have a ticket it need not take you all night to get it; you must get the ticket or get off"; and immediately pulled the bell-cord to stop the train. The plaintiff then told him that the brakeman had seen his ticket, and that he could call his brakeman and ask him. He did not call the brakeman, but again told the plaintiff to get off, remarking at the same time that persons had tried to play that on him before. Plaintiff then offered to pay his fare to the extent of the change that he had in his pocket, but this being only forty-five cents, and the fare being fifty cents, the conductor would not receive it; and in spite of the request of the plaintiff to wait a reasonable time for him to find his ticket, the conductor stopped the train and ordered him off, an order which he obeyed, the conductor making demonstrations of using force to carry out his command.

The train then pulled out, leaving the plaintiff in the woods near a water-tank, and at a place where there were no residences. The plaintiff, just after the train left, found his ticket, which had slipped through a hole in his pocket and got in next to the lining of his vest. It was about a minute and a half between the time the conductor called for the ticket and the time at which he ejected the plaintiff from the cars. All this occurred after midnight; the night was dark and the place swampy, and the plaintiff, not knowing what distance he was from either Longview or Kilgore, walked back to the former, crossing a railroad bridge over the Sabine River a half-mile long, and arriving at Longview about an hour and a half after he had left that place on the train. As a consequence of

these facts he became sick, lost two weeks from work, and had a doctor in attendance on him. For the mortification suffered by him in being ordered off the train in presence of the other passengers, in manner as stated, and the pain of mind and body, loss of time and expense to which he was subjected by reason of being put off the cars and forced to walk to Longview, he claimed damages to the extent of ten thousand dollars. The jury returned a verdict in his favor for five hundred dollars, and a motion for a new trial having been filed upon the ground, among others, that the damages found by the jury were excessive, his counsel remitted one hundred dollars, and the court rendered judgment for the balance. From that judgment this appeal is taken.

It is not disputed by the appellant that the conductor was bound to wait a reasonable time by the plaintiff to produce his ticket, but it is claimed that he complied with this requirement of the law. This was a question of fact for the jury, and under a charge not complained of, they found it in favor of the plaintiff, and we cannot say that their finding is not in accord with the evidence. What would have been reasonable time depends upon the circumstances of the case. The only fact which would have authorized an immediate expulsion of the plaintiff was a positive refusal to produce a ticket or pay fare. There was no such refusal; on the contrary, the plaintiff told the conductor that he had a ticket about his clothing, and would find it in a minute or two and give it to him. This was a statement of something that might frequently happen,—the placing of a ticket in some part of the clothing where it could not be readily found. If true, and he had the ticket, he was entitled to all the rights of a passenger; if not true, its falsity could soon be determined. The conductor had no reason to suppose it false, for if the plaintiff intended to ride to the next depot without paying fare, the delay of a few moments under pretense of looking for his ticket would not have furthered his object.

He also offered to prove by the brakeman that he had shown him his ticket when getting on the car. Whilst the conductor was not bound to receive this as proof that the plaintiff had a ticket, it should have convinced him that his assertion to that effect was in good faith, since, if not true, the brakeman was there to disprove it. But the conductor seems to have treated the statement as false the moment it was made, and the defendant as a trespasser, and to have allowed but little more

time to search for his ticket than was consumed in stopping the train and hurrying the plaintiff from the cars. That the latter did have a ticket, and would have found it had he been allowed but a moment longer for the search, was shown by the fact that he did find it in his clothing immediately after the train moved off, and this occurred so soon as he was ejected. We think the conductor acted too hastily, and the jury were justified in so finding: *Maples v. Railroad Co.*, 38 Conn. 557; 9 Am. Rep. 434; *Hayes v. New York Central R. R. Co.*, 18 Am. & Eng. R. R. Cases, 363; 20 N. Y. Week. Dig. 237; *Clark v. Railroad Co.*, 18 Am. & Eng. R. R. Cases, 366.

The second assigned error is virtually disposed of by what we have already said. It complains that the plaintiff was negligent in not being able to produce the ticket when called, or pay the fifty cents demanded.

The third and last assignment is: "The court erred in refusing a new trial, because the verdict is excessive in amount, and the *remittitur* does not obviate the objection, but confesses it." Had the *remittitur* not been entered, and the court had approved the verdict by overruling the motion for a new trial, we could not have reversed on the ground that the verdict was excessive. Taking into view the mortification caused by the several indignities heaped upon the appellee in the presence of his fellow-passengers, the mental and physical pain produced by his being left about midnight of a dark night in the woods where there was no one living, and by his long and dangerous walk to Longview, his consequent illness, lasting two weeks, also his losses from inability to labor during that period of time, we cannot say that five hundred dollars was too great a compensation. Indeed, this amount seems small as compared with the sums usually rendered by juries in similar cases, and which have been approved both by the *nisi prius* courts and those of last resort. In *Lake Eric etc. R'y Co. v. Fize*, 11 Am. & Eng. R. R. Cases, 109, 88 Ind. 381, 45 Am. Rep. 464, six hundred dollars was held no more than reasonable compensation for less injuries than were suffered by the appellee in this case, the facts of the two cases being much alike. This court, too, in the case of *International etc. R. R. Co. v. Gilbert*, 64 Tex. 536, sustained a verdict of six thousand five hundred dollars, and in *International etc. R. R. Co. v. Smith*, 62 Id. 252, sustained one for eight thousand dollars for a transaction and consequent injuries similar to the present, the principal difference in the cases being that in those the injured parties

were females traveling unprotected, with young children. There are no circumstances in this case tending to show that the jury were actuated by passion or prejudice in assessing damages. Neither does it appear that the trial judge regarded the verdict as excessive. He did not intimate that he would set it aside if a *remittitur* was not entered, but this entry was the voluntary act of the plaintiff's attorney.

These cases, which hold that a *remittitur* cannot be entered where the true amount of damages cannot be correctly ascertained from the evidence, rest upon the ground that an excessive verdict shows that the jury did not pay due regard to the evidence, but were actuated by passion or prejudice in coming to their conclusion; and that to allow a *remittitur* of a part of the damages would be to substitute the finding of the court for that of the jury. But where, as in this case, the damages are not excessive, and there is no proof of improper motives on the part of the jury, the rule loses its application, and the court gives judgment for a sum which the jury honestly thought the plaintiff should recover. Nor are the decisions of our state opposed to this view, as supposed by appellant's counsel.

In *Thomas v. Womack*, 13 Tex. 580, a case of assault and battery, where the plaintiff recovered ten thousand dollars damages and remitted eight thousand five hundred dollars, the judge refused a new trial on the express ground that the *remittitur* had been entered, thereby in effect holding that had it not been entered, a new trial would have been granted. In *Hardeman v. Morgan*, 48 Id. 103, the *remittitur* was entered after the district judge had stated that if the defendant would remit the damages recovered by him in reconvention, the motion for a new trial would be overruled. This court intimated that under the decision in *Thomas v. Womack*, *supra*, which was in point, the damages could not be remitted, but declined to make any authoritative decision upon the subject. In *Hughes v. Brooks*, 36 Id. 379, and in *Heidenheimer v. Shlett*, 63 Id. 395, exemplary and actual damages were mingled, and not separated in the verdict. In the latter case, too, the *remittitur* was suggested by the court. This court there said: "The amount remitted was evidently considered by the court as exemplary damages embraced in the general finding, and that the court, and not the jury, estimated the actual damages at the amount remaining after the *remittitur* was entered. Having held that it was not a case for exemplary damages,

and there being nothing before the court from which the exact amount of each class of damages could be arrived at, it was of course error for the district judge to separate them and say how much actual damages should be recovered." In *Hoskins v. Huling*, 4 Tex. Law Rev. 183, the trial judge held the verdict excessive, and the appellee thereupon remitted off portions of the recovery, and a new trial was ordered. The court of appeals held this action unauthorized.

Thus we see that in each of these cases the trial court regarded the verdict originally found as excessive, suggested a *remittitur* to prevent the grant of, or overruled, a motion for a new trial because a *remittitur* had been entered; or exemplary damages were so commingled with actual damages that they could not be distinguished from each other, so that the former might be remitted and the latter be allowed to stand. Here neither exemplary damages were recovered, nor did the court overrule the motion for a new trial, for the reason that a portion of the money had been remitted.

Hence, neither of the other decisions is applicable to the case in hand. But the case of *Texas Cotton Press Company v. Crowley*, decided at Galveston term, 1886, but not reported, is clearly in point. There a father received damages for the death of his infant child, caused by the negligence of the press company, to the extent of three thousand five hundred dollars. The plaintiff's attorney voluntarily remitted one thousand eight hundred dollars of the verdict. The court below refused a new trial, and its action was sustained by this court. It was stated in the opinion that the damages were in some measure conjectural, yet we said: "Unless the verdict appeared clearly to be excessive, the fact that a *remittitur* was entered would not interfere with the right of the appellee to have a judgment for a less sum than given by the verdict." And so with this case. The plaintiff's original recovery was not excessive, under the evidence, and there is no reason why a judgment for a less sum should be disturbed.

If it was the deliberate and unprejudiced opinion of the jury that the plaintiff was damaged in the sum of \$500, they certainly thought he was damaged to the extent of \$250, so that the finding is at last theirs, not that of the court. The attorney may have remitted through fear that the court would consider the verdict excessive, but the record does not show that this was the opinion of the judge, and we have no right to attribute such an opinion to him. We find no error in the judgment, and it is affirmed.

POWER OF COMMON CARRIER OF PASSENGERS to eject a passenger who has lost his ticket: Note to *Chicago etc. R. R. Co. v. Parks*, 68 Am. Dec. 571; *Pullman etc. Co. v. Reed*, 20 Am. Rep. 232. And that in such case the passenger must be given reasonable time in which to produce his ticket, or the company is liable for ejecting him: *Maples v. New York etc. R. R. Co.*, 9 Lu. 434; 2 Wood's Railway Law, 1407, 1408. As to what would be an excessive verdict in such case, see *Pullman etc. Co. v. Reed*, 20 Am. Rep. 232; *Terre Haute R. R. v. Vanatta*, 74 Am. Dec. 96.

INTERNATIONAL AND GREAT NORTHERN RAILROAD COMPANY v. COCK.

[68 TEXAS, 713.]

- IN ACTION AGAINST RAILROAD COMPANY FOR INJURIES** sustained while riding as a passenger on a hand-car under invitation of an employee of the company, it is error to charge as matter of law, in the face of evidence to the contrary, that the act of the employee was the act of the company. Such question should be left to the jury.
- IN ACTION AGAINST RAILROAD COMPANY** for injuries received while riding on a hand-car as a passenger under invitation of an employee, it is error to charge that the company is liable to a greater degree of care and skill than would be required in carrying passengers on regular trains, or to employ a greater degree of care in proportion to the greater degree of danger, when the hand-car is manned by men employed to work on the track, and run the car for their own convenience, but not accustomed to look after the safety of others, and not employed nor selected for that purpose.
- IN ACTION AGAINST RAILROAD COMPANY** for damages from an injury sustained while riding as a passenger on a hand-car under invitation of the company's employee, it appears that after the original destination was reached the passenger requested to be carried farther, and the employee voluntarily complied, evidence of all facts occurring after the original destination was reached is admissible.

SUIT for damages. Appellee Cock, as a justice of the peace, had occasion to hold an inquest on the body of a man found near appellant's track, and accepted the request and invitation of one Hume, train-master and dispatcher for that division of the road, to ride on hand-cars to the place mentioned; consequently appellee, and his jury and others, took passage on two such cars under charge of one Parker, a section foreman. They arrived safely at the place where the body was found, made an examination, and as appellee heard that deceased spent the previous night farther on, he directed Parker to take the party hither. This he proceeded to do; and after traveling a short distance one of the cars met with an accident, through which appellee and others were injured by the tilting of a

plank or scantling seat occupied by them, and not fastened in any way to the car. It did not appear that the company or its servants had ever before used hand-cars for the transportation of passengers, and the rules prohibited the carrying of any but trackmen on such cars. It did not appear that the public knew of these rules. Appellee had verdict and judgment below.

Hutcheson and Rose, for the appellant.

Brown, Cock, and Denman and Franklin, for the appellee.

By Court, MALTBIE, J. The judgment is sought to be reversed upon a number of grounds. Among others, the following charge of the court is complained of and assigned as error:—

1. "The jury is instructed that according to the undisputed evidence submitted to you, the plaintiff was on defendant's car, either at the invitation or with the consent of the servants, authorized by the general train-master of defendant company. You are instructed that the plaintiff was lawfully on said car, and that the defendant would be liable in damages for any injury the plaintiff may have sustained while on said car, by reason of any negligent conduct of the servants of the company in charge of said car."

2. "If you believe that said car was not ordinarily used to carry passengers, and by reason of its construction and mode of propelling it, persons riding on the same were exposed to more than ordinary danger, it was incumbent on the servants of defendants in charge of said car to employ a greater degree of care for the protection of plaintiff, in proportion to the greater degree of danger arising from the unusual situation and all of the surrounding circumstances. But the plaintiff, by entering such car, also accepted such greater risk as was patent to him, and such danger as was manifestly incident to riding on such car, and as could not be avoided by the careful and prudent management of the same by the defendant's servants, which the plaintiff had a right to expect, and might reasonably rely upon under the circumstances."

Each of these paragraphs of the charge of the court are assigned as error. By a reasonable construction of the first, the jury had a right to infer that the plaintiff was on the hand-car with the consent of some agent of the defendant, who was either expressly or impliedly authorized to give defendant's

consent for appellant to be carried on the hand-car, with all of the rights of a passenger on a train operated for transporting passengers. There was no dispute as to appellee having the consent of Hume to ride on the car; but it was denied that Hume had any authority to give appellant's consent for him to do so, and there was evidence tending to support this view of the case. We think that the district court erred in holding as a matter of law, under the facts of the case, that appellee had the consent of appellant to ride upon said hand-car, but that it should have been left to the jury, under appropriate instructions, to determine the *status* of appellee in connection with said car: *Pierce on Railroads*, 277; *Jackson v. Second Ave. R'y Co.*, 47 N. Y. 274; 7 Am. Rep. 448; *Redding v. South Carolina R. R. Co.*, 3 S. C. 1; 16 Am. Rep. 681.

The servants of appellant who gave appellee permission to ride on the car are not shown to have had the power to abrogate or suspend rules promulgated by the proper authority for the operation of the road; and the court below could not assume that said servants, in so doing, were acting in the apparent scope of their authority. But if the facts proven had been sufficient to justify the belief that appellant's agents had the authority to furnish transportation to facilitate holding the inquest, it might have been submitted to the jury to say whether such agents were acting in the apparent scope of their authority in furnishing the hand-car in question.

The decision in the case of *Prince v. International and Great Northern R. R. Co.*, reported in 64 Tex. 144, although growing out of the same facts that exist in the present case, was upon demurrer to plaintiff's petition, in which it was alleged that Prince was on the hand-car by the invitation and consent of an agent of defendant, who had authority to give defendant's consent thereto, and has no application to the question under discussion. And in the hand-car case of *Pool v. Chicago etc. R'y Co.*, 56 Wis. 227, it was shown that Pool took passage on defendant's hand-car to attend to business for defendant; that said car was furnished by an agent of defendant, authorized by defendant to furnish it, and the only point decided was that Pool was entitled to recover under the same facts that any other passenger would be who had paid his fare and was traveling on a passenger train, which was also held in *Prince v. Railroad Co.*, *supra*, and may be considered settled law in this state.

We think that there was also error in the second paragraph

of the charge of the court complained of above. Some courts have held that persons taking passage on trains not designed or used for the transportation of passengers were not entitled to the rights of passengers; and while such is not the law in this state, it would be unreasonable to require of a carrier of passengers, who at some time may gratuitously, or without hire, furnish a hand-car, or other vehicle not adapted to or intended for the carriage of passengers, manned by a crew that had been employed simply to work on the track and run the car for their own convenience, but had never been accustomed to look after the safety of others, and had not been selected or employed for such purpose, a greater degree of care, skill, or diligence than would be required in carrying passengers for hire on regular trains, although it might be, in fact, more dangerous to ride on such improvised conveyance than upon regular passenger-coaches.

We find no further error in the charge of the court.

The appellant objected to the proof of all facts that occurred after the jury of inquest started south from where the body was found, in the direction of Hunter, on the ground that said car was furnished to carry the coroner and jury to where the body was found, and no farther, and that anything occurring beyond this place was irrelevant. A sufficient answer to that is, that the coroner thought it was necessary to go beyond the spot of ground where the body was found in order to develop the facts leading to the death, the cause of death being the subject of investigation. Any other view would be exceedingly narrow and technical, and we do not think the court erred in overruling the objection.

We conclude that this case ought to be reversed and remanded on account of errors in charge of the court.

IN ABSENCE OF PROOF that railway company is accustomed to carry passengers on hand-cars, one who is injured while so riding has no cause of action against the company, although invited thus to ride by the section foreman: *Hoar v. Mains etc. R. R. Co.*, 35 Am. Rep. 299.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

BLUME *v.* HARTMAN.

[115 PENNSYLVANIA STATE, 32.]

ACTION OF COURT BELOW IN GIVING CONCLUSION OF ARGUMENT TO COUNSEL FOR ONE SIDE OR OTHER is not reviewable on error.

BURDEN OF CASE RESTS UPON CONTESTANT OF WILL to the conclusion of the trial, upon an issue *denavit vel non*, and his counsel has the right to close the argument to the jury.

BURDEN OF PROOF RESTS UPON STRANGER WHO WRITES WILL, by the terms of which he is the principal beneficiary, of showing that the testatrix was acquainted with its contents, and had an intelligent consciousness of the proportion of the estate to be taken by him; but the burden of proof in this respect rests upon the contestant, where the will is written by the son of the testatrix, who is the principal beneficiary.

BURDEN OF PROOF RESTS UPON CONTESTANT OF WILL of showing that the testatrix was not acquainted with its contents, and had not an intelligent consciousness of the proportion of the estate to be taken by the beneficiary, where the will is written by the son of the testator, who is, by its terms, the principal beneficiary; but the burden of proof is upon the son if the will was not read by the testatrix, nor read or explained to her before its execution, nor read by her afterwards before her death.

QUESTIONS WHETHER FRAUD AND UNDUE INFLUENCE WERE USED BY PROPONENT IN PROCURING WILL, and whether the will was executed by the testatrix without a knowledge of its contents, are properly submitted to the jury, where the will was written by a son of the testatrix, who was inequitably preferred over the other children, and there is evidence to show that the testatrix had repeatedly declared her intention to divide her property equally among her children, that she was in a state of excessive physical feebleness and exhaustion when she signed the will, and that she was not acquainted with its contents.

ISSUES directed out of the orphans' court of Allegheny County, to the court of common pleas of that county, to determine whether fraud, undue influence, or imposition was used to procure the execution of the will of Mrs. Charlotte Blume, and whether she had a full understanding of the nature of the dispositions contained in the will. It appeared on the trial that Mrs. Blume died February 7, 1886, leaving a will by which she gave about one hundred and seventy thousand dollars' worth of property to her son, Frederick Blume, the plaintiff, about twenty-nine thousand dollars to her daughter, Mrs. Charlotte M. McClure, and about twenty-eight thousand dollars to her daughter, Mrs. Amanda V. Hartman, with remainder to the son Frederick if the daughters died without issue. The will was executed December 24, 1885, in the presence of two witnesses, and was written by Frederick Blume. There was evidence to show that the testatrix had repeatedly declared her intention of making an equal distribution of her property among her children, that she was in a state of excessive physical feebleness and exhaustion when she signed the will, and that the will was not read by her, nor read or explained to her before its execution, nor read by her afterwards before her death. This evidence is given at some length in the opinion. The verdict was for the defendants, and the plaintiff assigned error. The first assignment of error was, that the court denied the plaintiff's right to close the argument to the jury, and held that the burden of proof was upon the defendants, and that they had the right to close. The second assignment of error was, that the court instructed the jury that if the testatrix was, in such a feeble condition mentally, from her physical weakness, as to be easily influenced, and to make it easy to perpetrate a fraud upon her, and if she was so weak as to be physically unable to read the will, and it was in fact not read by her, nor explained to her, then the burden of proof was upon the plaintiff to show that the will was in accordance with her directions. The third assignment of error was to the instruction that if the facts were found as alleged by the defendants as to the mental weakness of the testatrix from physical prostration at the time, and that the will was not explained nor read to her, nor read by her before her death, and that for a considerable time previous, and up to the time of making the will, she had an expressed, fixed intention of dividing her property equally among her children, taken in connection with the fact that the plaintiff

wrote the will, and that he alone consulted her about it, and in connection with the great advantage given to the plaintiff by it, then the burden of proof was thrown upon the plaintiff to show that the will was in accordance with the instructions of the testatrix, and was not procured by fraud and trickery. The remaining assignments of error were to the refusal of the court to instruct the jury that there was no evidence of fraud or undue influence in procuring the will on the part of the plaintiff, and that the will was not executed by the testatrix without a knowledge of its contents.

George Shiras, Jr., Thomas M. Marshall, and J. S. Strickler, for the plaintiff in error.

John Dalzell, A. M. Brown, and S. Schoyer, Jr., for the defendants in error.

By Court, GREEN, J. There is no merit in the first assignment of error. We have frequently held that the action of the court below, in giving the conclusion of the argument to counsel for one side or the other, is not reviewable on error. But here the main burden of the case rested with the contestants to the conclusion of the contest. It was for them to satisfy the jury as to the truth of their allegations; and there was, therefore, propriety in awarding to their counsel the right to begin and conclude the final argument to the jury. What was said by the court below in regard to the shifting of the burden of proof in certain circumstances was contingent upon a finding of certain facts by the jury, which finding could not be known in advance, and was itself a part of the general duty of the jury. Nor can we say there was error in the language covered by the second assignment. Beyond question, if the will had been written by a stranger, who was, by its terms, the principal beneficiary, the burden of proving that the testatrix was acquainted with its contents, and had an intelligent consciousness of the proportion of the estate to be taken by the beneficiary, would rest upon him. But the court below made a most ample exception to this rule in favor of the plaintiff, because he was a son of the testatrix, and therefore had a right of importunity in his own favor without incurring the penalty of affirmative proof. The qualifying language which reimposed the burden upon him in certain circumstances was applicable to the effect of other and additional facts, one of which was, that the will was not read to

the testatrix, nor by her, nor explained to her before its execution, nor read by her afterwards before her death, providing this, and the other facts referred to in the charge, should be found by the jury. Certainly, if such facts were found by the jury, they would altogether rebut the legal presumption of knowledge of contents, arising from the mere fact of execution; and then, without the help of affirmative testimony from the proponent showing knowledge of contents and free will in the execution, the jury would be justified, indeed required, to render their verdict against the will. All that the court said was, that if these facts were found, the burden of proof would rest with the proponent; and in this there was no error.

The remaining assignments allege error in submitting to the jury the question whether there was fraud or undue influence in procuring the will, on the part of the plaintiff, and whether the will was executed by the testatrix without a knowledge of its contents. Of course, these are questions of fact within the exclusive province of the jury, which includes the credibility of witnesses; and this court is not at liberty to review and revise the action of the jury, unless we are prepared to say there was no evidence, beyond a *scintilla*, in support of the verdict. After a most patient and careful study of the testimony, we find ourselves unable to take that position. The great and very serious difficulty with the plaintiff's case is, that, by his own testimony, it is almost distinctly and affirmatively proved that his mother did not know the contents of the will at the time she signed it. He said he finished its preparation between four and five o'clock on the morning of December 24th, and then went to bed. Between nine and ten of the same morning, still having it in his exclusive possession, he showed it to his counsel, and at about ten o'clock, or soon after, he brought it to his mother and left it with her. He admits that he neither read it to her nor explained it to her. He says he was gone for a while, and then returned for a few minutes, and then went for the witnesses. All the persons present at the signing concur in saying that the will was neither read nor explained at the time of execution. The plaintiff admits, and the others testify, that he took the will into his own possession very soon, if not immediately, after it was executed, and it remained there until it was probated. There is no evidence that the testatrix ever saw it, read it, or heard it read or explained, at any time after

the plaintiff took it on the day of its execution. During the short time the will was accessible to the testatrix, after it was left with her on the day of its execution, and before it was signed, her daughter, Mrs. McClure, was with her, and testified that her mother laid the will down on the bed beside her, and she did not know what became of it afterwards. She said the will was not read to her mother, and was not read at all, and that her mother asked for some paper to make signatures upon while her brother was gone for the witnesses. She does not say her mother read the will, but clearly implies that she did not. When the plaintiff was examined in the orphans' court, he did not say his mother read the will, or any part of it, or attempted to read it. When he was examined in the common pleas, he sought to convey the idea that she read a part of the will, without absolutely testifying that she did actually read it. After all he said was finished, he was asked in cross-examination, — and this was the last of his testimony on this subject: "Q. Was she reading it? A. I did n't say she was. Q. Do you say now she was reading the will? A. No, sir, I do not. Q. Do you say she ever read it? A. I do not say she did. I said she was reading from the beginning, and I thought it was open about there, from articles 5 to 8." The time at which he said this took place was during the short interval immediately after he gave her the will, and before he went out for the witnesses. It was the same time that Mrs. McClure went into the bath-room, but not longer than four minutes, according to her testimony. After searching the testimony most thoroughly, we can discover no possible opportunity for the testatrix to have become acquainted with the contents of the will, even upon the testimony of the plaintiff, except in this exceedingly short period, and that testimony fails to prove knowledge of the contents in the least degree satisfactory to a jury or a court.

That the plaintiff's testimony was changed in regard to this most important subject from his first examination in the orphans' court, when he said nothing about his mother's having read any part of the will, until he was examined in the common pleas, even if he had then sworn positively to her reading the whole of it, was in itself a most damaging circumstance against his credibility. His pecuniary interest in making the change in his testimony was enormous. His reputation as a man of fairness and honor was also deeply involved. The necessity for a change in his former statement was simply

overpowering, for without it, it was scarcely possible to expect a recovery. In such circumstances, the temptation to depart from the strict truth was so very great that the right of a jury to discredit the changed testimony must be conceded. It is scarcely too much to say that no disinterested tribunal would give the slightest credence to it. But the new testimony was not even distinct or positive that the will was actually read by the testatrix. It was inadequate, it was contradictory, it was confused, and so uncertain on the point whether there was any real reading of the will by the testatrix, that even if the witness had been disinterested, the jury would have been entirely justified in giving no weight to it whatever. There were many other considerations, such as the great inequality of the distribution made by the will, the repeatedly expressed declarations made by the testatrix to the effect that she intended to divide her property equally among her children, and her personal relations with her children, which bore as well upon the question of undue influence as upon knowledge of contents, which were or might be fairly influential with the jury. We cannot, however, go into an extended discussion of these matters. It is not necessary. We refer to them only as illustrative of the proposition that there was evidence proper for the determination of the jury on both the issues. It would be quite impossible for us to say, as matter of law, that there was no evidence, beyond a *scintilla*, tending to show ignorance of the contents of the will. To us it seems clear that the evidence greatly preponderated in favor of the allegation that the testatrix was not acquainted with the contents of the will, and if she was not, it cannot be said that it was legally her will.

On the question of undue influence, of course there was no evidence of physical force or personal constraint. But of that kind of influence which accomplishes its results by misrepresentation, by deceit, by fraud, we cannot say there was no evidence; the plaintiff, unfortunately perhaps for himself, chose to conduct his proceedings in the procurement and the preparation of the will, and in the inducements to his mother to sign it, secretly, and by himself alone. There is absolutely no evidence whatever except his own to support his own allegations as to his communications with her. Apparently, he was not even willing to suffer the presence of a lawyer, though employed by himself, at his interviews with his mother. He is directly responsible, therefore, for every inference which may fairly be made against him as to the means he employed

to obtain the assent of his mother to the execution of the will in question. The evidence of a testamentary intent on her part to make an equal division of her estate among her children comes from so many different persons, is so voluminous, so direct, so emphatic, and so entirely credible apparently, that it cannot but be regarded as a very important element in the inquiry whether the will she signed expressed her real or an imposed intent. It was very easy for the plaintiff to set this question entirely at rest by simply having her communicate her intentions in the presence of a third person, or by reading the will to her, or explaining it to her, or having her read it in such a presence. But he did not do this, and because he did not do it, he is subject fairly to an inference that the will did not contain her true testamentary purpose. For if it did, it would not only be largely to his pecuniary interest, but to the defense of his character as an honorable man, to let at least some one other person know the fact from her that she assented to its terms. Of course, if there were clear proof that she had read it, the same result would have been reached; but there is no such proof. Her condition at the time is also a matter of much importance in this connection. That she was in a state of excessive feebleness and exhaustion physically, when the will was signed, is proved by so many disinterested witnesses that the plaintiff's testimony to the contrary might well be discredited by the jury. In such a state of bodily health, the jury might well have inferred a condition of mind easily controlled by one in a confidential relation, as a son to his mother. The undisputed fact, testified to by the plaintiff himself, that he alone had said and done whatever was actually said and done for the purpose of inducing her to make a will; that he alone had consulted with her in regard to it; that he alone prepared it and knew its provisions,—proved clearly that he was the one person who procured it to be made and executed. If from all the evidence the jury believed that the will she signed did not reflect her true testamentary intent, but something quite different, they were justified in inferring that she had been imposed upon by her son, since no one else, under the evidence, could have done so. The immense inequality of division also is a circumstance in support of such a theory. He cannot say, therefore, that there was no evidence of undue influence proper to be submitted to a jury.

In making these comments upon the testimony, we have not undertaken to present both sides of the case, as that is not our

proper function. It is not for us to determine the facts upon their merits, but only to show that there was evidence in support of the verdict sufficient to be submitted to the consideration of the jury for their determination of the issues they were to try. We think it unnecessary to prolong the discussion. The learned judge who tried the cause treated it fairly and dispassionately, as it seems to us, and gave to the plaintiff every opportunity to have his views and his facts carefully considered. We see no error in the various matters assigned as erroneous, and must therefore affirm the judgment.

BURDEN IS UPON PROPONENT OF WILL to prove its due execution, and the testamentary capacity of the testator: *Jackson v. Van Dusen*, 4 Am. Dec. 330; *Clark v. Fisher*, 19 Id. 402; *Comstock v. Hadlyme Ecclesiastical Society*, 20 Id. 100; *Reynolds v. Reynolds*, 40 Id. 599; *Rigg v. Wilton*, 54 Id. 419; *Williams v. Robinson*, 1 Am. Rep. 359; *Hardy v. Merrill*, 22 Id. 441; and he has therefore the right to open and close the case: *Rigg v. Wilton*, *supra*; *Hardy v. Merrill*, *supra*; but see *Hemphill v. Hemphill*, 21 Am. Dec. 331; *Taylor v. Wilburn*, 64 Id. 186; *McMechen v. McMechen*, 41 Am. Rep. 682.

WILL DRAWN BY ONE WHO RECEIVES BENEFIT UNDER IT IS VIEWED WITH SUSPICION: *Coffin v. Coffin*, 80 Am. Dec. 235, and note; *Cheatham v. Hatcher*, 32 Am. Rep. 650; *Post v. Mason*, 43 Id. 680; *Montague v. Allen's Ex'rs*, 49 Id. 384, 387; *Yarley v. Cuthbertson*, 56 Id. 218.

BELL'S APPEAL.

[115 PENNSYLVANIA STATE, 83.]

ONE WHO IS MADE DEFENDANT TO CREDITOR'S BILL BY AMENDMENT WAIVES OBJECTION TO FAILURE TO SERVE NOTICE of the amendment upon him by entering an appearance and making defense.

STATUTE OF LIMITATIONS CEASES TO RUN FROM TIME OF AMENDMENT, as against one who is made a defendant to a bill in equity by amendment.

ONE WHO SUBSCRIBES TO STOCK OF CORPORATION IN VIEW OF AND FOR PURPOSE OF ITS SUBSEQUENT ORGANIZATION, which is effected, and pays in full for one share and transfers other shares, thereby recognizes and affirms his contract of subscription, and cannot be heard to disaffirm it.

LIABILITY OF SUBSCRIBER TO STOCK OF CORPORATION IS NOT DISCHARGED by an informal *ex parte* transfer of the shares in writing, not entered on the books of the corporation, or recognized by it, accompanied with a private agreement of the transferee that the transferor should not be liable for anything unpaid on the shares so transferred.

BILL FILED BY CREDITOR OF CORPORATION ALLEGED TO BE INSOLVENT, AGAINST STOCKHOLDERS, to compel payment of unpaid capital stock in discharge of the claims of creditors, is a proceeding to enforce the equitable obligations of the stockholders; and since only so much of the unpaid capital as is necessary for the payment of the debts can be called in, and this only when all the other assets are exhausted, there

must be an account of the amount of debts, assets, and unpaid capital, and a decree for an assessment of the amount due by each stockholder.

OBLIGATION TO MAKE GOOD UNPAID PORTIONS OF CAPITAL STOCK WHEN NECESSITIES OF CREDITORS REQUIRE It is a charge upon the stock which passes with it to the transferees thereof, subject to exceptional instances where the original subscribers are notwithstanding liable by charters or general statutory provisions.

BILL in equity, filed March 13, 1878. The facts are fully stated in the opinion.

Thomas M. Marshall and A. M. Imbris, for the appellant.

C. C. Dickey and Welty McCullough, for the appellees.

By Court, GREEN, J. The bill in this case was a creditor's bill, originally filed by one creditor of a corporation alleged to be insolvent, against several of the stockholders, for the purpose of compelling the payment of the unpaid capital stock in discharge of the claims of creditors. The bill set forth the debt of the plaintiff, and contained also a general allegation that there were other debts to the amount of thirty thousand dollars, without naming the creditors or the separate amounts due them. Subsequently, certain other persons claiming to be creditors were allowed to intervene by petition. The master, without making any report as to these latter claims, found that the appellant, who was brought in by amendment, was indebted for unpaid capital upon one share to the extent of four thousand dollars, with interest from November 1, 1875. He however did not report any form of decree, nor did he report as to any other debt, except that of the plaintiff, which he found to be \$3,169.81, with interest. The appellant resisted the plaintiff's claim upon three grounds, one of which was the statute of limitations. It appears, however, that the amendment by which he was brought in was filed in February, 1879, which, as the date of incorporation was June, 1873, was within six years of the time when the cause of action arose. It is alleged that Bell filed no answer till April, 1880, which was seven years after the subscription, and that no notice of the amendment was served upon him. He however entered an appearance, and made defense, which was a waiver of notice. But the statute ceases to run from the time of the amendment, on the same principle as the bringing of an action stops the running of the statute: *Hemphill v. Climens*, 24 Pa. St. 367; *McClure v. McClure*, 1 Grant Cas. 222. The plea of the statute, therefore, is no defense in this case.

It was also urged that the corporation did not exist at the time of the subscription. But the subscription was made in view of, and for the purpose of, a subsequent organization, which actually was had, and the appellant thereafter paid in full for one share and transferred other shares, and thereby recognized and affirmed his contract of subscription, and cannot now be heard to disaffirm it. It was further alleged that Bell had assigned the four shares which he did not pay for, and therefore was not liable. The master found that as to three of these the assignee had paid the whole amount in full, and as to the fourth, that there was no proof of assignment, except an informal *ex parte* transfer in writing, never entered or appearing on the books of the company, and a private agreement of the transferee that Bell should not be liable for anything due on the five shares. This, of course, could not relieve Bell from his liability if it existed otherwise. It does not appear that any certificate was ever issued to the assignee for the share attempted to be transferred, or that the transfer was recognized by the company in any way. As there does not seem to have been any actual, *bona fide*, completed assignment of this share, Bell's liability as owner of it would not be discharged. These several defenses, therefore, are inadequate.

There remains, however, the fifth assignment of error, which raises the question whether upon the whole record a decree can be entered against the appellant. An examination of the master's report discloses imperfections and defects of so serious a character as that it is impossible to found any decree upon it. A part of these were corrected by the court below, but fatal defects still remain. Only one debt is ascertained by the master, and that is the debt due the appellee, which he fixes as \$3,169.81. Yet a decree has been entered for the payment of various sums by different stockholders aggregating \$35,324. The amount decreed to be paid by the appellant alone is \$6,786, which is more than double the amount required to pay the only debt which is found by the master. In the opinion of the court, attention is called to some of the defects in the report, and reference is made to certain agreements of facts by counsel as supplementary to the report. The agreements are not printed, and we do not know what they contain, except as recited in the opinion, and as so recited, they seem to relate only to a question of set-off interposed by one of the defendants. The court also states some few additional facts in relation to the history of the company,

the amount of its capital stock, the amount of bonds given, the subscription of Heath and Speer, the sale of the property, and incidentally it is said there were seventy thousand dollars of unpaid bonds. But all these facts are introduced only to affect the question of the set-off of Heath and Speer. There is no ascertainment of any actual specific debts, no designation of creditors, no adjudication upon the claims of the intervening creditors, no determination that the whole unpaid capital is needed for the payment of debts, nor how much of the capital remained unpaid, nor by whom it was owing. Yet all these things are indispensable to the making of a correct and valid decree.

This is a proceeding to enforce the equitable obligation of stockholders in an insolvent corporation to pay the unpaid portions of the capital stock due by them, in order that the debts, all the debts, of the corporation may be paid to the extent of such unpaid capital. It is not a statutory obligation at all, but an obligation in equity arising out of the consideration that the capital stock of a corporation is a trust fund for the payment of its debts. Only so much of the unpaid capital as is necessary for the payment of the debts can be called in, and this can only be done when all the other assets are exhausted. It is manifest, therefore, that in a case of this kind there must be an account taken of the amount of debts, assets, and unpaid capital, and a decree for an assessment of the amount due by each stockholder. All of this is pointed out in the opinion of this court in the case of *Lane's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166, and had the method of proceeding there indicated been followed in this case, there would have been no difficulty in reaching correct results. As it is, the present record is defective in nearly all material particulars, and the decree must be reversed; but as the proceeding and parties are proper, only with directions to the court below to refer the matter back to the former or another master to perfect the report, and take such additional testimony as may be necessary for that purpose. The case of *Messeremith v. Sharon Savings Bank*, 96 Pa. St. 440, cited and relied upon in the master's report, must not be understood as a decision that the transferee of stock in a corporation which has become insolvent is not liable for the payment of the unpaid portion of the shares held by him when the unpaid capital is required for the payment of the debts of the corporation. That case did not involve that question. It was an ordinary common-law action of debt directly upon the

subscription contract, and the original subscriber was held bound to pay, because he had contracted to pay, the whole subscription price of the stock. The court below held that a transferee in good faith and upon an agreement to pay subsequent calls was not bound to pay them, and a single remark in the opinion of this court seems to countenance that idea. It is true that such is the law as declared in several decisions of this court, but they were decisions arising upon charters, or by-laws, providing for only a particular remedy in case of non-payment of installments, such as the forfeiture and sale of the stock itself in case of default, as was the case in *Franks Oil Co. v. McCleary*, 63 Pa. St. 317, and *Palmer v. Ridge Mining Co.*, 34 Id. 288; or that the company has no right of action against the transferee, and no remedy against him except a forfeiture of the shares, as was the case in *President etc. of Delaware etc. Canal Co. v. Sansom*, 1 Binn. 70, and *Palmer v. Ridge Mining Co.*, *supra*.

There is also another class of cases in which the same rule as to liability of original stockholders is held, notwithstanding they have transferred their shares. They are cases of subscriptions to the stock of railroad companies, subject to the general railroad law of February 19, 1849, the seventh section of which provides that no transfer shall have the effect of discharging any liabilities incurred by the owners thereof. Some of these cases are the following: *Pittsburgh etc. R. R. Co. v. Clarke*, 29 Pa. St. 146; *Graff v. Pittsburgh etc. R. R. Co.*, 31 Id. 489; *Hays v. Pittsburgh etc. R. R. Co.*, 38 Id. 81; *Cass v. Pittsburgh etc. R. R. Co.*, 80 Id. 31. Subject to such exceptional instances as these, it cannot be doubted that the obligation to make good the unpaid portions of capital stock when the necessities of creditors require it is a charge upon the stock, which passes with it to the holders of it. It is an equitable obligation founded upon no statute, and rests upon those who are the owners of the stock at the time of insolvency. If this were not so, the creditors of a corporation, which had been in existence for many years, and whose original subscribers were dead and gone long before the insolvency of the company occurred, would be deprived of all resource to the unpaid capital stock at the very time when alone they needed it. The doctrine is thus stated in Angell and Ames on Corporations, sec. 534: "When an original subscriber to the stock of an incorporated company, who is bound to pay the installments on his subscription from time to time as they are called in by the company, transfers

his stock to another person, such other person is substituted not only to the rights but to the obligations of the original subscriber, and he is bound to pay up the installments called for after the transfer to him. The liability to pay up installments is shifted from the outgoing to the incoming shareholder"; citing numerous authorities. The same doctrine was held and enforced in *Webster v. Upton*, 91 U. S. 65. The very question of that case was the liability of a transferee of stock for calls made after his acceptance as a stockholder by the company, upon an implied promise that he would pay calls made during his ownership. Mr. Justice Strong, in delivering the opinion of the court, reviews the whole subject of the liability of both the original subscriber and the transferee. After showing the liability of the original subscriber by a promise which the law implies to pay calls which he has never expressly agreed to pay, he says: "But if the law implies a promise by the original holders or subscribers to pay the full par value when it may be called, it follows that an assignee of the stock, when he has come into privity with the company by having stock transferred to him on the company's books, is equally liable. The same reasons exist for implying a promise by him as exist for raising up a promise by his assignor. And such is the law as laid down by the text-writers generally, and by many decisions of the courts (citing several cases). There are a very few cases, it must be admitted, in which it has been held that the purchaser of stock, partially paid, is not liable for calls made after his purchase. Those to which we have been referred are *President etc. of Delaware etc. Canal Co. v. Sansom*, 1 Binn. 70, where the question seems hardly to have been considered, the claim upon the transferee having been abandoned; and *Palmer v. Ridge Mining Co.*, 34 Pa. St. 288, which is rested upon Sansom's case, and upon the fact that by the charter the company was authorized to forfeit the stock for non-payment of calls. We are also referred to *Seymour v. Sturgess*, 26 N. Y. 134, the circumstances of which were very peculiar. In neither of these cases was it brought to the attention of the court that the stock was a trust fund for the protection of creditors in the first instance, a fund no part of which either the company or its stockholders was at liberty to withhold. They do not, we think, assert the doctrine which is generally accepted. . . . We think, therefore, the transferee of stock in an incorporated company is liable for calls made after he has been accepted by the company as a stockholder, and his

name has been registered on the stock books as a corporator; and being thus liable, there is an implied promise that he will pay calls made while he continues the owner."

It must also not be forgotten that, as to all corporations formed under the general law of 1874, the seventh section of that act expressly imposes upon transferees of stock all the liabilities and obligations of original subscribers. What is said upon this subject is cautionary only, and intended to guard against any erroneous impressions which might arise out of the generality of expression in the *Messersmith* case.

We notice that the master has charged interest upon the amount of unpaid capital found due by appellant from November 1, 1875. No such claim is made in the bill, and there is no testimony printed, and no distinct finding of any fact which necessarily determines the liability for interest. An indistinct reference is made in the report to a last call for installments on November 1, 1875, but no facts or testimony appear in relation to the subject. As a large part of the decree is made up of interest, the subject should receive a careful consideration.

The decree of the court below is reversed at the cost of the appellee, and the record is remitted, with instructions that the case be referred to a master to take such additional testimony and make such further report as may be necessary to perfect the proceedings.

SUBSCRIPTIONS TO CORPORATE STOCK. — See this question considered at length in *Parker v. Thomas*, 81 Am. Dec. 335, and note.

INDIVIDUAL LIABILITY OF STOCKHOLDERS FOR DEBTS OF CORPORATION: See *Prince v. Lynch*, 99 Am. Dec. 427, and note discussing the subject.

UNPAID SUBSCRIPTIONS TO CORPORATE STOCK CONSTITUTE FUND FOR CREDITORS: *Germantown Passenger R'y v. Fidler*, 100 Am. Dec. 546, and note; *Lane's Appeal*, 51 Am. Rep. 166.

TRANSFEREE OF STOCK FROM ORIGINAL SUBSCRIBER IS SUBSTITUTED TO HIS OBLIGATIONS as well as his rights: *Merrimac Mining Co. v. Levy*, 93 Am. Dec. 697.

JOHNSON'S APPEAL.

[115 PENNSYLVANIA STATE, 129.]

TENANT'S RIGHT OF RENEWAL IS PROPERTY OR ASSET INCIDENT TO EXISTING LEASE, although it may not be enforceable against the will of the landlord.

CHANCE OR OPPORTUNITY OF RENEWAL OF LEASE HELD BY PARTNERSHIP is in itself a distinct asset of the partnership in which all the partners have an interest, and consequently one partner cannot take a new lease in renewal of an existing one of the firm, in his own name, or for his own benefit, without being liable to account for it to the partnership.

DISSOLUTION OF PARTNERSHIP DOES NOT CHANGE RELATIONS OF PARTNERS in respect to the renewal of a partnership lease.

BILL in equity by Robert G. Loughrey against William H. Johnson for an account and settlement of the affairs of the partnership, which had existed between the parties and had been dissolved. The question raised on this appeal was as to the defendant's right to have the plaintiff account for the value of the renewal of the lease of premises occupied by the firm. The master, to whom the case was referred, reported that the plaintiff and defendant were partners in the plumbing business, and had leased certain premises in the city of Philadelphia. About May 1, 1883, the partners disagreed, and determined to dissolve the partnership at the end of the term. The defendant then offered the plaintiff one thousand dollars for the good-will of the business, with the privilege of occupying the store and carrying on business there. About July 1, 1883, the plaintiff asked the defendant if he would take the one thousand dollars which he (the defendant) had offered to give, and a bidding then took place between them, concluding with an offer of seventeen hundred dollars from the plaintiff, and an offer of eighteen hundred dollars from the defendant, which the plaintiff declined to accept. The plaintiff claimed that the bidding was simply for the occupancy of the store up to September 30, 1883, when the lease expired; while the defendant claimed that the bidding was for the successorship and the right to take a renewal of the lease. The partnership ended July 12, 1883, but the lease did not expire until September 30, 1883. The parties had a conversation on the subject about July 15, 1883, but no result was reached; and about July 20th the defendant prepared a written agreement, binding both parties not to occupy the store for one year after the dissolution, but the plaintiff refused to sign the agreement. In the latter part of the same month, the plaintiff proposed

to the defendant that they should surrender the lease, and thus save a couple of months' rent, to which the defendant at first agreed, but afterwards objected, having been informed that the plaintiff was taking steps to secure the store from the time it should be vacated by the firm. The plaintiff obtained a lease of the store for one year, on September 29, 1883, and entered into possession as sole tenant. There was no provision for a renewal in the original lease. The master reported that the defendant was not entitled to charge the plaintiff with the value of the renewal of the lease. The defendant filed exceptions to the report, which were dismissed. A decree was entered for Loughrey in accordance with the report, and the defendant appealed.

John G. Johnson and Joseph R. Rhoads, for the appellant.

Alfred Frank Custis, for the appellee.

By Court, GREEN, J. There is no question at all that the tenants' right of renewal, although it may not be enforceable against the will of the landlord, is a property or asset incident to an existing lease, and is so recognized by all the authorities. When the lease is held by a partnership, this chance or opportunity of renewal is in itself a distinct asset of the partnership in which all the partners have an interest. As a consequence of this doctrine, one partner in a firm cannot take a new lease in renewal of an existing one of the firm, in his own name or for his own benefit, without being liable to account for it to the partnership. In 2 Lindley on Partnership, 574, the rule is thus stated: "It has been decided more than once that if one partner obtains in his own name, either during the partnership or before its assets have been sold, a renewal of the lease of the partnership property, he may not be allowed to treat the renewal lease as his own, and as one in which his copartners have no interest." In *Lacy v. Hall*, 37 Pa. St. 360, this court said, Strong, J.: "A partner in a firm who takes a renewal of a lease to the firm in his own name holds it for the firm, and that even though the lessor has refused to renew the lease with the old lessees: *Featherstonhaugh v. Fenwick*, 17 Ves. 298; see also note to *Moody v. Matthews*, 7 Ves. 186, Sumner's ed. Yet the consideration for the new lease is the covenant of the partner who obtained it. But his relation to his copartner forbids his treating for it for his own individual benefit. And if he does so

treat, and obtains a lease in his own name, he holds in trust for the partnership."

In *Clegg v. Edmondson*, 8 De Gex, M. & G. 787, it is said: "Although it cannot be laid down that in no case can a partner during the partnership contract for a new lease to himself exclusively, of property let to a partnership, it is very difficult (and especially as regards a managing partner) to make out such a case, and the mere announcement to his partners of his intention to apply for such a lease after the dissolution is not sufficient to exclude their interest, although the partnership is at will."

Nor does the fact that the renewal was obtained after the dissolution change this rule. Thus in *Speiss v. Rosswog*, 96 N. Y. 651, the court of appeals of New York affirmed an opinion of the supreme [superior] court, in which Sedgwick, C. J., said: "The fact in this case which the learned counsel for the respondents argues distinguishes it from those cases in which the partner taking a renewal of the partnership leases has been held a trustee of the firm is, that the defendant Constantin Rosswog obtained them after the firm was dissolved. This dissolution did not annul or change those relations between the parties which are the basis of the obligation in such cases. After the dissolution the original leases remained partnership property for the purpose of liquidation. The obligation of each partner to deal with them, not for his individual benefit, but for the common or joint interest, remained. The trust as to the use of the partnership property remained attached to these leases, as part of their value was the so-called expectation of renewal. This is deemed so actual and vital that when a new lease is had it is considered to be a graft upon the old": 16 Jones & S. 135.

This reasoning is in consonance with our views, and appears to be a necessary consequence of the partnership relation applied to what is clearly a partnership asset. The circumstance, that there was no provision for a renewal contained in the old lease is immaterial. It is not the absolute right to a renewal, but the expectancy or opportunity of renewal which pertains to a greater or less extent to all leases, that constitutes the property or asset in question. And this expectancy grows out of and belongs to the old lease, which, being firm property, draws to it the expectancy and clothes it with the same quality. In the present case the lease of the firm expired October 1, 1883, the firm was dissolved July 12, 1883, and the new

lease was obtained by Loughrey on September 29, 1883, before the expiration of the old one. As the new lease was not made with the consent of Johnson, he has not lost his right to have Loughrey account for the value of the expectancy thus appropriated by him. That value, however, must be determined by the master; it cannot be fixed or even indicated by us, and it must be determined as an expectancy only, and not as a certainty.

The decree of the court below is reversed at the cost of the appellee, and the record is remitted, with direction that the cause be referred to the master to take the testimony and report the value of the expectancy of renewal, and thereupon to charge the appellee with the same as a partnership asset in the settlement of the accounts.

LEASE RENEWED BY ONE PARTNER IN HIS OWN NAME INJURES TO BENEFIT OF FIRM: *Mitchell v. Reed*, 19 Am. Rep. 252.

ARNOLD v. PENNSYLVANIA RAILROAD COMPANY.

[115 PENNSYLVANIA STATE, 125.]

FAILURE TO PERFORM DUTY WHICH IS WELL DEFINED IS NEGLIGENCE, and may be so declared by the court; but when the measure of duty is not unvarying, when a higher degree is required under some circumstances than under others, and where both the duty and the extent of performance are to be ascertained as facts, the jury alone can determine what is negligence, and whether it has been proved.

THERE IS NO IRREFUTABLE PRESUMPTION THAT ONE WHO TAKES PASSAGE UPON LIMITED RAILROAD TICKET, the limit of which has expired, is informed of the rules and regulations of the company prohibiting the use of such ticket, by his paying to the conductor of the train the difference between the redemption value of the ticket and a full fare, when no such prohibition appears upon the ticket.

ONE WHO TAKES PASSAGE UPON LIMITED RAILROAD TICKET, without knowledge that under the rules and regulations of the company the ticket cannot be used, is not to be treated as a trespasser, but as a passenger who, by mistake, has entered a train upon which, by his contract, he is not entitled to ride; and whether he had no such knowledge or not, so as to make him a trespasser or a passenger, is a question of fact for the jury.

TRESPASSER UPON RAILROAD TRAIN CANNOT BE EJECTED THEREFROM without a reasonable regard for his safety; and whether he was so ejected or not is a question of fact for the jury.

CASE by Charles M. Arnold against the Pennsylvania Railroad Company to recover damages for injuries sustained by him by reason of being ejected from the defendant's train. The plaintiff, on April 6, 1883, purchased an excursion ticket

from Philadelphia to Lancaster, and return, over the defendant's road. The return coupon, which was stamped with the date of purchase on its back, recited that "in consequence of the reduced rate at which this ticket is sold, it will only be received for return passage on the day of sale, as stamped on the back." The plaintiff, after transacting his business in Lancaster, went to the defendant's depot at that place, about eleven o'clock in the evening, for the purpose of returning to Philadelphia. He took passage upon a train which arrived at the depot after twelve o'clock. The conductor refused to take the return coupon, saying that it had expired at twelve o'clock, and demanded fare, and told the plaintiff that unless he paid it he would be put off. The plaintiff replied that his ticket was good, but rather than be put off, he would pay the difference between the redemption value of his return coupon and a full fare. The conductor refused to accept the offer, and after the train had stopped at several regular stations, and no effort was made to eject the plaintiff, the conductor stopped the train at a way-station, and told the plaintiff he would have to get off. The plaintiff arose, and under protest followed the conductor to the door. The conductor showed the plaintiff off on the side nearest the station, in order to reach which it was necessary to cross the tracks of the west-bound trains. There were no lights or signals at the station, and before the plaintiff could clear the tracks, he was struck by a train which was then due at that place, and considerably injured. The court nonsuited the plaintiff, whereupon he took this writ of error.

William W. Porter, for the plaintiff in error.

Isaac Elwell and David W. Sellers, for the defendant in error.

By Court, GORDON, J. Two well-established principles, governing cases like that in hand, seem to have been overlooked or disregarded by the court below in the disposition of the present contention. The one is, that as a general rule, questions of negligence are for the jury, and cannot be determined by the court. This rule with its exception is well stated in the case of *McCully v. Clarke*, 40 Pa. St. 399, wherein it is said by Mr. Justice Strong: "When a duty is defined, a failure to perform it is of course negligence, and may be so declared by the court; but when the measure of duty is not unvarying, when a higher degree is required under

some circumstances than under others, and where both the duty and the extent of performance are to be ascertained as facts, the jury alone can determine what is negligence, and whether it has been proved." An illustration of this rule and its exception may be found in the case of one who, without stopping to look and listen for approaching trains, attempts to cross the track of a railroad, and is injured. Here a fixed and well-defined duty has been violated, and the court determines that there has, *ipso facto*, been negligence. But if it were so, that he did, before attempting to cross, stop, look, and listen, then whether he was otherwise negligent, and whether the railroad company was remiss in its duty, are questions which a jury only can settle. As cases of accurately defined duty seldom arise, and as ordinarily both the duty and the neglect must be ascertained from the attendant facts and circumstances, we may assume the generality of the rule above stated. In the case in hand, the duty of the conductor, in expelling the plaintiff from the cars at the time and place selected for that purpose, was certainly one that was not strictly defined. It may be admitted that as a faithful officer he was obliged to eject Arnold from the train; but then the very important question arises, Did he, as the company's employee, properly discharge this obligation in dismissing the plaintiff from the cars between the tracks of the railroad, on a very dark night, at a way-station that, from the want of light in or about it, could not be seen? As everything in this proposition depends upon facts and circumstances, its solution was for the jury. If, indeed, we are not to treat the plaintiff as an intentional intruder, we may regard the contention as settled by the case of *Lake Shore and Michigan Southern R'y Co. v. Rosenzweig*, 113 Pa. St. 519, in which we held, per Mr. Justice Trunkey, that, "where a passenger purchases a railroad ticket, no irrebutable presumption arises that he is informed as to the rules and regulations of the company prohibiting the use of such tickets on particular trains when no such prohibition appears on its face. If in such case the passenger, without knowledge of such regulation, takes passage upon any one of such prohibited trains, he cannot be treated as a passenger; and although he has no right to a passage, cannot be expelled from the train as a trespasser, but must be treated as a passenger who by mistake has got upon a train on which, by his contract, he is not entitled to ride." But the second rule to which we have adverted is, that even a trespasser cannot be

ejected from a train without a reasonable regard for his safety. This rule as stated by Mr. Justice Hunt, in the case of *Railway Company v. Stout*, 17 Wall. 657, is as follows: Whilst a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to a passenger, it is nevertheless not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts. And this same doctrine has been approved by our own authorities, *inter alia*, in the cases of *Pennsylvania Co. v. Toomey*, 91 Pa. St. 256; *Pennsylvania R. R. Co. v. Lewis*, 79 Id. 33; *Hydraulic Works Co. v. Orr*, 83 Id. 332; *Philadelphia etc. R. R. Co. v. Hummell*, 44 Id. 375, and *Biddle v. Hestonville etc. Passenger R'y Co.*, 112 Id. 551. If, then, we assume that the plaintiff was a trespasser, still the defendant had a duty to perform with reference to his safety which it was not at liberty to neglect; hence the court erred in directing a nonsuit. But whether Arnold was a trespasser on the train or not, was also a question for the jury. That his ticket expired on the 6th of April at midnight, there can be no doubt, and as this was a fixed fact of which he was bound to take notice, nothing can be predicated of that ticket in his favor. Still the unused coupon had value, and as the company under the act of the 6th of May, 1883, was bound to redeem it, he may well have supposed, assuming that he knew nothing of the rule of the company in this particular, that by tendering money to the conductor, as he did, sufficient with the value of the coupon to cover the price of a return ticket, he would be entitled to a passage to Philadelphia, whither he was bound, and if the jury should so find, he would in that case not be a trespasser, and though liable to expulsion, could not be treated as a willful intruder. In other words, as was held in the *Rosenzweig* case, above cited, though *prima facie* he was improperly on the train, yet he might rebut that presumption by facts and circumstances going to show that he was there from no disposition to commit a trespass, but by mistake, and from misapprehension of the defendant's rules.

The judgment is reversed, and a new *verdict* ordered.

NEGLIGENCE IS GENERALLY QUESTION OF FACT FOR JURY: *Spencer v. Milwaukee etc. R. R.*, 84 Am. Dec. 758; *Warren v. Fitchburg R. R.*, 85 Id. 700; *Snow v. Housatonic R. R.*, 85 Id. 720; *Philadelphia etc. R. R. v. Spearren*, 86 Id. 544; *Smith v. O'Connor*, 86 Id. 582; *Louisville etc. R. R. v. Collins*, 87 Id. 486; *Stevens v. Inhabitants of Boxford*, 87 Id. 616; *Fox v. Sackett*, 87 Id. 682; *Johnson v. Winona etc. R. R.*, 88 Id. 83; *Hill v. Town of New Haven*, 88 Id. 613; *Baltimore etc. R. R. v. Breinly*, 90 Id. 49; *Ernst v. Hudson River R. R.*,

90 Id. 761, and note 786; *Simmons v. New Bedford etc. Steamboat Co.*, 93 Id. 99; *Sheridan v. Brooklyn etc. R. R.*, 93 Id. 490; *Frankford etc. Turnpike Co. v. Philadelphia etc. R. R.*, 93 Id. 708; *Baltimore etc. R. R. v. State*, 96 Id. 528; *Northern Central R'y v. State*, 96 Id. 545; *Quirk v. Holt*, 96 Id. 725; *Gaynor v. Old Colony etc. R'y*, 97 Id. 96; *Driscol v. Newark etc. Co.*, 97 Id. 761; *Nichols v. Sixth Avenue R. R.*, 97 Id. 780; *Pennsylvania R. R. v. Barnett*, 98 Id. 346; *Detroit etc. R. R. v. Curtis*, 99 Id. 141; *O'Flaherty v. Union R'y*, 100 Id. 343; *Johnson v. Bruner*, 100 Id. 613; *Kay v. Pennsylvania R. R.*, 3 Am. Rep. 628; *Steinweg v. Erie R'y*, 3 Id. 673, 675; *Eckert v. Long Island R. R.*, 3 Id. 721; *Toledo etc. R'y v. Pindar*, 5 Id. 57; *Chicago etc. R. R. v. Randolph*, 5 Id. 60; *Kerr v. Forgue*, 5 Id. 146; *Kesee v. Chicago etc. R'y*, 6 Id. 643; *Kellogg v. Chicago etc. R'y*, 7 Id. 69; *Ihl v. Forty-second Street etc. R. R.*, 7 Id. 460; *Southworth v. Old Colony etc. R'y*, 7 Id. 528; *Cosgrove v. Ogden*, 10 Id. 361; *Webb v. Rome etc. R. R.*, 10 Id. 389; *Barton v. St. Louis etc. R. R.*, 14 Id. 418; *Cleveland etc. R. R. v. Crawford*, 15 Id. 633; *Doe v. Missouri etc. R. R.*, 21 Id. 371, 378; *Troomley v. Central Park etc. R. R.*, 25 Id. 162; *Eppendorf v. Brooklyn City etc. R. R.*, 25 Id. 171; *Texas etc. R'y v. Murphy*, 26 Id. 272; *City of Atlanta v. Wilson*, 27 Id. 396; *Nolan v. Brooklyn etc. R. R.*, 41 Id. 345, 347; *Louisville etc. R. R. v. Goetz's Adm'rs*, 42 Id. 227; *Town of Albion v. Hetrick*, 46 Id. 230; *Peeverly v. City of Boston*, 49 Id. 37; *Stoner v. Pennsylvania Co.*, 49 Id. 764; *Dahlberg v. Minneapolis Street R'y*, 50 Id. 585; *Vicksburg etc. R. R. v. McGowan*, 52 Id. 205; *Burns v. Chicago etc. R'y*, 58 Id. 227; but when the facts are clear and satisfactory, the question is one of law: *Todd v. Old Colony etc. R. R.*, 80 Am. Dec. 49, and note; 83 Id. 679; *Pennsylvania R. R. v. Ogier*, 78 Id. 322; *Gahagan v. Boston etc. R. R.*, 79 Id. 724; *Snow v. Housatonic R. R.*, 85 Id. 720; *Fox v. Sackett*, 87 Id. 682; *Butterfield v. Western R. R.*, 87 Id. 678; *Roth v. Buffalo etc. R. R.*, 90 Id. 736; *Gonzales v. New York etc. R. R.*, 98 Id. 58; *Detroit etc. R. R. v. Curtis*, 99 Id. 141; *Johnson v. Bruner*, 100 Id. 613; *Bellefontaine R'y v. Hunter*, 5 Am. Rep. 201; *Pennsylvania R. R. v. Beale*, 13 Id. 753; *Cleveland etc. R. R. v. Crawford*, 15 Id. 633; *Lewis v. Baltimore etc. R. R.*, 17 Id. 521; *Pittsburg etc. R. R. v. Andrews*, 17 Id. 568; *Pennsylvania R. R. v. Weber*, 18 Id. 407; *Pennsylvania Co. v. Hensil*, 36 Id. 188, 192; *Thirteenth etc. R'y v. Bowdron*, 37 Id. 707, 710; *Ohio etc. R'y v. Collarn*, 38 Id. 134, 135; *Richmond etc. R. R. v. Medley*, 40 Id. 734; *Town of Albion v. Hetrick*, 46 Id. 230, 231; *Tolman v. Syracuse etc. R. R.*, 50 Id. 649; *Wichita etc. R. R. v. Davis*, 1 Am. St. Rep. 276.

RAILROAD COMPANY IS BOUND TO EXERCISE REASONABLE CARE IN REMOVING TREEPASSER FROM CAR: *Kline v. Central Pacific R. R.*, 99 Am. Dec. 282; *Holmes v. Wakefield*, 90 Id. 171; *Indianapolis etc. R'y v. Pitzer*, 58 Am. Rep. 387; and reasonable care must be exercised in expelling a passenger who by his conduct renders himself liable to expulsion: Note to *Hagan v. Providence etc. R. R.*, 62 Am. Dec. 383; *State v. Overton*, 61 Id. 671; note to *Chicago etc. R. R. v. Parks*, 68 Id. 572; *Pennsylvania R. R. v. Vandiver*, 82 Id. 520; *Higgins v. Waterlot etc. Co.*, 7 Am. Rep. 293; *Jeffersonville R. R. v. Rogers*, 10 Id. 103; *Philadelphia etc. R. R. v. Larkin*, 28 Id. 442; *Railroad Co. v. Vallerley*, 30 Id. 601; *Louisville etc. R. R. v. Sullivan*, 50 Id. 186; compare *Johnson v. Concord R. R.*, 88 Am. Dec. 199. As to whether a passenger can only be expelled at a regular station, see note to *Commonwealth v. Power*, 41 Id. 477; *Chicago etc. R. R. v. Parks*, 68 Id. 562; *Terre Haute etc. R. R. v. Vanatta*, 74 Id. 96; *Illinois Central R. R. v. Sutton*, 92 Id. 81; *Chicago etc. R. R. v. Flagg*, 92 Id. 133; *Illinois Central R. R. v. Whitemore*, 92 Id. 138; *Jeffersonville R. R. v. Rogers*, 92 Id. 270; *McClure v. Philadelphia etc. R. R.*, 6 Am. Rep. 345; *Lillis v. St. Louis etc. R. R.*, 27 Id. 255; *Toledo etc. R'y v. Wright*, 34 Id. 277.

DICKERSON'S APPEAL.

[115 PENNSYLVANIA STATE, 190.]

OWNER OF PERSONAL PROPERTY MAY IMPRESS UPON IT VALID PRESENT TRUST, either by a declaration that he holds the property in trust, or by a transfer of the legal title to a third party upon certain specified trusts.

TRANSFER OF SUBJECT-MATTER OF TRUST IS NOT NECESSARY, if the owner thereof makes himself trustee; but if he selects a third party, the subject of the trust must be transferred to him in such mode as will be effectual to pass the legal title.

TRUST IN PERSONAL PROPERTY IS VALID AGAINST EVERYBODY EXCEPT CREDITORS, where the facts show an executed intention or purpose, coupled with an express trust in the donor, for the benefit of the objects of his bounty, unrevoked by him at the time of his death.

RESERVED RIGHT OF REVOCATION IS NOT INCONSISTENT WITH CREATION OF VALID TRUST. If the right is not exercised during the lifetime of the donor, and according to the terms in which it is reserved, the validity of the trust remains unaffected, as though there never had been a reserved right of revocation.

ABSOLUTE AND UNCONDITIONAL TRUSTS CREATED BY FATHER IN FAVOR OF CHILDREN, DESIGNATING HIMSELF TRUSTEE, CANNOT BE REVOKED by the donor undertaking to annex thereto special terms and qualifications not expressed in the original declarations of trust.

HUSBAND MAY DISPOSE OF PERSONAL PROPERTY IN GOOD FAITH, BY GIFT OR OTHERWISE, DURING COVERTURE, free from all *post-mortem* claims thereon by his widow.

APPEAL by Mary Dickerson, from a decree of the orphans' court of Philadelphia County, making distribution of the estate of her deceased husband, John Dickerson. The decedent died testate, August 10, 1884, leaving surviving his widow, Mary Dickerson, four children by a former marriage,—Charles Thompson Dickerson, Thomas Jefferson Dickerson, Grace Darling O'Connell, and E. Gertrude Manning,—and four children of a deceased son by the same marriage, John M. Dickerson. The decedent married the appellant November 17, 1869, and had no children by her. It was the habit of the decedent, from about the year 1856, as each child was born, to set aside for its benefit, from time to time, various sums of money. Some of the funds so set apart were invested by the decedent in bonds and bank stock, and trusts therein were declared by him in favor of the respective children, in the manner stated in the opinion. The decedent's will, which was dated July 18, 1884, recited that, "whereas I have heretofore at different times invested various amounts in my name, as trustee generally, or as trustee for my respective children, which investments and settlements were purely voluntary upon my part, and in which no terms of trust were declared,

it being my intention to set forth the same in my last will and testament, now, therefore, I do hereby declare that the said securities and investments were and are held by me upon the following uses and trusts, that is to say: In trust to pay to myself the income for life, and at my decease, that the Fidelity Insurance, Trust, and Safe Deposit Company, who shall thereafter act as trustee in my place and stead, shall hold said investments in kind and keep the same invested, and shall pay the net income thereof, as it shall accrue, unto my children respectively, for whose use I have made such investments (as indicated by the registry of the certificates of the same) for life, or, if I shall have made any of such investments as trustee generally, then to hold the same and pay the income thereof to my children now living, to wit, . . . for life, and after the decease of each one of them respectively, then to hold their share for the use of their children, and pay the income to them until the youngest one attains the age of twenty-one years, and thereupon to divide the principal between them equally, absolutely." The decedent appointed the Fidelity Insurance, Trust, and Safe Deposit Company his executor, and letters testamentary were issued to it. After his death the bonds in question remained in the hands of the company, as trustee for the appellees, and the company was subsequently appointed such by the court. At the audit of the account of the company as executor, the widow of the decedent elected to take against the will, claiming that the trusts were testamentary, and therefore void as to her, and that the bonds formed part of the estate, in which she was entitled to share as widow. The auditing judge allowed her claim. To this, exceptions were filed, which were sustained by the court in bank, Hanna, P. J., filing an opinion. The widow appealed.

Harold Goodwin and J. H. Gendell, for the appellant.

George P. Rich, John W. Patton, Mayer Sulzberger, and Ephraim Lederer, for the appellees.

By Court, STERRETT, J. If the bonds and bank stock in controversy were the subjects of valid trusts, impressed upon them by the testator in his lifetime in favor of his children, and so remained until after his decease, they were not his property in his own right at the time of his death in 1884, and hence appellant, claiming as his widow against the will, has no interest in the securities or the proceeds thereof.

For reasons given in the opinion of its learned president, we think the orphans' court was clearly right in holding that the securities in question were the subjects of express trusts, created by the testator in favor of his children respectively, and unaffected by anything that occurred prior to his death. The decree might well be affirmed on that opinion, without attempting to further vindicate its correctness by adding anything thereto.

About the year 1856, nearly fourteen years before his marriage to appellant, testator inaugurated the scheme of providing a fund for the benefit of each of his children, by setting apart from time to time various small sums of money for that purpose. In 1875 the fund thus accumulated was represented in part by ten one-thousand-dollar bonds of the Lehigh Coal and Navigation Company, which, on their face, were payable to bearer, with the right to have them registered and made transferable on the books of the corporation. On June 2d of that year, testator executed two assignments of these bonds; one embracing five of them designated by their numbers, to himself, "John Dickerson, trustee for Charles Thompson Dickerson"; and the other embracing the remaining five, designated in same way, to himself, "trustee for Thomas Jefferson Dickerson." These assignments, duly executed and witnessed, were delivered to the company as evidence of the respective equitable interests of his sons in said bonds. At the same time he had the bonds themselves registered on the books of the company in his own name as trustee for each of his sons by name. He also indorsed on each of the bonds, and had same approved by the company, that they had been thus duly transferred and assigned on the books of the corporation by him to himself as trustee for his sons. In addition to all this, the five bonds thus impressed with a trust in favor of his son Charles were placed in an envelope on which testator made this indorsement: "These bonds belong to John Dickerson, in trust for Charles Thompson Dickerson, and were purchased for him from a fund created by the saving of small sums of money from the day of his birth, and set apart for his special benefit." Signed, "John Dickerson." The five bonds in trust for his son Thomas Jefferson were in like manner placed in another envelope similarly indorsed. Afterwards testator frequently spoke of these bonds to several persons, including appellant, as investments made for his children. After his death, the bonds inclosed in the envelopes, as above

described, were found among his papers in the safe which he had rented from the Fidelity Insurance, Trust, and Safe Deposit Company. On the books of the Lehigh Coal and Navigation Company they remained, unchanged, in his name as trustee for his sons respectively. The original assignments also were in the possession of the company, and still remain there.

The trust of five thousand dollars,—Philadelphia and Reading Railroad bonds,—in favor of testator's daughter, Grace Darling O'Connell, is substantially a counterpart of those in favor of his sons, above described.

That in favor of his daughter, Mrs. Manning, is different in form, but equally effective. It consists of twenty-seven shares of Farmers' and Mechanics' Bank stock, the certificate of which was deposited with the bank, together with testator's declaration of trust that he held the same as trustee for her separate use for life, with power to her to appoint by will, etc., and in case of testator's death, designating David Dickerson as substitute trustee. In same instrument, testator reserved the right to collect and appropriate the dividends, at his own discretion, and also the right to revoke the trust. At his death, the stock, remaining in same condition, was delivered by the bank to David Dickerson, the substituted trustee, by whom it is now held.

It is difficult to conceive how the testator could have more effectually impressed upon the securities present trusts in favor of his respective children without selecting a third party to act as trustee, and delivering the securities to him. To do that was not necessary to the creation of valid trusts. It is well settled that the owner of personal property may impress upon it a valid present trust, either by a declaration that he holds the property in trust, or by a transfer of the legal title to a third party upon certain specified trusts. In other words, he may constitute either himself or another person trustee. If he makes himself trustee, no transfer of the subject-matter of the trust is necessary; but if he selects a third party, the subject of the trust must be transferred to him in such mode as will be effectual to pass the legal title: *Bispham's Equity*, 78; *Perry on Trusts*, secs. 96, 98; *Hill on Trustees*, 117 et seq. Where, as in this case, the facts show an executed intention or purpose, coupled with an express trust in the donor, for the benefit of the objects of his bounty, unrevoked by him at the time of his death, such a trust is clearly valid against every-

body except creditors. A reserved right of revocation is not inconsistent with the creation of a valid trust. If the right is not exercised during the lifetime of the donor, and according to the terms in which it is reserved, the validity of the trust remains unaffected as though there never had been a reserved right of revocation: *Stone v. Hackett*, 12 Gray, 227. In that case, a delivery of railroad stock, without consideration, in trust, to pay the income to the donor for life, and at his death to transfer the shares to charities, with a clause of revocation, was held good against the widow, who claimed her share in the same as part of her husband's estate.

There is nothing in the transaction to indicate that either of the trusts was intended to take effect only on the death of the testator, and were therefore testamentary. On the contrary, everything that was done by him points to an intention to create a present trust in favor of each of his children. If he had died intestate, they would have been clearly entitled to the securities set apart by him, and impressed with trusts in their favor. Even in his will he recognizes the existence of previously created trusts in favor of his children, in which, as he says, "no terms of trusts were declared," and speaks of his intention to set forth the same in his will; and we find that in that he does not attempt to revoke the trusts previously created, but merely to qualify the terms thereof to some extent. If it be true, then, that he did create absolute and unconditional trusts in favor of his children respectively, and designate himself as their trustee, the trusts thus created could not be revoked by his undertaking to annex thereto special terms or qualifications not expressed in the original declarations of trust. If the *cestuis que trust* choose to respect the testamentary wish of their father, and accept the qualified terms specified in his will, they do not thereby renounce their right to the securities which were the subjects of the respective trusts, and thus preclude themselves from claiming the same as valid gifts *inter vivos*. In other words, they may accept the additional or modified terms of trust expressed in the will, and still retain their right to the securities as valid gifts from their father to them in his life-time, subject, however, to such self-imposed qualifications.

It follows from what has been said that the securities in question were subjects of valid trusts created by the testator in favor of his children prior to his decease, and having so continued unrevoked by his will or otherwise, they should be

treated as gifts *inter vivos*, and therefore no part of his personal estate at the time of his death.

It is scarcely necessary to add that such gifts, made in good faith as these were, cannot be impeached on the ground that they are a fraud upon the rights of the widow. Nothing is better settled than the power of a husband to dispose of his personal property in good faith, by gift or otherwise, during coverture, free from all *post-mortem* claims thereon by his widow: *Ellmaker v. Ellmaker*, 4 Watts, 91; *Pringle v. Pringle*, 50 Pa. St. 281.

Decree affirmed, and appeal dismissed at the costs of appellant.

EQUITABLE TITLE MAY BE DIVESTED BY DECLARATION OF TRUST: *Lane v. Ewing*, 77 Am. Dec. 632; and see *Blake v. Jones*, 21 Id. 530.

TRUST CANNOT BE REVOKED IN ABSENCE OF RESERVED POWER OF REVOCATION: *Keyes v. Carleton*, 55 Am. Rep. 446; unless the beneficiary renounces or dissents from the trust: *Skipwith v. Cunningham*, 31 Am. Dec. 642; *Stockard v. Stockard's Adm'r*, 46 Id. 79; compare *Huchabes v. Billingsly*, 50 Id. 183.

COVER v. MANAWAY.

[115 PENNSYLVANIA STATE, 333.]

DEED WILL BE PRESUMED TO HAVE BEEN MADE ON DAY OF ITS DATE, when it is found in the hands of the grantee, having on its face the evidence of its regular execution; and this presumption will be greatly strengthened if it is accompanied by an acknowledgment of the same date in proper form before a proper officer.

OFFICER TAKING ACKNOWLEDGMENT OF DEED MUST CERTIFY SAME, with the day and year when it was made, and by whom, and he will be presumed to have performed his duty, and will not be supposed, without proof, to have taken the acknowledgment before the deed was executed.

ACKNOWLEDGMENT OF DEED IS JUDICIAL ACT, and the certificate of it, in the absence of fraud, is conclusive as to the facts therein stated.

PAROL EVIDENCE MAY BE INTRODUCED TO SHOW THAT FRAUD WAS PRACTICED, not only in the execution of a deed, but in the obtaining of the acknowledgment; but it must be sufficiently explicit in its character to fairly rebut the presumption which the law raises as to the due execution of the deed and its acknowledgment.

GREAT LATITUDE IS ALLOWED ON QUESTION OF FRAUD, and every fact or circumstance from which a legal inference of fraud may be drawn is admissible.

EVIDENCE OF FRAUD SHOULD BE SUBMITTED TO JURY, if from it the jury can properly find the question for the party on whom the burden of proof rests; but if not, it should be withdrawn from the jury.

EJECTMENT by John Manaway against George W. Cover and Louise Cover, his wife, to recover the possession of 116 acres

and 126 perches of land, part of a larger tract containing 234 acres and 131 perches. The entire tract had been owned by Jacob Staup. On October 22, 1872, Staup and his wife executed a deed therefor to their son, Samuel B. Staup, and the defendant, Cover, reciting a consideration of three thousand five hundred dollars. On the same day the grantees entered into an agreement, which, after reciting the purchase, provided the amount of the purchase-money to be paid by each, and the interest in the land which each should have in proportion to the amount each paid, Samuel B. Staup to have two sevenths, and Cover five sevenths. Cover went into the possession of the land at the time the above conveyance was made. On August 12, 1872, previous to this transaction, a judgment for two thousand dollars in favor of John Collins was entered against Jacob Staup, which was a lien on the land. This judgment was afterwards revived by *scire facias*, for \$2,529.34, against Jacob Staup, and the defendant, Cover, as *terre-tenant*, and a *fieri facias* was issued thereon February 10, 1877. The return to the *fi. fa.*, and subsequent proceedings, were not offered in evidence; but the sale of the land under the writ, and the execution of the sheriff's deed to Collins, seem to have been assumed. On January 17, 1877, before the *fi. fa.* was issued, Collins, the judgment plaintiff in that action, and Cover, the defendant in this action, entered into an agreement, which provided that the land should be sold on the judgment, and that Collins would buy in the same, if it did not sell for more than the judgment, and then make a deed to Mrs. Cover for a part of the land, to be determined by "the amount of money found due George W. Cover, upon settlement of all claims between Jacob Staup and George W. Cover, and paid to Jacob Staup, and for him, by the said George W. Cover," and convey the balance of the land to Jane Staup, wife of Jacob Staup, for a specified consideration. On November 20, 1877, Collins and his wife accordingly executed a deed to Mrs. Cover for two parcels of the land, one, for which the action is brought, containing 116 acres and 126 perches, and the other containing 23 acres and 134 perches, the deed designating the premises as "part of the same premises which said Collins purchased at sheriff's sale, as the property of the aforesaid Jacob Staup, as set forth in a deed from Calvin Springer, high sheriff of said county, dated March 22, 1877, recorded in the court of common pleas of said county in sheriff's deed docket, No. 2, page 23." The balance of the

land was conveyed by Collins to Mrs. Staup. On June 25, 1873, while the agreement between Cover and Stephen B. Staup was existing, a judgment for \$390 in favor of William H. Playford, Esq., was entered against Cover. This judgment was revived by *sci. fa.* in 1878, and all of Cover's interest in the 234 acres and 131 perches conveyed to him and Stephen B. Staup by Jacob Staup was sold February 3, 1879, under a *fi. fa.* issued thereon to the plaintiff, John Manaway, who received a sheriff's deed therefor. The defendants gave in evidence an agreement purporting to be made between Jacob Staup and Cover, October 22, 1872, the date of the deed from Jacob Staup to Samuel B. Staup and Cover, providing that upon payment of three hundred dollars by Jacob Staup, or his daughter Louise, now Mrs. Cover, Cover would convey to Louise one half of the land deeded to him. The defendants also gave in evidence a deed claimed to have been made in pursuance of the agreement from Cover to Louise Staup, now his wife, dated November 5, 1872; and also an agreement of date December 5, 1872, between Cover and Louise Staup, whereby the latter sold the timber on the land conveyed for one thousand dollars. The plaintiff, in rebuttal, called a witness, who showed, by comparison with Jacob Staup's admitted signature, that the purported signature of Jacob Staup to the above agreement of October 22, 1872, was a forgery; and the plaintiff also attempted to show by George Sargent, the subscribing witness, Milton Glover, the brother-in-law of Mrs. Cover, and one John Church, that the deed of November 5, 1872, from Cover to Louise Staup, was in fact not executed for two or three years after that time, and that its purpose was to hinder, delay, and defraud Cover's creditors. This evidence sufficiently appears in the opinion. The deed showed that the word "fifth" in the date of the acknowledgment was written over an erasure. The court submitted the question of fraud to the jury. There was a verdict and judgment for the plaintiff, whereupon the defendant took this writ of error.

G. W. K. Minor, A. H. Coffroth, J. M. Core, W. G. Guiles, and W. H. Ruppel, for the plaintiffs in error.

A. D. Boyd and R. H. Lindsey, for the defendant in error.

By Court, CLARK, J. The return of the *fieri facias* on the John Collins judgment, the sale of the land in controversy under it, and the sheriff's deed to Collins, do not ap-

pear to have been read in evidence; whether this resulted from mere inadvertence, we cannot say, but the sale of the land on that writ, and the execution of the deed, would seem to have been assumed on both sides. The deed from John Collins and wife to Louise Cover, dated the 20th of November, 1877, was admitted in evidence without objection, and in the recitals of that deed, the premises conveyed are designated as "part of the same premises which said Collins purchased at sheriff's sale, as the property of the aforesaid Jacob Staup, as set forth in a deed from Calvin Springer, high sheriff of said county, dated March 22, 1877, recorded in the court of common pleas of said county, in sheriff's deed docket, No. 2, page 23." At no stage of the trial does any question seem to have been made as to the title of Collins, or as to the effect of the sale on his judgment.

But whether the land was sold on the Collins judgment or not, the question is still upon the deed of the 5th of November, 1872, from George Cover to Louise Staup, who afterwards became Cover's wife. If, on the one hand, we exclude the Collins title altogether, it is plain that the defendants must rely wholly upon their deed of the 5th of November, 1872; and if, on the other hand, we assume the sale and conveyance by the sheriff to Collins, it does not appear, outside of that deed, that on the 20th of November, 1877, when Collins conveyed to Cover's wife, her estate entered into the purchase, or indeed that she had any estate whatever which she could have applied to it. By the express terms of the contract of the 17th of January, 1877, between Collins and Cover, "the amount of money found due George W. Cover, upon settlement of all claims between Jacob Staup and George W. Cover, and paid to Jacob Staup, and for him, by the said George W. Cover," was to determine, and actually did determine, the measure of Mr. Cover's interest in the land, and the entire consideration would thus appear to have proceeded from him.

But if George W. Cover, on the 5th of November, 1872, when he was not indebted, nor anticipating any indebtedness, and before his marriage with Louise Staup, conveyed the premises to her, under the terms and conditions of the deed of that date; and the money, which was subsequently paid by Cover to Collins, was the proceeds of the timber taken from land under the subsequent agreement with her, Cover might well stipulate with Collins in 1877 for a conveyance of the land to her, in confirmation of the title which he had previously made.

The Collins judgment was the first lien; it was entered before the conveyance of the land by Jacob Staup to George W. Cover, and by Cover to Louise Staup; it was revived, and the lien continued against the terre-tenant, and the sale upon that judgment certainly extinguished the title of all the parties named. The judgment of William H. Playford, Esq., entered the 25th of June, 1873, was discharged by the sale, but as it was revived by *scire facias* in 1873, it became a lien upon whatever interest Cover acquired under the deed from Collins to his wife; and in order to explain the title of his wife, to trace the consideration, and to establish the *bona fides* of Cover's purchase from Collins, for the benefit of his wife, the deed of the 5th of November, 1872, becomes the necessary subject of investigation.

Whether the court was right or wrong, therefore, in assuming the validity of the Collins title is, we think, a matter of little consequence, as the same questions are presented in either event. Besides, the execution of the Collins deed was not seriously denied at the argument, and it seems to us that a reversal of the judgment on that ground would be of little avail.

The plaintiff in ejectment must recover on the strength of his own title, but if the sheriff's sale and deed to Collins should be wholly excluded, and the deed of the 5th of November, 1872, be shown to be a mere artifice and a fraud, as alleged, then the lien of Manaway's judgment, at the time of its entry, attached to Cover's title, acquired under the deed of the 22d of October, 1872, and the sale upon his judgment vested that title in him.

The deed of the 5th of November, 1872, was admissible in evidence, we think, without explanation of the alleged erasure; but as it was afterwards received and read without objection, the ruling of the court did the defendants no harm, and they cannot complain. The deed was duly executed; it was attested by and properly acknowledged before John Markley, Esq., a justice of the peace, on the same day of its date, and the date of the acknowledgment is admittedly in the proper handwriting of the officer. This deed was followed by an article of agreement bearing date the 5th of December, 1872, between S. B. Staup and his sister Louise Staup, for a partition of the tract between them, and another agreement of the same date between Louise Staup and George W. Cover, for the sale of the timber, by the former to the latter, on that part of the tract.

acquired by her in severalty by the partition; the due execution of the said agreements having been attested by the oath of the subscribing witnesses thereto.

When a deed is found in the hands of a grantee, having on its face the evidence of its regular execution, it will be presumed to have been made on the day of its date; and this presumption is greatly strengthened, if it is accompanied by an acknowledgment of the same date in proper form before a proper officer. The officer taking such an acknowledgment must certify the same, with the day and year when it was made, and by whom: *Myers v. Boyd*, 96 Pa. St. 427; and he will be presumed to have performed his duty, and will not be supposed, without proof, to have taken the acknowledgment before the deed was executed. The acknowledgment of a deed is a judicial act, and the certificate of it, in the absence of fraud, is conclusive as to the facts therein stated: *Heeter v. Glasgow*, 79 Pa. St. 83; 21 Am. Rep. 46; *Williams v. Baker*, 71 Id. 476.

But parol evidence may be introduced to show that a fraud was practiced, not only in the execution of the deed, but in the obtaining of the acknowledgment: *Heeter v. Glasgow*, *supra*; *Williams v. Baker*, *supra*. Fraud, however, is not to be presumed without proof, nor upon proof which is slight; it must be established upon satisfactory evidence; it must be sufficiently explicit in its character to fairly rebut the presumption which the law raises as to the due execution of the deed, and the acknowledgment.

The plaintiffs in rebuttal attempted to show that although the deed was dated November 5, 1872, it was in fact not executed for two or three years after that time, and the testimony of George Sargent, Milton Glover, and John Church is relied upon for that purpose. The testimony of Sargent is wholly unimportant, and ineffective for the purpose intended; he was not present at the execution of the deed; he was called upon by the parties to attest the signatures some time after its execution, in accordance with a suggestion of the justice made at the time of the acknowledgment; he did not pretend to know anything as to the date of its original execution. The examination of Glover was of such a grossly leading character, and the facts elicited thereby so meager and inconclusive, that his testimony as a whole is certainly entitled to but little if any respect. He admits that he heard part only of the conversation to which he testifies. He says that Mrs. Staup and her

daughter, some time about the year 1875, were discussing the date at which a deed was executed; that Mrs. Staup charged Louise and George with having been at Markley's to execute a deed, and with having dated it back three years, and Mrs. Cover answered, "No, we only dated it back two years." He does not state what deed, when it was executed, or whether indeed it was executed at all. His statement as to what occurred is vague and unsatisfactory, and his recollection of the transaction is very indistinct. John Church testified that Mrs. Cover, about 1875, said to him that she and Cover had been out at Markley's, and that she had got the deed for the property; that "she would show the damned nigger if he would get the property." He does not say when they had been at Markley's, whether at the time of the conversation or at some previous time, and we have no knowledge as to who was intended by the "damned nigger"; as Manaway had no claim upon Cover at that time, it is improbable that he could have been intended. In the absence of any evidence of collusion or combination, the declarations of Cover were of course inadmissible to affect the title of his wife.

On a question of fraud great latitude is always allowed; every fact or circumstance from which a legal inference of fraud may be drawn is admissible: *Yerkes v. Wilson*, 81½ Pa. St. 9. Whilst the evidence of Sargent, Glover, and Church was perhaps admissible for what it was worth, it was not sufficient, we think, to justify a submission of the question of fraud to the jury. Since the *scintilla* doctrine has been exploded both in England and in this country, there is a preliminary question in all cases for the court, not whether there is literally no evidence, "but whether there is any that ought reasonably to satisfy the jury that the fact sought to be found is established; if there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests, it should be submitted; if not, it should be withdrawn from the jury": *Hyatt v. Johnston*, 91 Pa. St. 196. We think the evidence on the question of fraud was vague, meager, and inconclusive, and was not such as could reasonably or fairly satisfy the jury that the deed in dispute was antedated as alleged, or such as would justify an inference of that fact. The mere casual and loose declaration of Louise Cover, disconnected from the conversation in which it was made, uttered in the heat of a discussion, standing alone, and wholly unsupported, ought not to affect the date of a deed duly executed, and on

the day of its date acknowledged before a proper officer, whose certificate attesting his official act, in his own handwriting, is not only not impeached, but is sustained by his own oath, and the oath of all the parties present. There is no evidence whatever to indicate that the officer was in collusion with the parties, or that he was in any way imposed upon in obtaining the acknowledgments; the whole testimony is distinctly and positively to the contrary.

The view which we have taken of this case renders it unnecessary to consider the other errors assigned.

The judgment is reversed.

DEED WILL BE PRESUMED TO HAVE BEEN MADE ON DAY OF ITS DATE: Note to *Blanchard v. Tyler*, 86 Am. Dec. 63.

ACKNOWLEDGMENT OF DEED IS JUDICIAL ACT, and the certificate of it, in the absence of fraud or imposition, is conclusive as to the facts therein recited: *Louden v. Blythe*, 55 Am. Dec. 527, and note; *Baldwin v. Snowden*, 78 Id. 303; *Heeter v. Glasgow*, 21 Am. Rep. 46; *Singer Mfg. Co. v. Rook*, 24 Id. 204; *Johnston v. Wallace*, 24 Id. 699; *Kocourek v. Marak*, 38 Id. 623, and note; compare *Dodge v. Hollingshead*, 80 Am. Dec. 433; but it may be impeached for fraud or imposition, except as to *bona fide* purchasers without notice: *Central Bank v. Copeland*, 81 Id. 597, and note; *Kerr v. Russell*, 18 Am. Rep. 634; *Singer Mfg. Co. v. Rook*, *supra*; *Kocourek v. Marak*, *supra*; compare *Strauch v. Hathaway*, 40 Id. 193.

NEALL v. HART.

[115 PENNSYLVANIA STATE, 247.]

STATEMENTS MADE TO JUSTICE BY PROSECUTOR, BY WHICH JUSTICE WAS INDUCED TO ISSUE WARRANT FOR ARREST, ARE ADMISSIBLE, in an action for false imprisonment against the prosecutor and the justice, to show probable cause, and in the absence of probable cause, to disprove malice in fact, in mitigation of damages.

JUSTICE IS JUSTIFIED IN ISSUING WARRANT FOR ARREST, upon a charge by the prosecutor that the defendant, by misrepresentation and trickery, had defrauded the prosecutor in the sale of goods, and had appropriated the same to his own use.

PROBABLE, IF NOT ACTUAL, CAUSE FOR ARREST EXISTS, which will defeat an action for false imprisonment against the prosecutor and the justice who issued the warrant for arrest, where the defendant obtained goods from the prosecutor under the pretense of a contract, and through a lie, although perhaps the defendant was not technically guilty of obtaining goods under false pretenses, or of embezzlement.

TRESPASS by James E. Neall against Albion W. Hart and Charles M. Griffith, to recover damages for illegal arrest and false imprisonment. In May, 1886, the plaintiff, who was the

superintendent of the Pennsylvania Granite Company, purchased from the defendant Hart a quantity of curbing-stone. The plaintiff failed to pay for the same, and the defendant Hart made complaint before the defendant Griffith, a justice of the peace, charging "that James E. Neall, by misrepresentation and trickery, has defrauded him (Hart) in the sale of curbing-stone, and has appropriated the same to his own use." Griffith thereupon issued a warrant for Neall's arrest, charging him "with defrauding him (Hart) of moneys due for labor and stone." Neall was arrested and committed to jail, but was discharged the same day on *habeas corpus*, on the ground that the complaint and warrant charged no offense known to the criminal law. Nothing further was done in the matter by either Hart or Griffith. There was a verdict and judgment for the defendants, whereupon the plaintiff took this writ, assigning as error the admission and rejection of certain evidence, and a portion of the charge of the court, which sufficiently appear in the opinion.

R. Jones Monaghan, John Sparhawk, Jr., and J. Frank E. Hause, for the plaintiff in error.

Charles H. Pennypacker and D. Smith Talbot, for the defendants in error.

By Court, GORDON, J. Several exceptions were taken to the rulings of the court below on the admission and rejection of evidence, and are here now assigned for error. We cannot sustain them. "The gist of false imprisonment is unlawful detention, and the general rule is, that malice will be inferred from the want of probable cause, so far at least as to sustain the action": Mr. Justice Trunkley, in *McCarthy v. De Armit*, 99 Pa. St. 63. From what is here said, it is obvious that Neall's action was open to defeat by proof of probable cause for the prosecution, and further that, even in the absence of probable cause, it was important to disprove malice in fact, and that, if for no other purpose than in mitigation of damages. Hence the statements made to the justice by the prosecutor, and by which he was induced to issue the warrant, were relevant. As to the assignments embracing the rejected offers, inasmuch as we cannot perceive how the price paid by the granite company for its property could possibly affect the case trying, we cannot sustain them. The remaining exceptions relate to the charge of the court, and its answers to the points,

and though numerous, may all be considered under two general heads.

1. Was the court right when it said to the jury: "The next question for you to determine is, whether there were such circumstances surrounding the transaction as warranted the prosecutor in making the complaint to the justice in issuing the warrant of arrest, thus placing the plaintiff in the position of a criminal." We are constrained to answer this interrogatory in the affirmative. A justice of the peace is not to be presumed to be learned in legal technicalities; hence, if the information set out a cheat of any kind, it was sufficient on which to ground a warrant. But that information alleged that "James E. Neall, by misrepresentation and trickery, has defrauded me in the sale of curbing, and has appropriated the same to his own use." This charge, as here set forth, is not very definite, forasmuch as it is difficult to say whether it was intended to charge embezzlement or obtaining goods on false pretenses, but that a cheat of some kind is thereby charged, no one, we think, will deny; and if so, it was sufficient to warrant the justice's action, and it was the business of the prosecuting officer, when the case reached his hands, to determine what should be the character of the indictment.

2. Was the court right in its instruction to the jury, that if the stones were to be paid for in cash before removal, they continued the property of Hart, though Neall had possessed himself of them, and their sale by the latter, and appropriation of the money arising therefrom to his own use, would constitute such a fraud as justified Hart in making the complaint on which the warrant issued? This, in effect, raises the question of probable cause, which, as we think, was properly submitted.

If the testimony of Hart and J. W. Morgan is to be believed, there was such cause for the prosecution, if nothing more. The plaintiff obtained a delivery of the curbing on the cars under a contract to pay when so delivered, and then, taking advantage of the defendant's performance, he shipped the curbing to market, under the pretense that he would pay the next day, but instead of so doing, he sold the curbing, and refused payment altogether. Let it be that this was not embezzlement in its technical sense, yet were the prosecutor's goods gotten under pretense of a contract, and through a lie. In the case of *Commonwealth v. Burdick*, 2 Pa. St. 163, Mr. Chief Justice Gibson makes use of the following language: "But I

think it at least doubtful whether a naked lie, by which credit has been gained, would not, in every case, be deemed within our statute, which declares it a cheat to obtain money or goods 'by any false pretenses whatsoever.' If, then, so great a jurist as the one cited was inclined to the opinion that a deliberate lie would support an indictment charging a false pretense under our statute, we may well excuse a layman and a country justice for coming to a like conclusion. In other words, on the strength of such authority, we may well conclude that Hart and Griffith had probable, if not actual, cause for what they did.

The judgment is affirmed.

LIABILITY OF MAGISTRATE, OFFICER, AND COMPLAINING WITNESS FOR FALSE IMPRISONMENT: See the note to *Mitchell v. State*, 54 Am. Dec. 263, where the subject is discussed.

DEFENDANTS IN ACTIONS FOR MALICIOUS PROSECUTION SHOULD BE ALLOWED GREAT LATITUDE OF INQUIRY for the purpose of showing probable cause: *Collins v. Hayte*, 99 Am. Dec. 521.

COMMERCIAL UNION ASSURANCE Co. v. HOCKING.

[115 PENNSYLVANIA STATE, 407.]

INSURANCE COMPANY WAIVES COMPLIANCE WITH CONDITIONS OF POLICY requiring proofs of loss to be made within a certain time, by receiving them, referring them to its adjuster, and retaining them, without objection or complaint, for five months.

PARTIES TO EXECUTORY CONTRACT WHO AGREE THAT ALL QUESTIONS OF DIFFERENCE or dispute which may arise between them in reference thereto, or that the amount of any claim arising therefrom, shall be first submitted to the arbitrament of a single individual or tribunal named, are bound by their agreement; but where the agreement does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either, and does not oust the jurisdiction of the courts having cognizance of the subject-matter of the dispute; and the applicability of this principle is not disturbed by a provision in the original contract that no action should be brought until after the award is filed, nor by the fact that arbitrators were chosen who failed to agree.

ACTION IS PREMATURELY BROUGHT AGAINST INSURANCE COMPANY, where the policy provides that the company shall have thirty days after the receipt of proofs of loss in which to give notice of its intention to rebuild, and that the loss shall not be payable until sixty days after the receipt of proofs of loss, and where the insured, having given immediate notice to the company of the total destruction of the property insured, brought an action about four months afterwards, but only twenty days after furnishing proofs of loss.

ASSUMPSIT by George H. Hocking against the Commercial Union Assurance Company of London, upon a policy of fire insurance. The facts are sufficiently stated in the opinion.

W. H. Koontz, for the plaintiff in error.

Coffroth and Ruppel, for the defendant in error.

By Court, CLARK, J. The policy in suit was issued on the 1st of December, 1884, by the Commercial Union Assurance Company, to George H. Hocking, in the sum of one thousand dollars, for one year from the date thereof, on his two-story frame building, etc., in Meyersdale, Pennsylvania, with the privilege of other insurance. When the policy issued, Hocking held a policy of the Howard Insurance Company of New York for two thousand dollars, dated the 24th of November, 1884, on the same building; and afterwards, on the 3d of December, 1884, obtained a policy of the German American Insurance Company, in the sum of one thousand dollars, making the total insurance four thousand dollars, all of which was in full force on the fourth day of December, 1884, when the building was destroyed by fire.

The policy required that persons sustaining loss or damage should forthwith give notice of said loss to the company, and within sixty days render a particular account of such loss, etc., stating certain specific matters of proof, affecting the extent of the defendant's liability. Notice of the loss was promptly given as required, but the proofs were not furnished within sixty days. The plaintiff's contention was, that as there was but a single subject of insurance, the loss total, and the notice to that effect, no further proof was necessary. But applying the principles laid down in *German American Ins. Co. v. Hocking*, 115 Pa. St. 398, which was argued with the case at bar, it is plain that the company, under the special terms of their policy, had the undoubted right to have furnished to them proofs of certain matters, according to the conditions of the contract. These proofs were furnished, and there is no substantial objection made, we think, either to their form or substance; but it is contended that as the loss occurred on the 4th of December, 1884, and the proofs were not furnished until the 28th of March, 1885, more than sixty days intervening, they were not in time, and the company was not bound to receive them. But the company did receive them, referred them to their adjuster, and retained them, without objection or complaint.

on that or any other ground, from the 28th of March, 1885, until the 18th of August, 1885. If the company acted upon these proofs as having been received in time, and made no objection whatever until the trial, they would be presumed, we think, to have waived the objections which they now make: *Lycoming Ins. Co. v. Schreffler*, 42 Pa. St. 188; 82 Am. Dec. 501. The policy is not printed, but as we understand it from the portions which are printed, the proofs of loss were but conditions precedent to the bringing of an action, and not of the insurance, and if the delay in furnishing them was waived, the remedy still remained. It was the duty of the company, if the proofs were imperfect or out of time, if objected to on that ground, to make their objection known. It is true, the policy provided that "no examination of the assured, nor investigation by the company, nor reference to nor award of arbitrators, shall operate as a waiver on part of the company of any of the provisions, conditions, or requirements of the policy, respecting the making or filing of a particular account of loss," as therein provided; but the act of waiver to which we have given effect is not embraced in this provision.

The second ground of error alleged is, that by the terms of the policy it is provided that "in case differences shall arise respecting any loss or damage, after proof thereof, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award, in writing, shall be binding," etc.; and as it is proven by the plaintiff that arbitrators were appointed, who have not yet made their award, the plaintiff can have no right of action until that condition of the policy has been complied with.

It is undoubtedly true, when the parties to an executory contract agree that all questions of differences or dispute which may arise between them in reference thereto, or that the amount of any claim arising therefrom shall be first submitted to the arbitrament of a single individual, or tribunal named, they are bound by their contract, and cannot seek redress elsewhere, until the arbiter agreed upon has been discharged, either by the rendition of an award, or otherwise: *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. 205; *Connor v. Simpson*, 104 Pa. St. 440; *Hostetter v. City of Pittsburgh*, 107 Id. 419. But it is equally true that where the agreement in question does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable

by either party; and such a provision is not adequate to oust the jurisdiction of the courts having cognizance of the subject-matter of the dispute: *Gray v. Wilson*, 4 Watts, 41; *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. St. 480; 21 Am. Rep. 80; *Hostetter v. City of Pittsburgh*, *supra*.

The applicability of this principle to the case in hand is not disturbed by the further special provision of the policy, that "no suit or action against this company shall be sustainable in any court of law or chancery till after the award shall have been filed, fixing the amount of such claim," etc. In *Mentz v. Armenia Fire Ins. Co.*, *supra*, a precisely similar provision existed, and referring to the effect of it, Mr. Justice Sharswood said: "If it were not in the power of the party to oust the courts of their general jurisdiction by such an agreement, that clause does not help them; had a general arbitration clause been valid, it would have been a condition precedent to an action of itself; the provision in question is but the expression of that which was implied." Nor is the effect of the general arbitration clause in this contract affected by the fact that two arbitrators were in fact chosen; they failed to agree; both parties appear to have abandoned the proceeding, and the bringing of this suit was a plain revocation of the submission. We are of opinion, therefore, that the second assignment of error cannot be sustained.

We are clearly of opinion, however, that the suit was prematurely brought. The company, as we have said, had a right to insist upon the provision in the policy for the proofs of loss; they were not furnished until the 28th of March, 1885. The company had thirty days thereafter in which to give notice of their intention to rebuild, and the loss was not payable in money, should the option not be exercised for sixty days, whereas the suit was brought on the 17th of April, 1885.

We will not discuss this branch of the case at length; the reasons are set forth in the opinion filed in *German American Ins. Co. v. Hocking*, already referred to.

The judgment is reversed.

INSURANCE COMPANY MAY WAIVE COMPLIANCE WITH CONDITIONS OF POLICY AS TO PROOF OF LOSS: See *St. Louis Ins. Co. v. Kyle*, 49 Am. Dec. 74, and note; *Clark v. New England M. F. Ins. Co.*, 53 Id. 44; *Trask v. State F. & M. Ins. Co.*, 72 Id. 622; *Lycoming Ins. Co. v. Schrefler*, 82 Id. 501; *Ayres v. Hartford F. Ins. Co.*, 85 Id. 553; *Insurance Co. of North America v. McDowell*, 99 Id. 497; *Beatty v. Lycoming Co. M. Ins. Co.*, 5 Am. Rep. 319; *Citizens' F. Ins. etc. Co. v. Doll*, 6 Id. 360; *Franklin F. Ins. Co. v. Chicago Ice Co.*, 11 Id. 469; *Jones v. Mechanics' F. Ins. Co.*, 13 Id. 405; *Pratt v. New York Central*

Ins. Co., 14 Id. 304; *Keeney v. Home Ins. Co.*, 27 Id. 60; *Levy v. Peabody Ins. Co.*, 27 Id. 598; *Rokes v. Amazon Ins. Co.*, 34 Id. 323. The foregoing cases also show what will amount to such a waiver.

AGREEMENTS TO SUBMIT TO ARBITRATION. — Agreements to submit to arbitration have heretofore been considered in the notes to *Allegre v. Maryland Ins. Co.*, 14 Am. Dec. 289, and *Nettleton v. Gridley*, 56 Id. 378; but the somewhat novel position taken by the principal case and other Pennsylvania decisions renders a re-examination of the question of the binding force of such agreements advisable in this connection.

It is settled that a provision or agreement in an executory contract, that any dispute which may arise thereunder shall be submitted to arbitration, will not, in the language of the authorities, "oust the courts of their jurisdiction," or in other words, bar a suit, either at law or in equity: Note to *Allegre v. Maryland Ins. Co.*, 14 Am. Dec. 296; note to *Nettleton v. Gridley*, 56 Id. 384; Morse on Arbitration, 91; 2 Arnould on Insurance, 2d Am. ed., *1245; Flanders on Insurance, 2d ed., 632; May on Insurance, sec. 492; 1 Phillips on Insurance, 5th ed., sec. 865; 2 Wood on Insurance, 2d ed., sec. 456; 2 Parsons on Maritime Law, 483; 2 Parsons on Contracts, *707; 1 Wharton on Contracts, sec. 417; *Kill v. Hollister*, 1 Wils. 129; *Thompson v. Charnock*, 8 Term Rep. 139; *Mitchell v. Harris*, 2 Ves. 129, 136; 4 Bro. Ch. 311; *Street v. Rigby*, 6 Ves. 815; *Nichols v. Chalie*, 14 Id. 265; *Waters v. Taylor*, 15 Id. 10, 18; *Gourlay v. Duke of Somerset*, 19 Id. 429, 431; *Goldstone v. Osborn*, 2 Car. & P. 550; *Earl of Mezbrough v. Bower*, 7 Beav. 127; *Horton v. Sayer*, 4 Hurl. & N. 643; *Stone v. Dennis*, 3 Port. 231; *Chamberlain v. Connecticut Central R. R.*, 54 Conn. 472; *Randel v. President etc. of Chesapeake etc. Canal Co.*, 1 Harr. (Del.) 233, 275; *Robinson v. Georges Ins. Co.*, 17 Me. 131; 35 Am. Dec. 239; *Hill v. More*, 40 Me. 515; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Id. 55; *Dugas v. Thomas*, 79 Me. 221; *Contee v. Dawson*, 2 Bland, 264, 275; *Allegre v. Maryland Ins. Co.*, 6 Har. & J. 408; 14 Am. Dec. 289; *Nute v. Hamilton M. Ins. Co.*, 6 Gray, 174, 182; *Cavanagh v. Dooley*, 6 Allen, 66, 67; *Wood v. Humphrey*, 114 Mass. 185; *Pearl v. Harris*, 121 Id. 390; *Smith v. Boston etc. R. R.*, 36 N. H. 458, 487; *March v. Eastern R. R.*, 40 Id. 548, 571; 77 Am. Dec. 732, 741; *Haggart v. Morgan*, 5 N. Y. 422; 55 Am. Dec. 350; *Binsse v. Paige*, 1 Keyes, 87; 1 Abb. App. 138, 144; *Hart v. Lauman*, 29 Barb. 410; *Sinclair v. Tallmadge*, 35 Id. 602, 607; *Gray v. Wilson*, 4 Watts, 39, 41; *Percival v. Herbemont*, 1 McMull. 59; see also *Millaudon v. Atlantic Ins. Co.*, 8 La. 557, 562; *Dyer v. Piscataqua F. & M. Ins. Co.*, 53 Me. 118; *Cobb v. New England Mut. M. Ins. Co.*, 6 Gray, 192; *Gibbs v. Continental Ins. Co.*, 13 Hun, 611, in which conditions as to submission were held waived. And a by-law of an insurance company which provides that any difference or dispute which may arise in relation to any loss sustained or alleged to be sustained under a policy shall be referred to and determined by certain referees, is no answer to an action on the policy: *Trott v. City Ins. Co.*, 1 Cliff. 439. So where an article of the constitution of an unincorporated association provided that it should be the duty of a committee to take cognizance of and exercise jurisdiction over all claims and matters of difference between members, and that their decision should be final, it was held that, assuming members to have assented to the constitution in such a manner as to establish a valid contract between them, the most that could be claimed for the article was that it should have the same force and effect as an agreement made by persons to submit to arbitration any controversy existing between them, and such agreement was not binding: *Heath v. New York Gold Exchange*, 38 How. Pr. 168; 7 Abb. Pr., N. S., 251.

Agreements or stipulations of this character are most frequently found in policies of insurance, building and construction contracts, articles of copartnership, and leases. It is said that such agreements are contrary to public policy, in tending to oust the jurisdiction of the courts. The foundation of the rule is sometimes attributed "to the jealousy of the courts, and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction," and sometimes "to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizens is renounced": Allen, J., in *President etc. of Delaware and Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250, 258; but in this case the same judge remarks: "An agreement of this character, induced by fraud or overreaching, or entered into unadvisedly through ignorance, folly, or undue pressure, might well be refused a specific performance, or disregarded when set up as a defense to an action. But when the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand, and the parties made to abide by it and the judgment of the tribunal of their choice. Were the question *res nova*, I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. But the rule that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned; and the decision of the appeal of the present defendant does not make it necessary to inquire into the reasons of the rule, or question its existence. The better way, doubtless, is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties; and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to courts of law; and the rule is essentially modified and qualified."

It should be noticed that the general rule is stated without regard to the fact whether or not the particular person or persons to whom the dispute is to be referred is named in the agreement. The authorities, very generally, do not regard the naming of an arbitrator or arbitrators as material. But in Pennsylvania it is maintained that while parties to an executory contract, who agree that any question of difference which may arise between them in reference thereto shall be submitted to the determination of one or more persons to be mutually chosen, are not bound by such an agreement, yet the agreement is binding if the individual or tribunal be named or designated: The principal case; *Monongahela Navigation Co. v. Fenlon*, 4 Watts & S. 205; *Snodgrass v. Gavit*, 28 Pa. St. 221, 224; *Lauman v. Young*, 31 Id. 306; *O'Reilly v. Kerns*, 52 Id. 214; *Howard v. Allegheny Valley R. R.*, 69 Id. 489; *Hostetter v. City of Pittsburgh*, 107 Id. 419; *Page v. Vankirk*, 1 Brewst. 282, 285. Nor, it seems, is it of any consequence whether or not the agreement contains a special provision not to sue, or the power to make the submission a rule of court, or an authority to the arbitrators to examine witnesses on

oath. Although it was held by Lord Sugden, in *Dimdale v. Robertson*, 2 Jones & L. 58, that "an agreement to refer, and arbitrators named, and a covenant not to sue, and a power to make the submission a rule of court, — particularly having regard to the legislative provisions in such a case, — do prevent a party from filing a bill, with a view, as in this case, to withdraw the case from the arbitrators"; and the early decision of *Halfhide v. Fenning*, 2 Bro. Ch. 336, 2 Dick. 705, was approved on the ground that the agreement in question in it was not only to refer to arbitration, but that there should not be any suit at law or in equity. A number of cases in which *Halfhide v. Fenning* had been doubted, or at least which were regarded as inconsistent with it, were distinguished on this point: *Mitchell v. Harris*, 2 Ves. 129; 4 Bro. Ch. 311; *Street v. Rigby*, 6 Ves. 815, 821; *Waters v. Taylor*, 15 Id. 10, 18; *Tattersall v. Groote*, 2 Bos. & P. 131, 136. In *Wellington v. Mackintosh*, 2 Atk. 569, Lord Hardwicke also seems to think that the agreement to submit might be binding, if a power was given the arbitrators of examining the parties, as well as witnesses, on oath. But in *Cooke v. Cooke*, L. R. 4 Eq. 77, 86, Vice-Chancellor Page-Wood, in speaking of *Dimdale v. Robertson*, says: "The power to make the submission a rule of court, and the legislative authority given to arbitrators of examining witnesses on oath, hardly appear sufficient to distinguish the case from others in which these conditions are not found. . . . We further find the authority of *Halfhide v. Fenning*, 2 Bro. Ch. 336, saying this: that a special covenant not to sue may make a difference; but that question remains *in dubio*."

The cases usually speak of the agreement to submit as being "void" or a "nullity"; but this is not strictly true; for if the parties have proceeded in the arbitration, and the arbitration is pending, or at all events an award has been made, it is conceded that the power of the courts to entertain a suit on the original contract is at an end: *Morse on Arbitration*, 91; *Kill v. Hollister*, 1 Wils. 129; *Mitchell v. Harris*, 2 Ves. 129, 136; 4 Bro. Ch. 311; *Stone v. Dennis*, 3 Port. 231; *Contes v. Dawson*, 2 Bland. 264, 275; *Smith v. Boston etc. R. R.*, 36 N. H. 458, 487; compare *Smith v. Compton*, 20 Barb. 262; and according to the weight of judicial opinion, although the agreement will not bar an action on the original contract, yet an action for a breach of the agreement can be maintained: *Morse on Arbitration*, 90; *Livingston v. Ralli*, 5 El. & B. 132; *Mitchell v. Harris*, 2 Ves. 129, 132; *Nute v. Hamilton M. Ins. Co.*, 6 Gray, 174, 182; *Hill v. More*, 40 Me. 515, 523, 524; *Haggart v. Morgan*, 5 N. Y. 422; 55 Am. Dec. 350; *Percival v. Herbermont*, 1 McMull. 59; *contra: Tattersall v. Groote*, 2 Bos. & P. 131; *Gray v. Wilson*, 4 Watts, 39, 41.

While it is thus true that an agreement that any dispute which may arise under a contract shall be submitted to arbitration will not bar a suit upon the contract, it is also settled by the comparatively modern decisions that an agreement may make the determination by arbitrators of amounts or values, or perhaps other matters which do not go to the root of the action, a condition precedent to the bringing of a suit. Thus in *Scott v. Avery*, 8 Ex. 487, 5 H. L. Cas. 811, it was held that a proviso in a policy of insurance that the insured should not be entitled to sue on the policy, until the amount of his claim was ascertained by arbitration, was a condition precedent and valid. Bramwell, B., who was counsel for the plaintiff in the case, afterwards explains it as follows, in *Horton v. Sayer*, 4 Harl. & N. 643, 650: "The principle of that decision is very intelligible. If a man covenants to do a particular act, and also covenants that if any dispute shall arise in respect thereof it shall be referred to arbitration, that is the case with reference to which the courts have used the unfortunate expression that 'their jurisdic-

tion is ousted by the agreement of the parties.' On the other hand, if a man covenants to do a particular act, and that in the event of his not doing it the other party shall be entitled to receive such a sum of money as they shall agree upon, or, if they cannot agree, such an amount as shall be determined by an arbitrator, there is no debt which can be sued for until the arbitrator has ascertained what sum is to be paid." And again he says of the case in *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 237, 245: "If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. For to say the contrary would be to give the party a different measure or rate of compensation from that for which he had bargained. This is plain common sense, and is what I understand the house of lords to have decided in *Scott v. Avery*." See also *Dawson v. Lord Fitzgerald*, L. R. 1 Ex. Div. 257, 260, per Coleridge, C. J., adopting this language.

This doctrine has been repeatedly followed where policies of insurance provide that in case of any dispute with respect to the amount of compensation or loss, the question shall be referred to arbitration: *Braunstein v. Accidental Death Ins. Co.*, 1 Beat & S. 782; *Tredwen v. Holman*, 1 Hurl. & C. 72; *Wright v. Ward*, 24 L. T. 439; *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 237; *Edwards v. Aberayron Mut. Ship. Ins. Soc.*, L. R. 1 Q. B. Div. 563; and see 2 Arnould on Insurance, 6th Eng. ed., 1127; Flanders on Insurance, 2d ed., 633; May on Insurance, sec. 493; 2 Wood on Insurance, 2d ed., sec. 457. Such provisions are conditions precedent. So a clause in a policy of life insurance that the company would pay the amount insured for, if in the opinion of their surgeon-in-chief the insured did not die of intemperance, is a condition precedent to the right to recover on the policy: *Campbell v. American etc. L. Ins. Co.*, 1 McAr. 246; 29 Am. Rep. 591. The doctrine has also been followed in cases where building contracts provide that disputes concerning the value of extra work should be determined by arbitrators: *Holmes v. Richet*, 56 Cal. 307; 38 Am. Rep. 54; *Weeks v. Little*, 15 Jones & S. 1; and in similar cases: *Condon v. South Side R. R.*, 14 Gratt. 502; *President etc. of Delaware and Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250. So where the tenant of a furnished house agreed at the expiration of his tenancy to deliver up possession of the house and furniture in good order, and in the event of loss, damage, or breakage, to make good or pay for the same, the amount of such payment if disputed to be settled by valuers, it was held that the settlement of the amount by the valuers was a condition precedent to the right of the landlord to bring an action in respect of the dilapidations: *Babbage v. Coulburn*, L. R. 9 Q. B. Div. 235; and a like result was reached where it was stipulated in a lease that at the end of the term buildings erected on the land by the lessee should be appraised by three disinterested persons, and the lessor should purchase the buildings at the price so set by the appraisers: *Hood v. Hartshorn*, 100 Mass. 120; 1 Am. Rep. 89; and where the defendant was stake-holder of a race, which was to be decided by the award of four stewards, but the stewards were unable to agree, it was held, in an action by the plaintiff to recover the stakes, that it was a condition precedent that there should be a decision of the stewards if practicable: *Brown v. Overbury*, 11 Ex. 715. The following cases also recognize the doctrine of *Scott v. Avery*,

supra, in the application of the more general rule: *Hill v. More*, 40 Me. 515; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Id. 55; *Dugan v. Thomas*, 9 Atl. Rep. 354 (Me.); *Wood v. Humphrey*, 114 Mass. 185. There are some decisions, however, which have reached a result inconsistent with the foregoing. Thus in *Liverpool etc. Ins. Co. v. Creighton*, 51 Ga. 95, *Leach v. Republic F. Ins. Co.*, 58 N. H. 245, *Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478, 21 Am. Rep. 80, stipulations in policies of insurance that differences as to the amount of loss should be submitted to arbitration were held not to bar the insured of his right of action; and where the effect of a contract to build a bridge was, that if the parties could not agree upon what the bridge was reasonably worth, the matter should be submitted to certain named persons, it was held that either party had the right to revoke the submission at any time before the award, or before the submission was made a rule of court: *Leonard v. House*, 15 Ga. 473; so a stipulation in a contract for building, that "in case any question arises under this contract in relation to the work, both as to the value of the work added or deducted, the same shall be adjusted by the aforementioned architect, and his decision shall be binding on both parties, and be final," was held not to bar an action: *Hurst v. Litchfield*, 39 N. Y. 377; and an agreement in a lease that in case of dispute between the parties as to whether certain of the repairs, which the lessor was bound to make, were sufficient, the question should be referred to an arbitrator, was held to oust the court of jurisdiction, and invalid: *Vass v. Wales*, 129 Mass. 38.

Certain cases show a disposition to restrict the doctrine as to conditions precedent, by holding the agreement to submit may be merely collateral to an agreement in the contract to pay loss or damage, and as therefore not preventing an action. Thus it is held that where a policy of insurance contains an agreement to pay the loss, a condition that if any difference or dispute should arise touching the loss it should be referred to arbitration, was simply collateral to the main agreement to pay, and would not prevent an action on the policy before the reference: *Roper v. Lendon*, 1 El. & E. 825; *Gibbs v. Continental Ins. Co.*, 13 Hun, 611; *Mark v. National Fire Ins. Co.*, 24 Id. 565, 569. So where a lessee covenanted that he would keep such a number only of hares and rabbits as would do no injury to the trees or crops of the lessors or their tenants, and in case he kept such a number as should injure the trees or crops he would pay a fair and reasonable compensation, in case of difference to be referred to two arbitrators, or an umpire, and the lessors brought an action for breach of covenant, alleging that the lessee had not kept such a number only of hares and rabbits as would do no injury, but had kept such a number as did injure, and had neglected to pay any compensation, it was held that the covenant to refer was a collateral and distinct covenant, and that the action was maintainable, although there had been no arbitration: *Dawson v. Lord Fitzgerald*, L. R. 1 Ex. Div. 257, reversing L. R. 9 Ex. 7. In this case Jessel, M. R., said: "There are two cases where such a plea as the present [that no arbitrators were appointed or award made] is successful: first, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to pursue one of two courses, either to bring an action for not referring, or to apply under section 11 of the Common Law Procedure Act, 1854, to stay the action till there has been an arbitration, in which case a judge has

power to prevent the case going to a jury, if the arbitration can be fairly enforced." See also *Manfield v. Doolin*, 1 R. 4 C. L. 17; *Seward v. City of Rochester*, 39 Hun, 44; *Rowe v. Williams*, 97 Mass. 163.

It is quite common in building contracts and other contracts for construction to provide that the quantity and value of work done shall be determined by a certain person, as the architect or engineer. In such a case, the parties are bound to submit to his determination, and when made, the estimate is, in general, final: *Scott v. Corporation of Liverpool*, 3 De Gex & J. 334, 367; *Mills v. Bayley*, 2 Hurl. & C. 36, 41; *Smith v. Briggs*, 3 Denio, 73; *Smith v. Brady*, 17 N. Y. 173, 176; *Herrick v. Belknap's Estate*, 27 Vt. 673; *Baltimore etc. R. R. v. Polly*, 14 Gratt. 447, 459; *Smith v. Boston etc. R. R.*, 36 N. H. 458, 487; *Fausce v. Burke*, 16 Pa. St. 469; 55 Am. Dec. 519; *Hudson v. McCartney*, 33 Wis. 331; and where a person contracted to build a building to the satisfaction of a committee, it is necessary for him to aver, in an action to recover the price stipulated to be paid, that the work was done to the satisfaction of such committee: *Butler v. Tucker*, 24 Wend. 447; so where an agreement was made between a company and a person entering its employ, by which the employee was to deposit a certain sum of money with the company as security for the proper discharge of his duties, and the manager of the company was to be the sole judge between it and the employee whether it was entitled to retain the whole or any part of the deposit, and his certificate was to be conclusive evidence in all courts of justice that the amount retained was the true amount to be retained, it was held that the agreement was very like the stipulation in a building contract that the certificate of the architect should be conclusive, and it was therefore binding: *London Tramways Co. v. Bailey*, L. R. 3 Q. B. Div. 217; but in *White v. Middlesex R. R.*, 135 Mass. 210, an almost identical agreement was held to be an agreement to submit to arbitration, and an attempt to oust the courts of jurisdiction, and was consequently void. These stipulations, providing for the decision and certificate of an architect or engineer as to the quantity or quality of work done, while they create conditions precedent, are not strictly agreements to submit to arbitration, because there is no dispute to be referred or determined: *Lloyd on Building*, sec. 17; *Wadsworth v. Smith*, L. R. 6 Q. B. 332; *Northampton Gas Light Co. v. Parnell*, 15 Com. B. 630; *White v. Middlesex R. R.*, 135 Mass. 216, 220. The distinction between them and proper agreements to submit is clearly pointed out in *Wadsworth v. Smith*, *supra*, by Blackburn, J.: "Where by an agreement the right of one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination an award; but where there is an agreement that any dispute about a particular thing shall be inquired of and determined by a person named, that may amount to a submission to arbitration, and the determination, though in the form of a certificate, be an award." Should the architect or engineer fraudulently neglect to make the estimate, or withhold his certificate, there can still be no recovery, unless it was by collusion with the other party: *Battenbury v. Vyne*, 2 Hurl. & C. 42; *Clarke v. Watson*, 18 Com. B., N. S., 278; *Reynolds v. Caldwell*, 51 Pa. St. 298; but see *Hudson v. McCartney*, 33 Wis. 331; *Herrick v. Belknap's Estate*, 27 Vt. 673; *Baltimore etc. R. R. v. Polly*, 14 Gratt. 447, 459; the remedy is against the architect or engineer: *Reynolds v. Caldwell*, *supra*.

CONDITION OF POLICY REQUIRING SUIT TO BE BROUGHT WITHIN CERTAIN TIME IS VALID: *Ripley v. Aetna Ins. Co.*, 86 Am. Dec. 362, and note; *Keim v. Home M. F. & M. Ins. Co.*, 87 Id. 291; *Mayor of New York v. Hum-*

Ilion F. Ins. Co., 100 Id. 400; *Merchants' M. Ins. Co. v. Lacroix*, 14 Am. Rep. 370; *Chandler v. St. Paul F. & M. Ins. Co.*, 18 Id. 385. As to when such a condition is complied with, see *Insurance Co. of North America v. McDowell*, 99 Am. Dec. 497; *Killips v. Putnam F. Ins. Co.*, 9 Am. Rep. 507; *Wilkinson v. First Nat. F. Ins. Co.*, 28 Id. 166; *Johnson v. Humboldt Ins. Co.*, 33 Id. 47; *Hay v. Star F. Ins. Co.*, 33 Id. 607; *Arthur v. Homestead F. Ins. Co.*, 34 Id. 550; *Barber v. Fire & M. Ins. Co.*, 37 Id. 800; *Steen v. Niagara F. Ins. Co.*, 42 Id. 297.

KEYSTONE MUTUAL BENEFIT ASS'N v. NORRIS.

[115 PENNSYLVANIA STATE, 446.]

INSURABLE INTEREST IN LIFE OF ANOTHER, SUCH AS WILL TAKE CONTRACT OUT OF WAGER CLASS, MUST ARISE from the relation of the party taking the insurance to the insured, either as surety or debtor, or from the ties of blood or marriage, so that from the relation thus established there may be some expectation of benefit or advantage in the continuance of the insured life.

POLICY OF INSURANCE ON LIFE OF ANOTHER, TAKEN BY ONE WHO HAD INSURABLE INTEREST IN IT, for the purpose of assigning it to a third person who had no such insurable interest, is void as a wagering policy in the hands of the assignee.

CONDITION IN POLICY OF LIFE INSURANCE PROVIDING THAT NO ACTION SHALL BE BROUGHT THEREON, unless within one year from the death of the insured, is not suspended by an action brought within the year in a court which had no jurisdiction of the defendant.

DEBT by Charles Norris, to the use of Jacob R. Spangler, against the Keystone Mutual Benefit Association, on a policy of insurance on the life of Mrs. Louisa Rausch. On August 29, 1878, the defendant issued a policy for one thousand dollars on the life of Mrs. Rausch, payable to her son-in-law, Charles Norris. On September 16th following, Norris assigned the policy to Jacob R. Spangler, who had no interest in the life of Mrs. Rausch. It was understood between Mrs. Rausch and Spangler, before the application was made, that the policy was to be taken in the name of Norris, and assigned by Norris to Spangler. The assignment was accepted by the defendant, and entered on its books. Spangler paid all the assessments and annual premiums. The policy contained the condition that "no suit or action at law under this contract shall lie against this association, unless the same shall be brought within one year from and after the death of the insured; and this policy is issued and accepted upon the express condition that said period of time be the limit of the right of action at law under this contract." Mrs. Rausch died October 28, 1882; but suit was not brought until March 14, 1885. The legal

effect of delay in bringing suit was sought to be avoided by showing that on March 10, 1883, Spangler had brought suit in his own name on the policy in the court of common pleas of York County; but as Mrs. Rausch did not die in that county, and as the principal office of the defendant was in Lehigh County, the court could not obtain jurisdiction of the defendant, and the suit failed. The defendant requested the court to charge that, as the policy was taken out by Spangler, and all the premiums and assessments were paid by him, upon the understanding between Spangler and Mrs. Rausch, this made Spangler the real beneficiary, and as he had no insurable interest in the life of Mrs. Rausch, the verdict must be for the defendant; that, according to the admissions of Spangler and Norris, the contract of insurance was, in its inception, a wagering policy, and therefore void, and the verdict must be for the defendant; and that if Spangler effected the insurance for himself, and paid all the premiums and assessments, and the policy was taken out with the understanding that it was to be for his benefit, and to be assigned to him, he, having shown no insurable interest in the life of the insured, would not be entitled to recover, and the verdict must be for the defendant. The refusal to give these instructions constituted the defendant's fifth, sixth, and seventh assignments of error. The court also refused to charge, at the request of the defendant, that this suit, not having been brought within one year from and after the death of the insured, could not be sustained. The plaintiff had a verdict and judgment, whereupon the defendant took this writ of error.

Edward Harvey, for the plaintiff in error.

Robert E. Wright and J. Marshall Wright, for the defendant in error.

By Court, GORDON, J. Jacob R. Spangler, the use plaintiff, had no insurable interest in the life of Mrs. Rausch; hence this policy now in suit, which was taken for his use, in the name of Charles Norris, was but a wager on Mrs. Rausch's life, and as such void and of no effect. A single question and answer, selected from his own testimony, proves the nature of the transaction beyond cavil. Question: "And it was understood between you and Mrs. Rausch, before the insurance was taken, that it was to be taken in the name of Norris, and by Norris assigned to you?" Answer: "Yes, sir." If, now, we admit that

Norris had such an interest in the assured as would have warranted him in taking a policy on her life, yet that fact cannot help out the plaintiff's case, since the policy was not founded on that interest, neither was it for the benefit of Norris, but for the benefit of one who had no interest whatever in the insured life. Norris's name was used as a mere blind, and could deceive no one conversant with the facts; Spangler was the real beneficiary, and the policy would have been quite as efficient had it been issued directly to him. The doctrine here advanced is supported by all our own authorities, one of the most recent being *Corson's Appeal*, 113 Pa. St. 438; 57 Am. Rep. 479. As a case in point, we may also cite *Warnock v. Davis*, 104 U. S. 775, in which it was held, by Mr. Justice Field, that an insurable interest, such as will take the contract out of the wager class, must arise from the relation of the party taking the insurance to the insured, either as surety or debtor, or from the ties of blood or marriage, so that from the relation thus established there may be some expectation of benefit or advantage in the continuance of the assured life. Otherwise the risk is to be regarded as a pure wager, in which the interest of the policyholder is to be found rather in the cessation than the continuance of the life. On all authority, therefore, the court should have affirmed the defendant's fifth, sixth, and seventh points. Nor can we agree with the learned judge of the court below, that the running of the one-year limitation prescribed by the policy was suspended by the York County suit. Passing by the fact that that suit was brought in the name of the equitable instead of the legal plaintiff, yet as it was instituted in a court not having jurisdiction of the defendant, it was wholly without effect. As a consequence, the analogy sought to be established between the plaintiff's case and the act of the 27th of March, 1713, and the decisions under it, wholly failed, and so the court should have ruled.

The judgment is reversed.

INSURABLE INTEREST IN LIFE OF ANOTHER, NECESSITY OF, AND WHEN EXISTS: See note to *Morrell v. Trenton Mut. L. & F. Ins. Co.*, 57 Am. Dec. 93; note to *Continental L. Ins. Co. v. Volger*, 46 Am. Rep. 189; note to *Currier v. Continental L. Ins. Co.*, 52 Id. 135. A creditor has an insurable interest in the life of his debtor: *Morrell v. Trenton Mut. L. & F. Ins. Co.*, 57 Am. Dec. 92; *Rawls v. American M. L. Ins. Co.*, 84 Id. 280; *Corson's Appeal*, 56 Am. Rep. 196; 57 Id. 479; so has a husband in the life of his wife: *Currier v. Continental L. Ins. Co.*, 52 Id. 134; a woman in the life of a man to whom she is engaged to be married: *Chisholm v. National Capital L. Ins. Co.*, 14 Id. 414; a father in the life of his minor child: *Mitchell v. Union L. Ins.*

Co., 71 Am. Dec. 529; a son in the life of his father: *Reserve M. Ins. Co. v. Kane*, 22 Am. Rep. 741; but see *Guardian M. L. Ins. Co. v. Hogan*, 22 Id. 180; but a daughter has not necessarily an insurable interest in her mother's life: *Continental L. Ins. Co. v. Volger*, 46 Id. 185; and a son-in-law has no insurable interest in the life of his mother-in-law: *Rombach v. Piedmont etc. L. Ins. Co.*, 48 Id. 239; nor has an uncle in the life of his nephew: *Singleton v. St. Louis Ins. Co.*, 27 Id. 321; but a grandfather may insure his own life for the benefit of his grandson with whom he lived: *Elkhart Mut. Aid etc. Ass'n v. Houghton*, 53 Id. 514.

ASSIGNABILITY OF POLICY TO ONE HAVING NO INTEREST IN LIFE: See note to *Morrell v. Trenton M. L. & F. Ins. Co.*, 57 Am. Dec. 103; note to *Singleton v. St. Louis Ins. Co.*, 27 Am. Rep. 327; note to *Currier v. Continental L. Ins. Co.*, 52 Id. 143. The assignability is upheld in the following cases: *St. John v. American M. L. Ins. Co.*, 64 Am. Dec. 529; *Clark v. Allen*, 23 Am. Rep. 496; *Mutual L. Ins. Co. v. Allen*, 52 Id. 245; *Bursinger v. Bank of Watertown*, 58 Id. 848; and denied in the following: *Franklin L. Ins. Co. v. Hazard*, 13 Id. 313; *Missouri Valley L. Ins. Co. v. Sturges*, 26 Id. 761; *Helmetag's Adm'r v. Miller*, 52 Id. 316; *Missouri Valley L. Ins. Co. v. McCrum*, 59 Id. 537; and see *Gilbert v. Moose*, 40 Id. 570.

CONDITION IN POLICY REQUIRING SUIT TO BE BROUGHT WITHIN CERTAIN TIME: See the cases on this question collected in the note to *Commercial Union Assurance Co. v. Hocking*, *ante*, p. 565.

WHEELER AND WILSON MANUFACTURING COMPANY v. HEIL.

[115 PENNSYLVANIA STATE, 487.]

CONTRACT IS ONE OF BAILMENT, AND NOT OF SALE, where a sewing-machine company rented a sewing-machine to a married woman for a definite period at a certain rent, she to become the agent of the company in holding and keeping possession of it, and at the expiration of the term, or upon failure to pay the rent, to deliver up the possession to the company, but on payment of the rent for the entire term, to have an option to buy at a nominal price, and where it was further expressly agreed that the contract was one of renting only, and not of sale, and that no payment, except that of the nominal price, should vest any title in her, or prevent the company from reclaiming possession of the machine; and upon failure on her part to comply with the conditions of the contract, the company has a right to reclaim the machine, whether such a contract could be made by a married woman or not.

WIFE IS PERSONALLY LIABLE FOR TORT COMMITTED BY HER, unless her husband was both present and directed the doing of it at the time, when he alone is liable. If the husband was present during the commission of the tort, whether actively participating in it or not, *prima facie* the wrong is deemed his alone; but this presumption may be rebutted, and each of the two may be shown to be the doer of the wrong, the same as though unmarried.

TROVER by the Wheeler and Wilson Manufacturing Company against Walter Heil and Maria Heil, his wife, to recover damages

for the conversion of a sewing-machine. On May 24, 1884, the company and Mrs. Heil entered into the following contract. "The party of the first part has this day rented to the party of the second part a Wheeler and Wilson sewing-machine, No. 480,825, style K. B. E., valued at fifty dollars (\$50), for the period of fourteen months from the date hereof, for the sum of ten dollars (\$10), the receipt of which is hereby acknowledged, and the further sum of three dollars (\$3), to be paid promptly at the office of said company, in Allentown, Pennsylvania, on the twenty-fourth day of each month, consecutively, during the continuance of this agreement, commencing on the twenty-fourth day of June next. And the party of the second part agrees to pay said several sums promptly, and not to move said machine from her present residence without the consent in writing of the party of the first part. It is distinctly understood and agreed between the parties hereto that this is a contract of renting only, and not a sale, conditional or otherwise, and the whole of the contract between the parties is expressed in this instrument. And it is further understood and agreed that the party of the second part is to be the agent of the party of the first part, in holding and keeping possession of said machine, and that it is to be well preserved and carefully used by the said party of the second part, and delivered up to the party of the first part on demand; but the party of first part agrees not to demand a return of said property so long as it is properly used and kept at the place agreed upon, and so long as the rent shall be faithfully and promptly paid in the terms and spirit of this contract. At the expiration of the time for which the said machine is rented, the party of the second part shall return and deliver the same to the party of the first part in good order, save reasonable wear. If the party of the second part shall faithfully keep and perform this agreement, and make all the payments therein stipulated when due, then, and not otherwise, the second party may, at her option, purchase said machine within ten days after the time for which the same is rented, and not afterwards, by paying to the party of the first part one dollar purchase-money; and upon such payment the party of the first part shall sell and deliver said machine, by a good and sufficient bill of sale, to the party of the second part. Nothing in this agreement contained, and no payment of money pursuant hereto, excepting the payment of the purchase-money as above provided, shall in any wise vest, or be understood or

construed to vest, in the second party any title, legal or equitable, to said machine, or any property therein for any term whatever, or shall prevent or hinder the party of the first part from reclaiming possession of said machine whenever the party of the second part fails to pay the rent above stipulated to be paid." The deposit money and four monthly installments were paid as stipulated in the contract; but in December, Mrs. Heil being in arrears in her monthly payments, E. H. Leon, the general agent of the plaintiff, and W. F. Kengott, the district agent, called upon her and demanded payment thereof. She refused to pay it, and the agents then demanded the machine, but she refused to surrender it. Leon then lifted the top of the machine off the stand, and carried it away. Kengott afterwards went to Heil's house and demanded the stand, first of Mrs. Heil, and then of Mr. Heil, and both in turn refused to surrender it, whereupon this action was brought. The court nonsuited the plaintiff, who thereupon took this writ of error.

James S. Biery and John Sparhawk, Jr., for the plaintiff in error.

A. G. Dewalt and M. C. Henniger, for the defendants in error.

By Court, CLARK, J. That the contract of the 24th of May, 1884, between the Wheeler and Wilson Manufacturing Company and Maria Heil, wife of Walter Heil, is in terms a bailment, and not a sale of the sewing-machine, we think cannot be doubted.

By the terms of the contract, the company "rented" the sewing-machine to Mrs. Heil for a definite period at a certain rent; she agreed to become the agent of the company in holding and keeping the possession of it, and not to remove it from the place where she then resided without the company's consent; and at the expiration of the term, or upon failure to pay the rent, on demand, to deliver up the possession to the company. On payment of the rent for the entire term specified in the contract, however, she had an option to buy, at a nominal price, but there was no present sale with a reservation of the title to secure payment.

Moreover, by the express provisions of the contract, it was "distinctly understood and agreed between the parties," that the contract was "a contract of renting only, and not a sale,

conditional or otherwise," and that "no payment of money pursuant thereto, excepting the payment of the purchase-money as provided, shall in any wise vest, or be understood or construed to vest, in the second party any title, legal or equitable," or "shall prevent or hinder the party of the first part from reclaiming possession of said machine," etc.

Under the very recent rulings of this court in *Edwards's Appeal*, 105 Pa. St. 103, *Dando v. Foulds*, 105 Id. 74, and *Forrest v. Nelson*, 108 Id. 481, it must be conceded that the contract was to all intents and purposes a bailment. Whether a given transaction is a bailment or a sale is in some cases obscure, but we think there can be no doubt as to the effect of the contract in this case.

Besides, this is a contention arising between the parties to the contract; the nature and effect of the transaction is not questioned by creditors or third parties, and if the parties were *sui juris*, they would of course be bound by the exact terms of their agreement, whether a technical bailment existed or not.

It may be doubted, perhaps, whether a contract of this character was authorized to be made by a married woman, under the act of the 29th of February, 1872. Whether it was or not, however, is, we think, wholly immaterial in this case. One thing is certain, that Mrs. Heil did not own the machine; she either held it upon the terms of the contract under which it came into her custody, or she did not, and in either event, the title to the sewing-machine was in the Wheeler and Wilson Manufacturing Company, and upon failure on her part to comply with the conditions of the contract, the company had a clear right to reclaim their property.

Assuming that the company was bound by the contract, and that Mrs. Heil was not, there could, of course, be no personal obligation on her part to pay the rent, but the right of property remained in the company, subject to the conditions of the contract.

The rent for the machine was not paid, as provided, and the company demanded the possession of Mrs. Heil, in whose custody the company had placed it; she refused to surrender it, not only in the presence of her husband, but in his absence; there is, therefore, neither proof nor presumption of coercion on his part. The company, upon demand made, were entitled to the possession, and her refusal was a tortious conversion of the property.

When a tort is committed by a wife, she is personally liable, unless her husband is both present and directs the doing of it, at the time: *Appeal of Franklin's Adm'r*, 18 Week. Not. Cas. 245; 115 Pa. St. 534 [post, p. 583]. His presence furnishes evidence and raises a presumption of his direction, but it is not conclusive, and the truth may be established by competent evidence: *Cassin v. Delany*, 38 N. Y. 178. "The true view is, when the husband is present, during the commission of a tort by the wife, whether himself actively participating in it or not, *prima facie* the wrong shall be deemed his alone; but both in civil and criminal causes this *prime facie* case may be rebutted, and each of the two may be deemed in law the doer of the wrong, the same as though they were unmarried": Cord on Rights of Married Women, sec. 1154. They may both, therefore, be guilty of the conversion of a chattel. "Except where otherwise provided by statute, the husband is liable for the torts of the wife, during coverture; if committed in her company, and by his order, he alone is liable; if not, they are jointly liable, and the wife must be joined in the suit with her husband. And when the remedy for the tort is only damages by suit, the husband is liable with the wife": 2 Kent's Com. 149; *Appeal of Franklin's Adm'r*, supra.

The judgment is therefore reversed, and a *venire facias de novo* awarded.

CONTRACTS OF SALE OR LEASE, PROVIDING FOR PAYMENTS IN INSTALLMENTS: See these contracts discussed in *Miller v. Steen*, 89 Am. Dec. 127, and note; also in *Murch v. Wright*, 95 Id. 455; *Latham v. Sumner*, 31 Am. Rep. 79, and note; *Goodell v. Fairbrother*, 34 Id. 631; *Cole v. Berry*, 36 Id. 611; *Stultfield v. Huntman*, 37 Id. 661, and note; *Brunswick v. Hoover*, 37 Id. 661; 43 Id. 674; *Singer Manufacturing Co. v. Cole*, 40 Id. 20, and note; *Hine v. Roberts*, 40 Id. 22, 170; *Knittel v. Cushing*, 44 Id. 598; *Loomis v. Bragg*, 47 Id. 638.

MARRIED WOMAN IS PERSONALLY LIABLE FOR TORT COMMITTED BY HER, when not committed in the presence nor by the direction of her husband: See Stewart on Husband and Wife, secs. 66, 423; Schouler's Domestic Relations, sec. 75; note to *Commonwealth v. Neal*, 6 Am. Dec. 107; *Appeal of Franklin's Adm'r*, post, p. 583; but in such a case, the husband, as husband, is to be sued jointly with her: See Stewart on Husband and Wife, secs. 66, 423; Schouler's Domestic Relations, sec. 75; note to *Commonwealth v. Neal*, 6 Am. Dec. 107; *Hubble v. Fogurtie*, 45 Id. 775; *Ball v. Bennett*, 83 Id. 356; *Brazil v. Moran*, 83 Id. 772, 774, and note 776; *Hackle v. Lurvey*, 3 Am. Rep. 366; *Shaw v. Hulihan*, 14 Id. 628; *Appeal of Franklin's Adm'r*, post, p. 583. She is also personally liable for a tort committed in the presence of her husband, but against his will: See Stewart on Husband and Wife, secs. 66, 423; note to *Commonwealth v. Neal*, 6 Am. Dec. 105; *State v. Cleaves*, 8 Am. Rep. 422; but he, as husband, is to be sued jointly with her: See Stewart on Husband and Wife,

notice of a change in the use or occupancy of his own or the neighboring premises, which in the fair exercise of his own knowledge and judgment he believed would not increase the hazard or the rate of insurance; this would be absurd. There may be cases, of course, in which the increase of risk is so palpable and plain that the knowledge of the insured must necessarily be inferred; this inference may be drawn from evidence, direct or circumstantial, as in other cases.

But the proper question for the consideration of the jurors was, not as the learned judge of the court below seemed to suppose, whether or not, according to their judgment under the evidence, the risk was so increased as to increase the rate, but whether, from all the facts in the case, the plaintiff knew that it was so increased. If he did, he was bound, by the express terms of his contract, to give notice of the fact to the company; if he did not, he was not. The exact question in this case was considered and decided in *Lebanon Mut. Ins. Co. v. Losch*, 42 Leg. Int. 416, 109 Pa. St. 100, where our brother Paxson, in his construction of a policy containing the same clause, says: "Had the condition of insurance required the insured to give notice to the company of any change in the surroundings, it would have been his duty to give notice of the erection of the carriage factory. Such, however, was not the condition. The notice was only required in case the change was such as to increase the risk or hazard, 'so as to increase the rate of insurance.' Under this clause, it is manifest that the insured must be shown to have knowledge that the building would not only increase the risk, but that it would also enhance the rate of insurance. The conditions of the policy must be construed most strongly against the company. We are not to assume, when the plaintiff below seeks to recover on his policies for what at least appears to be an honest loss, that he knew the factory building would increase the risk to such an extent as to increase the rate of insurance. There was nothing upon the face of his policy or in the conditions attached, had he read carefully every word of both, which could have given him this information. It was a fact, the solution of which must be found outside this policy. There was not a word of evidence to show that the insured knew that the carriage factory would increase the risk to the extent specified in the policy, nor indeed to any extent."

The judgment is reversed, and a *venire facias de novo* awarded.

due notice and proofs of loss were given as required by the policy.

Among the printed conditions of the insurance set forth in the policy was the following:—

9. "If, during the insurance, any alterations be made on the premises, buildings be erected, or change made in the use or occupation of the same or neighboring premises, or otherwise, whereby the risk or hazard is increased, so as to increase the rate of insurance, it shall be the duty of the insured to give notice thereof to the secretary, pay the additional premium, and obtain the consent of the company thereto in writing, otherwise the insured shall not be entitled to recover for any loss or damage by fire originating in consequence of such change; provided, that in case of any alteration and consequent increase of risk the company may, at their option, terminate the insurance, after notice given to the insured, or his representative, of their intention to do so."

In the year 1881, Michael Schall, who was the owner and operator of a furnace property on the adjoining land, by the order of the court of common pleas of Dauphin County, under act of the 5th of May, 1832, constructed a lateral railroad to connect his furnace with the Pennsylvania railroad; and locomotive engines and cars were placed thereon and used, in transporting coal, ore, and iron, between the points named, a distance of about five hundred yards. This lateral railroad ran within about twelve feet of the corner of the corn-house, and the jury has found that the fire, which originated in the corn-house, was caused by sparks from the locomotive engines.

The question in the cause arises upon the proper construction of the ninth condition of the policy above quoted. The court submitted to the jury the following questions of fact: 1. Whether by the construction of the lateral road the rate or hazard was increased; and if so, 2. Was it increased so as to increase the rate of insurance? and 3. Did the fire originate from, or in consequence of, the change in the occupancy of the neighboring premises? All of these inquiries were settled in the affirmative, and the verdict under the instructions of the court was necessarily for the defendant.

It must be conceded, we think, that the plaintiff was bound only to give notice to the company of any change of which he had knowledge, and by which he knew the rate of insurance would be increased. He was certainly not obliged to give

notice of a change in the use or occupancy of his own or the neighboring premises, which in the fair exercise of his own knowledge and judgment he believed would not increase the hazard or the rate of insurance; this would be absurd. There may be cases, of course, in which the increase of risk is so palpable and plain that the knowledge of the insured must necessarily be inferred; this inference may be drawn from evidence, direct or circumstantial, as in other cases.

But the proper question for the consideration of the jurors was, not as the learned judge of the court below seemed to suppose, whether or not, according to their judgment under the evidence, the risk was so increased as to increase the rate, but whether, from all the facts in the case, the plaintiff knew that it was so increased. If he did, he was bound, by the express terms of his contract, to give notice of the fact to the company; if he did not, he was not. The exact question in this case was considered and decided in *Lebanon Mut. Ins. Co. v. Losch*, 42 Leg. Int. 416, 109 Pa. St. 100, where our brother Paxson, in his construction of a policy containing the same clause, says: "Had the condition of insurance required the insured to give notice to the company of any change in the surroundings, it would have been his duty to give notice of the erection of the carriage factory. Such, however, was not the condition. The notice was only required in case the change was such as to increase the risk or hazard, 'so as to increase the rate of insurance.' Under this clause, it is manifest that the insured must be shown to have knowledge that the building would not only increase the risk, but that it would also enhance the rate of insurance. The conditions of the policy must be construed most strongly against the company. We are not to assume, when the plaintiff below seeks to recover on his policies for what at least appears to be an honest loss, that he knew the factory building would increase the risk to such an extent as to increase the rate of insurance. There was nothing upon the face of his policy or in the conditions attached, had he read carefully every word of both, which could have given him this information. It was a fact, the solution of which must be found outside this policy. There was not a word of evidence to show that the insured knew that the carriage factory would increase the risk to the extent specified in the policy, nor indeed to any extent."

The judgment is reversed, and a *venire facias de novo* awarded.

CHANGE IN INSURED PROPERTY, WHEN AVOIDS POLICY WITHIN MEANING OF CONDITION: See *Pade'ford v. Providence M. F. Ins. Co.*, 67 Am. Dec. 496, and note; *Calvert v. Hamilton M. Ins. Co.*, 79 Id. 744; *Gilliat v. Pawtucket M. F. Ins. Co.*, 91 Id. 229; *Commonwealth v. Hyde & Leather Ins. Co.*, 17 Am. Rep. 72; *Brewer v. Liverpool etc. Ins. Co.*, 21 Id. 703.

APPEAL OF FRANKLIN'S ADMINISTRATOR.

[115 PENNSYLVANIA STATE, 534.]

MARRIED WOMAN, OR HER ESTATE, IS LIABLE FOR WRONGFUL CONVERSION OF GOVERNMENT BONDS, constituting a trust fund, to the interest of which she was entitled during her life, where the bonds were delivered to her by the trustees, who took a receipt from her by which the interest was to be retained by her, and the bonds returned, and where, afterwards, she converted them into money, and gave another receipt, in which her husband joined, acknowledging their conversion, and promising that the proceeds should be returned at her death.

WIFE IS PERSONALLY LIABLE FOR TORT COMMITTED BY HER, unless her husband was both present and directed the doing of it at the time. His presence furnishes evidence, and raises a presumption of his direction, but it is not conclusive, and the truth may be established by competent evidence.

APPEAL by George M. Franklin, administrator *de bonis non cum testamentum annexo* of the estate of Mrs. Anne Franklin, deceased, from a decree of the orphans' court of Dauphin County, sustaining exceptions to the report of the auditor, distributing the estate. Mrs. Franklin died in 1853. A codicil to her will provided as follows: "I direct the executors of my said will to retain three thousand dollars of the proceeds of the sale of my aforesaid house and lot of ground, in trust; that they pay the annual interest and income thereof to my two daughters, Anne and Elizabeth, during life, and to the survivor of them during the life of the survivor; and also in trust, that the said executors shall, at the request of my said daughters, or the survivor of them, invest said sum, or any part thereof, in the purchase of real estate for the use of my said daughters, and the survivor of them, during life; and at the decease of the survivor of them, my said daughters, then in trust that said principal sum, or any part thereof not invested as aforesaid, and the proceeds of the sale of any real estate purchased and then held in trust as aforesaid, and which real estate I order and direct the said executors of my said will, or the survivor of them, to sell and convey to the

purchaser in fee, shall be divided and distributed among my surviving children and the issue of any then dead, in such manner and proportions as is directed in my said will in respect to the *residuum* of my estate." The will and codicil were duly probated, and letters testamentary were issued to the executors therein named. The executors invested three thousand dollars in the purchase of real estate under the will. Anne E. Franklin afterwards married Amos S. Henderson, and her sister, Elizabeth R. Franklin, made her home with her, thus rendering the real estate unnecessary as a home for the sisters. The executors accordingly sold the property, under order of court, and invested the three thousand dollars, in three one-thousand-dollar United States seven-thirty treasury notes. The executors subsequently delivered these notes to Mrs. Henderson and Miss Franklin, taking the following receipt, signed by them: "Received, Lancaster, May 1, 1865, from the executors of the will of Anne Franklin, deceased, three one-thousand-dollar seven-thirty treasury notes, which they invested under the provisions of said will, and the interest of which is to be retained by us, the bonds to be returned to the said executors by the survivor of us, as directed by said will." Miss Franklin died shortly afterwards, and Mrs. Henderson retained the notes until August 5, 1881, when she obtained payment thereof from the government. On the same day, Mrs. Henderson and her husband executed a paper, which, after reciting the above receipt, provided: "And whereas Elizabeth R. Franklin is now deceased, and the investment in said three thousand dollars in seven-thirty treasury notes has been changed, now the said Anne E. Henderson, and her husband, Amos S. Henderson, acknowledge that we have in our hands the sum of three thousand dollars, the interest on which is to be retained by the said Anne during her life for her own use, and the principal on her decease is to be returned to the said executors, to be distributed according to the provisions of the said will of Anne Franklin, deceased." Henderson died in January, 1885, and his wife died in June following, leaving a will by which Clara Franklin was appointed residuary legatee. The account of the executor of Mrs. Henderson's will showed a balance of \$9,181.11 for distribution, which appeared to have been almost entirely made up of the proceeds of a policy of insurance on the life of her husband. The auditor awarded three thousand dollars to the administrator of Anne Franklin. To this exceptions were sustained, and

the sum awarded to Clara Franklin. The administrator thereupon took this appeal.

H. M. North, W. A. Atlas, and W. M. Franklin, for the appellant.

D. G. Eshleman, for the appellee.

By Court, TRUNKEY, J. The executors of the will of Anne Franklin, deceased, invested the trust money in United States treasury notes. These notes, on May 1, 1865, were delivered to Anne E. Henderson and Elizabeth R. Franklin, who were entitled to the interest and income, on the express terms that they should retain the interest, and that the survivor should return the notes to the executors, as directed by the said will. Soon after, Miss Franklin died, and the notes passed into the hands of Mrs. Henderson. On the 5th of August, 1881, Mrs. Henderson and her husband, reciting the prior receipt, and that the investment had been changed, acknowledged that they held "three thousand dollars, the interest on which is to be retained by said Anne during her life, and the principal sum, upon her decease, is to be returned to the said executors, to be distributed according to the will of Anne Franklin, deceased."

That Anne E. Henderson knew the notes were trust property under the said will, is clear. It was her duty as survivor to return them to the executors, or hold them so they could be returned after her decease. Her acknowledgment, with her husband, that she had changed the investment, and held the money to be returned to the executors, put no new face on the transaction. It left her just as she stood immediately after the conversion of the notes. She had no right whatever to appropriate the notes to her own use, or the money she received for them. Because of her coverture, her contract to return the notes was void, so was her promise to return the sum of three thousand dollars which she received for the notes; but the executor gave her no authority to dispose of the notes, or to use the proceeds. If she used the trust fund, or gave it away, or destroyed it, her act was a wrongful conversion.

There is nothing in the case showing that she committed the tort by coercion of her husband. The presumption of coercion does not arise unless it appear that he was present at the time of the offense committed. In the absence of evidence that he was present, there is no presumption.

Upon the facts found by the auditor, Anne E. Henderson, with full knowledge of the trust, received the trust fund, and so disposed of it that it is impossible to trace it. The fund for distribution is affirmatively shown to have been derived from another source. If in her lifetime she were liable in damages for the conversion of the fund, her estate is liable. Her legatees may make the same defense which she could make, if living, and no other.

Except where otherwise provided by statute, the husband is liable for the torts of the wife during coverture; if committed in his company, and by his order, he alone is liable; if not, they are jointly liable, and the wife must be joined in the suit with her husband. And when the remedy for the tort is only damages by suit, the husband is liable with his wife: 2 Kent's Com. *149. Husband and wife may be jointly guilty of the tortious conversion of a chattel. At common law, the wife is liable to an action for her torts, and while living, her husband may be joined, and will be liable with her for the damages recovered; but if she dies, then his liability terminates, while if the husband dies, she may be sued alone, the same as if she had been *feme sole* when the tort was committed: Cord on Rights of Married Women, secs. 1147-1149.

A declaration in trover against husband and wife, stating that the defendants converted the property to their own use, was held sufficient, the objection having been made after verdict: *Keyworth v. Hill*, 3 Barn. & Ald. 685. Although the point decided in that case related only to the pleading, the declaration was held good on the ground that the wife could be guilty of conversion by other means than the acquisition of property. It was not gainsaid that she was liable and responsible in case she was guilty of the conversion.

When a tort is committed by the wife, she is personally liable, unless her husband was both present and directed the doing of it at the time. His presence furnishes evidence, and raises a presumption of his direction; but it is not conclusive, and the truth may be established by competent evidence: *Cassin v. Delany*, 38 N. Y. 178.

We are of opinion that the facts reveal a wrongful conversion of the trust fund by Mrs. Henderson, and that she was liable therefor in damages. Therefore the appellant is entitled to recover.

Decree reversed; and it is now considered and decreed that the report of distribution made by the auditor be and is con-

firmed, and that the money be paid to the parties entitled, as shown by said report.

Appellee, Clara A. Franklin, to pay costs of appeal.

Record remitted for enforcement of this decree.

MARRIED WOMAN'S LIABILITY FOR TORT COMMITTED BY HER: See *Wheeler and Wilson Mfg. Co. v. Hell*, ante, p. 575, and note collecting authorities.

LEHIGH COUNTY v. HOFFORT.

[116 PENNSYLVANIA STATE, 119.]

WHERE COMMISSIONERS OF COUNTY HAVE MAINTAINED BRIDGE IN PROPER REPAIR, as originally planned and erected in a small village, the county is not liable for failure of the commissioners, in the exercise of a proper discretion, to anticipate the growth of the village into a city, or, in the exercise of that discretion, for a like failure to determine the necessity for a new bridge, or for improvements necessary to meet the demands of a greatly increased travel, or to anticipate that horses would become frightened and unmanageable on the wagon road, and that injuries might thereby be inflicted upon foot-passengers.

COUNTY IS NOT LIABLE FOR INJURIES resulting from the failure of its county commissioners to exercise discretionary power under the statute which authorized them to make certain improvements at the expense of the county, no time being fixed within which the work was to be performed, nor the method of its performance being in any way prescribed, but leaving the matter wholly to the judgment and discretion of the commissioners.

AS IT RESPECTS DUTY OF MUNICIPAL CORPORATION, general rule is, that where any person has a right to demand the exercise of a public function, and there is an officer or set of officers authorized to exercise that function, there the right and the authority give rise to the duty; but when the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed.

MUNICIPAL CORPORATION — NON-LIABILITY FOR UNFORESEEN ACCIDENT. — A foot-passenger, while crossing a long and narrow county bridge in a large city, was caught by the wheel of a wagon drawn by a team of runaway horses, and injured. The injury occurred upon the foot-way, which was narrow, and not separated from the wagon road by any guard or rail. The bridge had been built fifty years, but was in good repair, and in all respects substantial and secure. In an action against the county to recover damages for the injury, *held*, that it was unreasonable to suppose that such an occurrence could be foreseen by the authorities as the result of a failure to erect guards or barriers, and that the county was not liable.

CASE for the recovery of damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant. The facts appear in the opinion. The verdict was for the plaintiff, and the defendant took this writ.

C. J. Erdman, for the plaintiff in error.

John Rupp and James B. Deshler, for the defendant in error.

By Court, CLARK, J. On the fifth day of October, 1883, the plaintiff, whilst passing over the bridge across Jordan Creek and meadows in the city of Allentown, was caught by the wheel of a wagon drawn by a runaway team of horses, and injured. The bridge is about six hundred feet long and twenty-six feet wide,—the City Passenger railway occupying eight feet on one side, the wagon road fourteen feet on the center, and the foot-walk four feet on the other side. It is a stone structure, and is conceded to have been originally constructed and since maintained as a county bridge. The plaintiff, at the time of the injury, was on the foot way, which was not separated from the cart-way or wagon road by any guard or rail, but merely by a stone curb, six inches in height. As the team of runaway horses approached her, she leaned over the parapet of the bridge to escape harm, but the hub of the wheel struck her a severe blow in the back, and this suit is brought to recover damages from the county of Lehigh for the injuries sustained.

It is not pretended that the injury complained of resulted from any want of repair or defect in the bridge. It is said, however, that the bridge was insufficient; that it was too narrow; that there was not a sidewalk of adequate width for foot-passengers; and that the sidewalk was not properly protected by a rail or guard from the vehicles on the wagon road.

The bridge was erected half a century ago, when Allentown was but a small country village, situate wholly on one side of Jordan Creek, and it is not improbable that, owing to the rapid growth of the city, and the great increase of its population, the bridge has not now the capacity to accommodate the public in as full and ample manner as might be desired; but it is shown to be a solid stone bridge, in proper condition of repair, and in all respects substantial and secure. The county commissioners have maintained the bridge as it was originally designed and constructed; all the requirements of the law were satisfied in its original approval, and the duty of the commissioners was discharged in the proper maintenance of the structure according to its original design. It must certainly be conceded that the county of Lehigh is not now to be convicted of negligence because the commissioners, in the exercise of a proper discretion, failed to anticipate the growth of the city, or, in the

exercise of that discretion, have failed to determine the necessity for a new bridge, or for such additions or improvements as may be supposed to be necessary to meet the demands of a greatly increased travel upon it. Nor can it be said that the commissioners should have anticipated that horses would become frightened and unmanageable on the wagon road, and would break away from control on the bridge, and that injuries might thereby be inflicted on the foot-passengers. It is unreasonable to suppose that such a condition of things should have been foreseen as the result of their failure and neglect to erect a rail or barrier above the curb. As well, indeed, with much more propriety, might we hold the city of Philadelphia bound to erect barriers on either side of Chestnut Street, to protect the people who from day to day throng the sidewalks of that street. Runaway horses are liable to come upon the pavement in all streets, and the authorities are not bound to guard against this mere possibility.

But it is said that by a special act of assembly, approved in the year 1870, an absolute duty was imposed upon the county of Lehigh to provide a larger accommodation to foot-passengers on this bridge. By this statute it is enacted "that the commissioners of Lehigh County are hereby authorized to erect foot-sidewalks, adjoining the stone bridge crossing Jordan Creek at the Hamilton Street crossing, in the city of Allentown, county of Lehigh, Pennsylvania, at the cost and expense of the county."

It is plain that the language employed by the legislature in the draught of this bill is not essentially of a mandatory character. If the provision is held to be imperative, it must be upon some rule of construction which will impart to the words an interpretation beyond their usual and ordinary signification. The county commissioners were, by the express terms of the act, simply "authorized," not required, to erect foot-sidewalks adjoining the stone bridge, at the cost and expense of the county. No time was indicated within which the work was to be performed, nor is the manner or method of the performance in any way prescribed, or any particular fund in the immediate control of the state appropriated to the purpose. The matter is left wholly to the judgment and discretion of the county commissioners, who, as the representatives of the people and of the public in the administration of the affairs of the county, might be supposed to have especial facilities for knowing, not only when the public interests required, but when

the county was prepared to undertake the proposed improvement; and the legislative intent doubtless was, that the powers conferred would be exercised at such time and in such manner as the public interests would require and the ability of the county would permit, and of this the commissioners were to judge.

A municipal corporation is not liable to an action for damages for the non-exercise of discretionary powers of a public character: Dillon on Municipal Corporations, 753. The general rule in such cases is thus stated in *Carr v. Northern Liberties*, 35 Pa. St. 324, 78 Am. Dec. 342: "Where any person has a right to demand the exercise of a public function, and there is an officer or set of officers authorized to exercise that function, there the right and the authority give rise to the duty; but when the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed." Therefore it was held that an action would not lie against a municipal corporation invested with the power to construct sewers for neglecting to construct a proper system of drainage, in consequence of which a citizen's store was overflowed and his goods damaged. "We do not admit," said Chief Justice Lowrie, "that the grant of authority to the corporation to construct sewers amounts to an imposition of a duty to do it." To the same effect is *Grant v. City of Erie*, 69 Pa. St. 420; 8 Am. Rep. 272.

The case of *Goodrich v. City of Chicago*, 20 Ill. 445, is directly in point. The city of Chicago, among other powers, had express authority to remove all obstructions in the harbor, but it was held that if the city had never undertaken to exercise the power, it was not liable to a party who had sustained damage from a sunken hulk remaining there. If, however, says Caton, J., the city had entered upon the work of removing the hulk, and in doing so had carelessly left it in an exposed condition, by reason of which the navigator's vessel was injured, it would be liable for such negligence. So, too, we apprehend, if the county of Lehigh had actually undertaken the erection of the foot-walk outside of the bridge, it would have been liable for injuries from the negligent performance of the work. But as the work was never undertaken, no such question arises.

The learned court instructed the jurors that, apart from the special statute of 1870, no negligence of the county was shown, and that under the statute it was not the absolute duty of the

county to build the foot-walks on the outside of the bridge; yet notwithstanding this, that inasmuch as the commissioners had the authority to do so, if they (the jurors) believed the bridge was insufficient reasonably to accommodate the travel, and in their judgment the sidewalks were necessary for the public accommodation, they might find the county guilty of negligence. This was simply substituting the discretion of jury for that of the commissioners, and, in the light of the authorities we have cited, was clear error.

The judgment is reversed.

ACTION LIES AGAINST MUNICIPAL CORPORATION FOR DAMAGES CAUSED BY ITS FAILURE TO PERFORM DUTY IMPOSED BY LAW: *Clayburgh v. Chicago*, 79 Am. Dec. 346; *Mayor etc. v. Cullens*, 95 Id. 398.

IN ABSENCE OF STATUTE, COUNTY IS NOT LIABLE FOR DAMAGE BY FAILURE TO REPAIR ITS PUBLIC BRIDGES: *Wood v. Tipton County*, 32 Am. Rep. 561; *White v. Commissioners etc.*, 47 Id. 534; *Brabham v. Supervisors*, 28 Id. 352; compare *Eyler v. County Commissioners*, 33 Id. 249; *House v. Board of Commissioners*, 28 Id. 657; *State v. Board of Commissioners*, 41 Id. 821; *Town of Wallham v. Kemper*, 8 Id. 652; *White v. County of Bond*, 11 Id. 65; *Gilman v. County of Contra Costa*, 68 Am. Dec. 290, and extended note 291-300.

MUNICIPAL CORPORATION MAY DETERMINE FOR ITSELF TO WHAT EXTENT IT WILL GUARD AGAINST MERE POSSIBLE ACCIDENTS: *Hubbell v. City of Yonkers*, 58 Am. Rep. 522, and extended note 526.

THE PRINCIPAL CASE IS CITED and approved as holding that an act of assembly which authorized the county commissioners to erect a foot-walk along the side of a county bridge for the public use and benefit was a discretionary power only, and the county was not liable for its non-exercise, in *McDade v. Chester City*, 117 Pa. St. 424.

ROZELLE v. RHODES.

[116 PENNSYLVANIA STATE, 129.]

PENSION MONEY FROM UNITED STATES IS NOT EXEMPT FROM ATTACHMENT EXECUTION, after it is received by the pensioner, and by him deposited in the hands of a third person for safe-keeping.

DEPOSIT, PROPERLY SO CALLED, IS NAKED BAILMENT, AND EXISTS where one of the contracting parties gives something to the other to keep, who is to do so gratuitously, and return it *in indiducto*, upon request.

DEPOSIT OF MONEY IS SUCH AS IS SUBJECT TO ATTACHMENT EXECUTION under the provisions of the Pennsylvania act of June 16, 1836, section 22, where the money is left with another for safe-keeping, to be returned to the owner, not in money of like amount, but in the identical money deposited.

DEPOSITARY IS HELD TO EXERCISE OF ORDINARY CARE ONLY, but when he becomes the depositary of a fund, he assumes that relation under the law as it exists, and thereby subjects himself to the chances that it may be attached in his hands for the depositor's debts.

R. H. Helgats and J. Alton Davis, for the plaintiff in error.

James E. Frear, for the defendant in error.

By Court, CLARK, J. On the first day of May, 1885, Mason C. Rhodes, executor of the last will and testament of Sidney Bailey, deceased, entered a judgment in the court of common pleas of Lackawanna County, against Eben Rozelle, for debt, one hundred dollars, with interest and costs; on the next day he issued an attachment execution thereon, with clause of *scire facias*, to Isaac F. Tillinghast, garnishee. The writ was served on the defendant, and all debts, deposits, etc., due or owing the defendant in the hands of the garnishee, were levied and attached in satisfaction of the judgment.

On the 27th of June, 1885, the defendant filed a special plea, in substance as follows: That the defendant has no money, goods, effects, or merchandise in the hands of Tillinghast, the garnishee, except the sum of eight hundred dollars, which he received from the United States as a pension for the loss of his son whilst in the military service of the government during the war of the Rebellion; that the money attached is the identical money so received, and that it is in the hands of the garnishee for safe-keeping only; that it is not held by the garnishee as a pledge, pawn, loan, or deposit, to be returned in kind, or in gold, silver, or legal-tender money of like amount, but in the identical money left in his custody. The defendant's contention is: 1. That the money is not subject to seizure in any form of legal procedure; and 2. That if it is liable to be taken in execution for the defendant's debts in any form, it is not subject to seizure on an attachment execution. The answer of the garnishee is to the same effect, and the questions for consideration here are raised upon a rule against the garnishee on his answer and upon a demurrer to the defendant's plea.

The defendant, after issue joined on the demurrer, without leave added the pleas of *nil debet*, payment with leave, etc., but the cause was disposed of in the court below, and argued here solely upon the demurrer.

Is the money subject to seizure for the debts of the defendant under legal process in any form? Section 4747 of the Revised Statutes of the United States provides as follows: "No sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy, or seizure, by or under any legal or equitable process whatever, whether the same remains with

the pension office, or any officer or agent thereof, but shall inure wholly to the benefit of such pensioner." The money which is exempted from legal seizure, under this section, it will be observed, is particularly designated; it is "any sum of money due or to become due to any pensioner." This refers, of course, to money due or becoming due from the pension department; it is not pretended that the language of the statute can have any wider application than this. The further provision is, that such money shall not be liable to levy or seizure under any process in law or equity, "whether it remains with the pension office, or any officer or agent thereof." It is very plain that the eight hundred dollars in the hands of Tillinghast is not "money due or to become due" from the pension department; nor is it money which "remains in the pension office, or in the hands of any officer or agent thereof." It is money which some time previous to the attachment had been paid to the pensioner, and which when paid to him "inured wholly to his benefit"; it was his money; he could dispose of it as he pleased. The exemption provided by the statute upon any fair and reasonable construction will only protect the fund whilst in course of transmission to the pensioner; after that, it is liable to seizure as other money. Some analogy was intended, we think, to the rule of law which prevails as to the fees and salaries of public officers, which, as long as they maintain their distinctive character, have always been held not liable to be taken by creditors under any form of process, by levy, sale, attachment, or sequestration: *Davis v. Duke of Marlborough*, 1 Swanst. 79; *Rundle v. Scheetz*, 2 Miles, 330; *Hutchinson v. Gormley*, 48 Pa. St. 270. Therefore, in *Elwyn's Appeal*, 67 Id. 367, the half-pay of an officer of the government was held not to be liable to seizure by creditors; but when it had actually reached the beneficiary, and had lost its distinctive character, when as money it was in a proper sense a distributable fund, lying in the hands of the law, it was held to be governed by the direction of the law.

The precise question, it is true, is one of first impression in Pennsylvania; no case has been brought to our notice which rules it. In *Friend in Equity v. Garcelon*, 77 Me. 25, 52 Am. Rep. 739, however, the exact question has been fully considered and decided. Peters, C. J., of the supreme judicial court, in passing upon this point, says: "The question is, whether this provision furnishes any protection to or exemption of the money, after it comes into the pensioner's hands. A careful

examination inclines us to the conclusion that it does not. The meaning of the section seems to be that the protection is extended, so long as the money remains in the pension office, or its agencies, or is in course of transmission to the pensioner; it is money due or to become due that is protected by the law." *Spellman v. Aldrich*, 126 Mass. 113, *Cavanaugh v. Smith*, 84 Ind. 380, *Faurote v. Carr*, 108 Id. 123, *Jardain v. Fairton Saving Fund Association*, 44 N. J. L. 376, and *Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 408, although differing in some respects from the facts of this case, are substantially to the same effect.

But assuming that the money was liable to seizure to satisfy the defendant's debts, was it the proper subject of an attachment execution, so that Tillinghast might be charged as a garnishee? It is contended that "deposits of money," in sections 22 and 35 of the act of the 16th of June, 1836, must, in analogy to the principle announced in *Lennig's Appeal*, 9 Week. Not. Cas. 503, be construed to be such as constitute the relation of debtor and creditor between the depository and the depositor. In order to a complete understanding of this question, a reference to the provisions of the act of 1836 becomes necessary.

Prior to 1836, the goods and chattels, lands and tenements, only, of the defendant, were liable to be taken in execution upon a judgment. Stocks in incorporated companies held by him, it is true, were made liable to seizure and sale under the act of the 29th of March, 1819. With this exception, however, the general provision of the law was as stated. By section 22 of the act of 1836, however, it is provided that, in addition to stocks owned by the defendant in any body corporate, "deposits of money belonging to him, in any bank or with any person or body corporate or politic, and debts due to him, shall be liable, like other goods and chattels, subject to all lawful claims," etc.; and by section 23, "goods or chattels pawned or pledged by the defendant, as security for any debt or liability, or which have been demised, or in any manner delivered or bailed for a term," are declared to be "liable to sale upon execution, as aforesaid, subject, nevertheless," etc. Section 35 of the same act provides, however, that in the case of a debt due to the defendant, or of a deposit of money made by him, or of goods and chattels pawned, pledged, or demised, as aforesaid, the same may be attached and levied, in satisfaction of the judgment, in the manner

allowed in the case of a foreign attachment; in which case, the writ shall contain a clause of *scire facias* to the garnishee, etc.: See *Wray v. Tammany*, 13 Pa. St. 394; *Gochenaur v. Hostetter*, 18 Id. 414; *Strause's Ex'r v. Becker*, 44 Id. 206.

Whilst, therefore, all the goods and chattels of the defendant, whether they have been previously "pawned, pledged, or demised, as aforesaid," or not, are liable to seizure and sale on execution under a *feri facias*, it is only such goods and chattels as have been "pawned or pledged by the defendant, as a security for a debt or liability, or which have been demised or in some manner delivered or bailed for a term," that are liable to an attachment execution; the party in whose possession the goods are must have such a title or interest therein that they cannot be taken from him: *Lennig's Appeal*, 9 Week. Not. Cas. 503.

But there is no restriction in section 35 to any particular kind or class of debts due, or deposits of money made by the defendant; that section applies in the most general terms to all debts and deposits; and whilst section 22 provides that such debts and deposits shall be liable like other goods and chattels, section 35, as was said by Mr. Justice Woodward, in *Reed v. Penrose*, 36 Pa. St. 239, prescribes that the manner of levying and seizing all such credits and choses in action shall be like that allowed in foreign attachment.

It may be conceded, perhaps, that if the money which Rozelle deposited with Tillinghast had been in the view of the sheriff, and within his power, he might, upon a *feri facias*, have taken of it to the amount of his writ; but the money, it must be conceded, was a deposit with Tillinghast, and even if liable to levy upon a *feri facias* it was also liable to an attachment in execution in his hands. In disposing of the rule and the demurrer, we must of course assume the truth of the facts which the defendant and the garnishee have set forth in the plea and answer respectively, but we are not bound to accept their legal conclusions. A deposit, properly so called, is a naked bailment, and exists where one of the contracting parties gives something to the other to keep, who is to do so gratuitously, and obliges himself to return it *in individuo* when he shall be requested. When one deposits money with another for safe-keeping, the latter to return, not the specific money, but an equal sum, the transaction is also called a deposit, but it is an irregular deposit: Bouv. 511. Now, the transaction between Rozelle and Tillinghast was undoubtedly a deposit of

money, plain and simple; the money was left with Tillinghast for safe-keeping, to be returned, not in money of like amount, but "in the identical money deposited," and it is of no consequence that the garnishee in his answer, and the defendant in his plea, deny that it was a deposit, as by the admitted facts it was plainly nothing else.

It is true that a depositary is held to the exercise of ordinary care only, but when he becomes the depositary of a fund, he assumes that relation under the law as it exists, and thereby subjects himself to the chances that it may be attached in his hands for the depositor's debts; and if he thereby incur a larger measure of responsibility, it is but the legitimate consequence of his own voluntary act.

Upon a careful examination of the whole case, we find no error in this record, and the judgment is affirmed.

PENSION MONEY, WHEN NOT EXEMPT FROM LEGAL PROCEEDINGS: *Craws v. White*, 41 Am. Rep. 408; *Friend v. Garcelon*, 52 Id. 739; *Robion v. Walker*, 58 Id. 878; when exempt: *Hissom v. Johnson*, 55 Id. 327; recovery back of illegal fees for obtaining: *Hall v. Kimmner*, 1 Am. St. Rep. 575, and note 578.

GRATUITOUS BAILEE, DILIGENCE REQUIRED OF: *Smith v. First National Bank*, 97 Am. Dec. 59, and note 62; *First National Bank v. Ocean National Bank*, 19 Am. Rep. 181; *Jenkins v. Bacon*, 15 Id. 33; *Tancil v. Seaton*, 26 Id. 380; *Caldwell v. Hall*, 45 Id. 410; *Schermer v. Neurath*, 39 Id. 397.

WHEN MONEY RESULTING FROM PENSIONS BECOMES SUBJECT TO GARNISHMENT.—The conclusion arrived at in the principal case, that the provisions of the United States Revised Statutes, section 4747, exempting pensions from execution, does not apply after the money reaches the hands of the pensioner, is well sustained by the cases cited in the opinion: See *Craws v. White*, 27 Kan. 319; 41 Am. Rep. 408; *Friend v. Garcelon*, 77 Me. 25; 52 Am. Rep. 739; *Robion v. Walker*, 82 Ky. 60; 56 Am. Rep. 878; *Cavanaugh v. Smith*, 84 Ind. 380; *Spellman v. Aldrich*, 126 Mass. 113; *Jardais v. Fairton Saving Fund Ass'n*, 44 N. J. L. 376; to which may be added other well-considered cases to the same effect: See *Webb v. Holt*, 57 Iowa, 712; *Triplett v. Graham*, 58 Id. 135; *Baugh v. Barrett*, 69 Id. 495. It is held that money received by a debtor as a pension from the federal government stands upon the same footing as any other money which he may have: *Fawcett v. Carr*, 106 Ind. 123. Property purchased by a pensioner with pension money is liable to sale on execution: *Cavanaugh v. Smith*, 84 Id. 380. So where a pensioner gives his pension money to his sons, who buy land therewith, such land is not exempt from execution upon a judgment against the pensioner, obtained prior to the gift: *Sims v. Wabsham*, Ct. App. Ky., Mar. 3, 1888. And where a pensioner deposited his pension money in a bank to his credit, it was held not to be exempt, in the hands of the bank, from the process of attachment for the pensioner's debts: *Webb v. Holt*, 57 Iowa, 712.

The view taken by the courts in the cases above cited is, that the federal statute (U. S. R. S., sec. 4747) is limited to protecting and exempting pension money from levy and seizure while it remains in the pension office, or in the hands of government officials, and in the course of transmission to

the pensioner entitled thereto; but after the money is paid over, the United States law ceases to be operative, and the right of exemption after that, if any exists, must be found in the laws of the state where the pensioner resides: See also *Burgett v. Fancher*, 35 Hun, 647, 650; *Stockwell v. National Bank*, 36 Id. 583. It is held that the language of the federal statute precludes the idea that it was the intention of Congress to exempt either the money, after it had gone into the hands of the pensioner, or the property which he may have purchased with it; and therefore, that a homestead purchased with pension money, and levied upon in satisfaction of a debt contracted prior to such purchase, is not exempt from execution under the statute: *Foster v. Byrne*, Sup. Ct. Iowa, Dec. 15, 1887, Beck and Rothrock, JJ., dissenting, and reaching the conclusion that under the statutes of the United States a person may hold a homestead purchased with his pension money, free from all debts, without regard to the time they were contracted: *Foster v. Lyne*, Sup. Ct. Iowa, Dec. 15, 1887. So the view was entertained in a Vermont case, that so long as the pension money is kept as a fund, or invested for keeping and use as current circumstances may require, it would not be subject to attachment by trustee process or otherwise, in suits against the pensioner. Nor was the court prepared to say that property needful for proper purposes of current life of the pensioner and his family, purchased with the pension money, could be so subjected: *Hayward v. Clark*, 50 Vt. 612. So it is held in Wisconsin, contrary to the prevailing weight of authority elsewhere, that money received by a pensioner of the United States in payment of his pension, and remaining in his possession, is exempt from seizure on process against him for debt, under the federal statute: *Folschow v. Werner*, 51 Wis. 85. In the cases last cited, the courts were disposed to give the closing clause of the section—"but shall inure wholly to the benefit of such pensioner"—such a force and application as would effectuate the benefit therein meant: See *Hayward v. Clark*, 50 Vt. 617. The same view is taken by the court in a recent case in West Virginia, holding that where a pensioner receives pension drafts from the government, and transfers them or their proceeds to another, upon his agreement to convey land to the pensioner's wife, and the land is so conveyed, it is not subject to the lien of judgments against the pensioner existing at the time the drafts were received by him: *Wiseem v. Johnson*, 27 W. Va. 644; 55 Am. Rep. 327.

The New York statute (Code Civ. Proc., sec. 1306), providing for the exemption from seizure of a pension granted by the United States for military services, is broader in its terms than the federal law, and was not intended to be as limited in its operation. By it a pension is exempted, not as by the federal statute only when "in course of transmission," but after it has been received by the pensioner. And it is held that, although the pension money may have been deposited in a bank, the account cannot be reached by a creditor: *Burgett v. Fancher*, 35 Hun, 647; *Stockwell v. National Bank*, 36 Id. 583; *Wildrich v. De Vauxy*, 16 N. Y. Week. Dig. 355. But pension moneys given by the United States to a woman on account of the military services of her son are not, after her death, exempt, either under the New York statute or the federal statute, in favor of her descendants not constituting a family for whom she provided, from liability to be applied to the payment of a judgment recovered, upon a debt of the decedent, against her administrator: *Matter of Winans*, 5 Demarest, 138; see *Hodge v. Leaning*, 2 Id. 553.

It was held in a recent case in Iowa that a homestead purchased with pension money, and levied upon in satisfaction of a debt contracted prior to such purchase, is not exempt from execution under a statute of that state

providing for the exemption of pension money, or the property purchased therewith, and that such exemption "shall apply to debts of such pensioners contracted prior to the purchase of such homestead." The statute, so far as it applies to debts contracted before the purchase of the homestead, is held to be in conflict with the constitution of the United States (art. 1, sec. 10), in that it impairs the obligation of contracts: *Foster v. Byrne*, Sup. Ct. Iowa, Dec. 15, 1887.

Where a woman received pension money, and loaned it, taking a note for security, and shortly before her death assigned the note as a gift to her daughter, it was held that, in the absence of other assets, the note was liable in the daughter's hands to the payment of the claims against her mother's estate, the mother's death having occurred prior to the taking effect of the state statute exempting pension money from execution: *Baugh v. Barrett*, 69 Iowa, 495. The question whether pension money is exempt is to be determined by the law in force when the pensioner died: *Id.* 496.

Under the statutes of Iowa, pension money is exempt from execution whether the pensioner "is the head of the family or not," and upon the death of a married man leaving money derived from a pension, the money goes to his administrator, and not to his widow, who is entitled to such property only as would be exempt in the hands of her husband "as the head of a family": *Perkins v. Hinckley*, 71 Iowa, 499.

RAUCH v. DECH.

[116 PENNSYLVANIA STATE, 157.]

VENDOR OR MORTGAGOR WHO SELLS OR MORTGAGES LAND WHICH HE DOES NOT OWN WILL NOT BE PERMITTED TO SET UP AFTER-ACQUIRED TITLE THERETO, to defeat his previous grant or mortgage, for this would be to permit him to perpetrate a fraud on his grantee or creditor.

ID.—BUT THIS RULE DOES NOT APPLY where the lien of a mortgage is discharged by a judicial sale, and the mortgagor, having been discharged in bankruptcy, reacquires title to the mortgaged premises through the purchaser at such sale. The purchase by the mortgagor in such case does not work a revival of the discharged mortgage lien.

SCIRE FACIAS to revive the lien of a judgment obtained on a mortgage. The mortgage was executed by Rauch to Dech on May 3, 1874, upon certain premises already subject to prior encumbrances, to secure the payment of one thousand dollars. Rauch was adjudicated a bankrupt on July 5, 1877, and judgment was entered against him on March 22, 1878, in liquidation of the mortgage executed to Dech. On March 28, 1879, he received his discharge in bankruptcy from all debts and claims, including said judgment. To the *scire facias* the defendant filed a special plea, setting out the discharge in bankruptcy, and further alleging that the lien of said judgment was forever divested by a sheriff's sale of the mortgaged premises upon a previous mortgage. To this plea the plaintiff

filed a demurrer, which was sustained, and judgment entered thereon in his favor. Whereupon the defendant took this writ. Other facts in the opinion fully state the case.

W. E. Doster, for the plaintiff in error.

Robert L. Cope and J. B. Kemmerer, for the defendant in error.

By Court, GORDON, J. This was a *scire facias* to revive the lien of a judgment obtained on a mortgage, and which lien had been discharged by a sale of the premises by a judicial sale on a previous mortgage. This sale seems to have been made by the sheriff to C. A. Luckenbach, on the 15th of June, 1878; and subsequently, June 1, 1882, the executors of Luckenbach, for a full consideration, conveyed the premises to James K. Rauch, the defendant in the present suit. The court below seemed to think that, because there had been a reacquisition of the mortgaged property by the defendant, the lien of the discharged mortgage had been thereby revived; hence entered judgment on the demurrer for the plaintiff. This was a mistake; a result such as this could only arise by way of estoppel. When a vendor or mortgagor either sells or mortgages land which he does not own, and afterwards obtains the title thereto, he will not be permitted to set up this after-acquired title to defeat his previous grant or mortgage, for this would be to permit him to perpetrate a fraud on his grantee or creditor. But there is nothing of the kind in the case before us; for it is not pretended that Rauch mortgaged to Dech land to which he had no title, or that he was guilty of any species of fraud whereby Dech was deceived. The plaintiff's lien was lost by force of legal process, and it is not even intimated that Luckenbach's title was not taken clear of that lien. In the mean time, and before the date of the deed of the executors to the defendant, he had received his discharge in bankruptcy; so that, at that time, he was not even the debtor of the plaintiff. It thus follows that, so far as Dech and his mortgage were concerned, Rauch, at the time of his purchase, occupied the position of a stranger. To hold, therefore, that that purchase worked a revival of the extinguished debt and mortgage was a clear mistake, without the shadow of authority for its support.

The judgment of the court below is now reversed, and it is ordered that judgment be entered on the demurrer for the defendant.

RELEASE OF MORTGAGE, EFFECT OF: See *Garwood v. Eldridge*, 34 Am. Dec. 125, note 192.

MORTGAGE EXECUTED TO SECURE PAYMENT OF NOTE, AFTER BEING CANCELED BY AUTHORITY OF THE HOLDER THEREOF, WILL NOT BE REVIVED IN FAVOR OF A SUBSEQUENT HOLDER OF THE NOTE: *Dell v. Rinetti*, 96 Am. Dec. 399.

OWNER OF LAND COGNIZANT OF HIS TITLE, STANDING BY AND ENCOURAGING ANOTHER, IGNORANT OF HIS TITLE, TO CONTRACT FOR THE PURCHASE OF IT FROM A THIRD PERSON IN POSSESSION WITH COLOR OF TITLE, IS ESTOPPED FROM SETTING UP HIS TITLE AGAINST SUCH PURCHASER: *Guffy v. O'Beiley*, 57 Am. Rep. 424, and cases collected in note 429.

IF MORTGAGEE PERMITS MORTGAGOR TO RETAIN MORTGAGE, AND LATTER FRAUDULENTLY CANCELS IT OF RECORD, MORTGAGEE CANNOT ENFORCE IT AS AGAINST A SUBSEQUENT *bona fide* GRANTEE: *Heyder v. Excelsior Building Loan Ass'n*, 59 Am. Rep. 49.

DOCTRINE OF ESTOPPEL IS INTERPOSED TO PREVENT INJURIOUS OR GUARD AGAINST FRAUD BY DENYING A PARTY THE RIGHT TO REPUDIATE HIS ADMIS- SIONS WHEN THEY HAVE BEEN ACTED UPON BY PERSONS TO WHOM THEY WERE DIRECTED, AND WHOSE CONDUCT THEY WERE INTENDED TO INFLUENCE: *Johson v. Friatic*, 96 Am. Dec. 503.

THE PRINCIPAL CASE IS CITED AND APPROVED IN *Rushin v. Lippincott*, 119 Pa. St. 12.

CAKE v. POTTSVILLE BANK.

[126 PENNSYLVANIA STATE, 241.]

WRITTEN AGREEMENT MAY BE MODIFIED, EXPLAINED, REFORMED, OR SET ASIDE BY PAROL EVIDENCE OF AN ORAL PROMISE OR UNDERTAKING MATERIAL TO THE SUBJECT-MATTER OF THE CONTRACT, MADE BY ONE OF THE PARTIES AT THE TIME OF THE EXECUTION OF THE WRITING, AND WHICH INDUCED THE OTHER PARTY TO PUT HIS NAME THERETO.

IN ACTION BY PAYEE AGAINST INDORSER TO RECOVER AMOUNT OF PROMIS- SORY NOTE, DEFENDANT MAY SHOW BY PAROL TESTIMONY THAT AT THE TIME OF THE EXECUTION, INDORSEMENT, AND DELIVERY OF THE NOTE, IT WAS AGREED BY THE PAYEE'S AGENT, WHO CONDUCTED THE TRANSACTION, THAT THE PAYEE WOULD LOOK ALONE TO THE MAKER, AND THE COLLATERAL SECURITY AGREED TO BE GIVEN BY HIM, AND THAT THE DEFENDANT SHOULD NOT BE HELD LIABLE UPON HIS INDORSEMENT.

PRESIDENT OF BANK WHO NEGOTIATES SETTLEMENT WITH INDORSER ON MATURED PAPER HELD BY HIS BANK ACTS AS THE BANK'S AGENT, AND WHATEVER HE DOES WITHIN THE APPARENT SCOPE OF HIS AUTHORITY TO OBTAIN THE NEW SECURITY BINDS THE BANK WHICH ACCEPTS AND HOLDS THE SECURITY.

TESTIMONY OF PARTY TO CONTRACT, WHICH TENDS ONLY TO SHOW HIS THOUGHTS AND PURPOSES, NOT DISCLOSED AT THE TIME OF MAKING THE CONTRACT, IS INADMISSIBLE TO SHOW THAT HIS AGREEMENT MEANT SOMETHING ELSE.

ASSUMPSIT by the Pottsville Bank against J. A. Cake, as indorser, to recover upon certain negotiable promissory notes made by J. W. Cake. The circumstances under which the notes were indorsed by the defendant appear in the opinion.

Upon the trial, the plaintiff put the notes with the indorsements in evidence, and rested. The defendant then offered to prove by his own testimony in substance as follows: That Henry Saylor, at the time president of said bank, asked for a settlement of certain overdue paper of J. W. Cake; that a settlement was made of all such paper, including certain paper upon which the defendant was liable, upon the following terms: That three notes were to be given by J. W. Cake, indorsed by the defendant, and a bond secured by mortgage upon real estate for the full amount of the debt was to be given by J. W. Cake; that the defendant was not to be held liable upon his indorsements, but that they were to be given merely to satisfy the rule of the bank requiring an indorser upon negotiable paper, but, in consideration of the giving of the mortgage as security, he was not to be held liable. The testimony was objected to by the plaintiff, upon the grounds: 1. That the declaration of the president, or other officer of a bank, to an indorser, that his indorsement should be merely nominal, or that he should not be held liable thereon, did not bind the bank, unless it was first shown that such officer was authorized by the board of directors to make such a contract; that the discounting of commercial paper is a function vested in the board of directors of the bank, and cannot be delegated to any one officer of the bank, and that the offer is otherwise incompetent and irrelevant, except as to the question of usury; 2. That the defendant, in the lifetime of Henry Saylor, the president of the bank, made affidavit admitting that there was about eight thousand dollars due the plaintiff; that since the filing of that affidavit said Saylor, the president of this corporation and its agent, the party with whom the contract was made, has died, and that the witness is incompetent within the act of 1869, and that is another reason why this testimony is incompetent; 3. This being a suit against the defendant as indorser on a promissory note, his contract, being in writing, cannot be varied by parol testimony, except upon the ground of fraud, accident, or mistake. The court sustained the plaintiff's objections, and rejected the offered evidence (first assignment of error). The defendant then proposed to renew the offer, and prove in addition that he would not have indorsed the notes had it not been for the express stipulation that he should not be held liable thereon, and that he so stated to Mr. Saylor at the time of the indorsement, and that the said Saylor then agreed for the bank that he should not be held liable,

and thereupon he indorsed the notes in suit. Objected to on the same grounds as the previous offer, and the objection was sustained by the court (second assignment of error). The defendant then offered in evidence the bond and mortgage from J. W. Cake to the Pottsville Bank, to be followed by proof that the bank accepted the mortgage, and used and pledged it as collateral for loans obtained by the bank: 1. As a part of the *res gestæ*; and 2. For the further purpose of showing that the bank accepted and ratified the agreement as made by the defendant and the said Saylor, as president, in relation to the settlement of the indebtedness of J. W. Cake, the bond and mortgage being produced by the plaintiff on the trial. Objected to,— 1. Because it was not disputed that the bond and mortgage were given by J. W. Cake as collateral security for the notes in suit; 2. Because the bond and mortgage did not show that the bank accepted them in full satisfaction and payment of their indebtedness; 3. The defendant, being indorser on a note which on its face shows that a bond and mortgage were also held by the holder of the note or the bank as collateral security, becomes entitled to the collaterals the moment he pays the debt; that as indorser of the note, which is the only contract in evidence, it was his duty to pay the note at maturity, and if he had paid it at maturity, he would have been entitled to the mortgage and bond, which were collaterals given to secure the payment of it, and might enforce the mortgage and collaterals for his own benefit; 4. That in so far as sought by this offer to impeach the legal effect of the defendant's indorsement, the testimony is irrelevant and incompetent. The objections sustained, and the evidence rejected (third assignment of error). The jury found a verdict for the plaintiff, as directed by the court, and judgment was entered thereon whereupon the defendant took this writ.

Guy E. Farquhar, for the plaintiff in error.

F. W. Bechtel and N. Heblick, for the defendant in error.

By Court, TRUNKEY, J. On May 1, 1877, the bank held overdue notes against J. W. Cake, amounting to \$14,060, two of which, amounting to \$6,000, were indorsed by J. A. Cake. The bank wishing to have the notes settled, its president went to Sunbury for the purpose of effecting a settlement, and adjusted the claim by J. W. Cake giving three notes, amounting to \$14,128.29, which were indorsed by J. A. Cake; and J. W.

Cake also gave a bond and mortgage for the amount of the notes as collateral security. So says the bank.

It follows that the notes in suit, secured by the mortgage, were given in settlement of overdue notes, and that the president of the bank was its agent, who took the old notes to Sunbury and negotiated the settlement. Therefore the defendant, in his relation to the bank, does not stand as if the bank were an innocent holder, who discounted or purchased for value. Nor is he an accommodation indorser for the purpose of enabling the maker to obtain money on the notes. He is *prima facie* liable for the debt, but it is as competent for him to prove any matter to impeach the indorsement as it would be were his liability evidenced by written contract in another form. And the president of the bank was not performing the duties of the directors respecting discounts when he made the settlement; he was a mere agent, and whatever he did within the apparent scope of his authority to obtain the new security is binding on the bank which accepted and holds the security.

That a written agreement may be modified, explained, reformed, or set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it, is repeated as a settled principle in the late case of *Cullmans v. Lindsay*, 18 Week. Not. Cas. 509. It was also said that the fact whether or not the parol promise was the inducing cause of the execution of the contract is generally an inference to be drawn by the jury from the evidence. When a party is charged with the commission of an act with a particular intent, he may testify what that intention was; but he cannot testify to the undisclosed purpose of his mind, or declare a mental reservation, to nullify the express words of his contract.

The offers of testimony set out in the first and third assignments of error ought to have been admitted. If the facts are as therein stated, by the law of this state the defendant is not liable on his indorsements. The giving of the bond and mortgage by the principal debtor to secure all the notes was for the benefit of the bank and of the indorser, if the latter were liable; the taking of that security was part of the transaction, and is consistent with the allegation of either party respecting the nature of the indorsement.

At present the question is, whether the proposed testimony was admissible. Had it been received, other testimony might

have been adduced tending to establish the alleged facts. At the argument, it was contended by the plaintiff's counsel that had the proposed testimony been heard, the uncorroborated testimony of the witness would not have been sufficient to overthrow the indorsements. That point does not arise, for the testimony was rejected. The court refused the offer without inquiry of or statement by the defendant whether it was to be followed by corroborative testimony.

The second assignment is not sustained, because the offer seems to include testimony by the defendant himself that he "would not have indorsed the notes, had it not been for the express stipulation that he should not be liable thereon." It was competent for him to testify what he said to Saylor at the time of indorsing, to testify all that then and there was said and done by the parties relating to the alleged agreement, but not that he indorsed for any reason that he did not express. His thoughts and purposes, not disclosed at the making of the contract, shall not be disclosed to the jury in the attempt to show that his indorsement means something else.

Judgment reversed, and *venire facias de novo* awarded.

ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN OR VARY INSTRUMENT IN WRITING: *Pratt v. Morrow*, 100 Am. Dec. 381, and cases collected in note 384; *Stoops v. Smith*, 1 Am. Rep. 85; *Sweat v. Shamway*, 3 Id. 471; *McMaster v. Insurance Co.*, 14 Id. 239; *McKim v. Auldach*, 39 Id. 479; *Allen v. Rundle*, 47 Id. 599; *Lewis v. Seabury*, 30 Id. 311; *McLeod v. Skiles*, 51 Id. 254; as to bills and notes: *Ross v. Espy*, 5 Id. 394; *Downer v. Chesbrough*, 4 Id. 29; *Charles v. Denis*, 24 Id. 383; *Chaddock v. Vanness*, 10 Id. 256; *Walker v. Crawford*, 8 Id. 701; *Koehring v. Musmeninghoff*, 21 Id. 402; *Donley v. Tindall*, 5 Id. 234; *Poster v. Clifford*, 28 Id. 603; *Doolittle v. Ferry*, 27 Id. 163.

WEST MAHANOT TOWNSHIP v. WATSON.

[116 PENNSYLVANIA STATE, 241.]

IN ACTION FOR NEGLIGENCE, IMMEDIATE, AND NOT REMOTE, CAUSE OF INJURY SUSTAINED IS CONSIDERED; and this rule is not to be controlled by time or distance, but by the succession of events. The question is, Did the cause alleged produce the injury without another cause intervening? or was it to operate through or by means of such intervening cause?

IN DETERMINING WHAT IS PROXIMITY OF CAUSE, TRUE RULE IS, that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the circumstances of the case, might and ought to have been foreseen by the wrong-doer as likely to flow from his act.

IN ACTION FOR NEGLIGENCE, QUESTION OF PROXIMATE CAUSE IS FOR JURY, if the facts are disputed; but if they are undisputed, the question is one for the court.

PROXIMATE CAUSE—LIABILITY OF MUNICIPAL CORPORATION.—A pair of horses and sleigh, while being driven along a township road, struck an ash heap negligently left in the highway, overturning the sleigh. The horses became frightened, and ran off the road, and upon a railroad track, where, after being overtaken and driven from the track by one train, they changed their course, and running in the opposite direction, were struck by another moving train and killed. In an action against the township to recover damages, it was *held*, that the facts not being disputed, the court should have instructed the jury that the negligence of the township in leaving the ash heap on the road was not the proximate, but the remote, cause of the loss of the horses, and that the township was not liable therefor.

CASE to recover damages for the loss of a team of horses, a sleigh, and harness, through the alleged negligence of the defendant. The facts appear in the head-note and opinion. See also same case on a former appeal, 112 Pa. St. 574.

S. H. Kaercher and Mason Weidman, for the plaintiff in error.

James B. Reilly and M. M. L'Velle, for the defendant in error.

By Court, GORDON, J. As we now have this case presented to us, we find the evidence much more full and complete than when it was here before. On this last trial the course of the horses was traced with accuracy from the point where the upset occurred, at the ash heap in the township road, to the place on the railroad where they were struck and killed by the moving locomotive. We have also that which we had not in the former case, a full and particular detail of the manner and immediate cause of their death. On this point we give a summary of the testimony of Jeremiah Ryan, the fireman of locomotive No. 69, and of Jonathan Bretz, engineer of No. 389, both witnesses for the plaintiff. Ryan says the horses were first seen by him in full flight eastward, on the track of the railroad about twenty-five yards ahead of the engine, which was running at the rate of from fifteen to eighteen miles an hour; that the team was overtaken, and either the sleigh or the horses were struck by the locomotive, which drove them from the track, and changed the course of their flight from an eastern to a western direction. He then left his engine and followed in the track of the horses, as he says, about one mile

and a half, when he found they had been struck and thrown over an embankment; the one dead and the other mortally wounded. Bretz says that at about 8:40 P. M., when coming down the mountain with his train, he discovered the horses on the track; signaled "down breaks" twice, but before he could stop they were struck and thrown from the track over the embankment. Now, omitting entirely the effect that the pursuing train, giving out its warning signals, would have upon the flight of the horses, we have here two facts distinctly proved: 1. That the course of the team was entirely changed by the stroke received from engine No. 69; 2. The actual and immediate cause of the destruction of the plaintiff's property was its collision with engine No. 389. These facts narrow the case down to the single question, Was the upset at the ash heap, on the township road, the immediate or direct cause of the loss of the horses? As we have seen, the facts themselves answer this interrogatory in the negative, and necessarily determine the case in favor of the plaintiff in error. In the case of *Hoag v. Michigan etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, Mr. Justice Trunkey, then president of the common pleas of Venango, in his charge to the jury, on the trial of the above-named case, said: "The immediate, and not the remote, cause is to be considered. This maxim is not to be controlled by time or distance, but by the succession of events. The question is, Did the cause alleged produce its effects without another cause intervening? or was it to operate through or by means of this intervening cause?" As the principle here stated was adopted by the affirmance of this court, following *Pennsylvania R. R. Co. v. Kerr*, 62 Pa. St. 353, 1 Am. Rep. 431, we may regard it as the settled law of this state, and we need hardly say that under this rule the plaintiff below ought not to have been permitted to recover the value of the horses; for the direct cause of the loss was not the upset in the township road, but the intervention of the locomotives. Moreover, in the case above cited, we have, per Mr. Justice Paxson, this rule stated, the rule also of *Pennsylvania R. R. Co. v. Kerr*, *supra*: "That in determining what is proximity of cause, the true rule is, that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer as likely to flow from his act." Measured again by this rule, and the plaintiff's case fails; for whilst the supervisors might have foreseen the upset on the ash heap, it

was not possible for them to anticipate the ultimate result of the accident as it finally happened.

The counsel for the plaintiff have cited us to several cases which they regard as supporting their contention, but an examination of them will, we think, demonstrate that they are not at all in point. *Scott v. Hunter*, 46 Pa. St. 192, 84 Am. Dec. 542, held, where one negligently causes property to be exposed to dangers which he knew, or in the exercise of ordinary prudence might have anticipated, he is responsible for the damage resulting therefrom, though his act may not have been the proximate cause. This is the rule of *Pennsylvania R. R. Co. v. Kerr*, *supra*, and, were the facts similar, would apply to the case in hand; but as the facts are not similar, as the supervisors could not reasonably foresee that a comparatively trifling accident at the ash heap would result in a more serious and fatal one on the railroad, the rule stated does not apply. Of *Hey v. Philadelphia*, 81 Pa. St. 44, it may be said that the want of guards along the bank of the river was the direct cause of the accident; at all events, the city officials ought to have known, from the circumstances surrounding the highway, that an accident such as happened might at any time occur, and were therefore bound to provide against it. *Pittsburgh v. Grier*, 22 Pa. St. 54, 60 Am. Dec. 65, is further from the point than the cases cited; for in consequence of the pile of pig-iron which the city negligently permitted to lie on the wharf, the plaintiff's boat was compelled to assume a dangerous position, in consequence of which the injury complained of resulted.

It is also urged that the question of remote or proximate cause was for the jury, and was properly submitted. This would be so were there any dispute about the facts, but where, as in this case, they are not disputed, the court should determine the question as a matter of law. "It is undoubtedly true, as a general proposition, that the question of proximate cause is for the jury; yet it has been repeatedly held that where there are no disputed facts the court must determine it": *West Mahanay Township v. Watson*, 112 Pa. St. 574, per Mr. Justice Paxson. It follows, from what has been said, that the plaintiff's recovery in this case should have been confined to the damage done to the sleigh and harness.

The judgment is now reversed, and a new *venire* ordered.

WHEN NEGLIGENCE IS PROXIMATE CAUSE OF INJURY: See *Northern etc. R. R. Co. v. State*, 96 Am. Dec. 545, and cases collected in note 553, 554; *Page v. Bucksport*, 18 Am. Rep. 239; *Metallic etc. Casting Co. v. Fitchburg R. R. Co.*,

12 Id. 689; *Pennsylvania R. R. Co. v. Kerr*, 1 Id. 431; *Pennsylvania R. R. Co. v. Hope*, 21 Id. 100; *Webb v. Rome etc. R. R. Co.*, 10 Id. 389; *Poeppers v. Missouri etc. R. R. Co.*, 29 Id. 518; *City of Atlanta v. Wilson*, 27 Id. 396; *Forney v. Goldmacher*, 42 Id. 388; *City of Galveston v. Peismansky*, 50 Id. 517; *Campbell v. City of Stillwater*, 50 Id. 567; *Railway Co. v. Staley*, 52 Id. 74; *Knappe v. Sioux City etc. Co.*, 54 Id. 1; *Flagg v. Hudson*, 56 Id. 674; *Seals v. Gulf etc. R. R. Co.*, 57 Id. 602; negligence not proximate cause of injury: See *Township of West Mahanoy v. Watson*, 56 Id. 336; *Lewis v. Flint etc. R. R. Co.*, 52 Id. 790. *

WHERE DOUBT ARISES AS TO WHETHER DAMAGES ARE PROXIMATE OR REMOTE, THESE SHOULD BE PRESENTED TO JURY by proper instructions: *Clemens v. Hannibal etc. R. R. Co.*, 14 Am. Rep. 460; *Toledo etc. R. R. Co. v. Pindar*, 5 Id. 57; *Lehigh Valley R. R. Co. v. McKeen*, 35 Id. 644; and see *Johnson v. Bruner*, 100 Am. Dec. 613, and note 618.

THE PRINCIPAL CASE IS CITED and approved to the second point stated in the syllabus, in *Passenger Ry Co. v. Frick*, 117 Pa. St. 489.

LANCASTER AVENUE IMPROVEMENT CO. v. RHOADS.

[116 PENNSYLVANIA STATE, 577.]

EMPLOYEE NOT NEGLIGENT IN HIS SELECTION is not liable to third persons for contractor's want of care in the performance of work of which he takes entire control, the employer having no right of supervision or of interference, and this rule is applicable alike to individuals and corporations.

INDIVIDUAL OR CORPORATION CANNOT EVADE LIABILITY by committing to another the performance of certain duties affecting the public health or the safety of public travel, and expressly assumed by such individual or corporation in consideration of certain powers and privileges conferred by the public for private emolument.

PRIVATE CORPORATION FOR PROFIT cannot avail itself of the rule that, in actions for negligence, a municipal corporation may, in certain cases, cast the responsibility upon an independent contractor whose negligence caused the injury.

IT IS DUTY OF INCORPORATED TURNPIKE COMPANY UNDERTAKING REPAIRS OF ITS ROAD, while in receipt of tolls, and the road is open for travel, to guard that part of the road retained for public use, and also to warn travelers of any danger threatened by reason of obstructions in the road, and by suitable devices to direct them in the proper route; and the company cannot divest itself of these duties by shifting the responsibility upon others, and the fact that the person injured by the neglect of the company had paid no toll is immaterial.

CASE for the recovery of damages for injuries sustained by the plaintiff through the alleged negligence of the defendant. The facts appear in the opinion.

Neville D. Tyson and John B. Thayer, for the plaintiff in error.

Henry Pleasants, Jr., Aaron S. Swartz, and Samuel H. Thomas,
for the defendant in error.

By Court, CLARK, J. The Lancaster Avenue Improvement Company is a private corporation, created in the year 1880, for the purpose of constructing and maintaining a turnpike road from Fifty-second Street, in the city of Philadelphia, through the counties of Montgomery, Chester, and Delaware, to a point one half mile west of the eighteenth mile-stone on the old Lancaster road, a distance of some fifteen miles. The turnpike was opened for travel some time in the fall of 1882, and the company was after that in the receipt of tolls under its charter.

About two weeks after the turnpike was completed, the company undertook to let down the grade of the road at Wayne for a distance of some five hundred feet. The cutting at the point of highest elevation was about six feet deep, and ran out to grading points about 250 feet distant, east and west. Mr. Henry W. Dunne, the superintendent, under authority from Mr. Cassatt, the president of the company, made a contract with B. M. Shandley for the performance of the work, Shandley to receive twenty-five cents per cubic yard for the grading, and ninety cents per square yard for the stone-work. The contractor was to furnish all the labor, take charge of the work, and perform his contract in a good and workmanlike manner; he agreed also to provide a safe passage-way for the public, and to indemnify the company against loss arising from the negligent performance of his contract; he gave no bond, nor was the contract reduced to writing.

The center line of the road having been ascertained by the superintendent, and the extent and depth of the excavation indicated on the ground by stakes set by an engineer, the contractor proceeded with the work. In order that the public travel on the turnpike might not be impeded or rendered unsafe, a passage-way was left on the north side of the road until the excavation should be made, and the stone put in place on the south side, when it was proposed to divert the travel into the cut on the south side, until the whole work was completed.

It was at this stage of the work when the travel had just been turned into the cut on the 12th of December, 1882, that the plaintiff's injury was received. He was hauling hay from his home to Philadelphia. Starting about three o'clock in the

morning, he entered the turnpike at the Eagle; when he came to this excavation, he found no barriers erected, no light burning, to direct his course or to warn him of danger. The night was sufficiently dark to render objects on the road indistinct, and his horses took a route so close to the bank on the north side of the excavation that his wagon, loaded with hay, was upset, and he was thrown off into the road, and thus received the injuries complained of. The bank which caused the injury was near the center of the turnpike, and it is alleged, and the jury has found, that there was nothing whatever to warn him of the existence of the obstruction.

In the absence of all precautions against danger, the plaintiff, in the night-time, might well assume that the center of the road was the usually traveled route, that it was in proper condition of repair, and that he could pass safely upon it. It is clear, under the verdict, that it was owing to somebody's negligence that the injury occurred.

The defendant's contention, however, is, that it was the negligence of Shandley which caused the injury; that Shandley had contracted to perform the work, and had entire control of it; that he was at the time exercising an independent employment, and was alone responsible for the negligence complained of. The general principle is undoubted, that when a contractor takes entire control of a work, the employer having no right of supervision or of interference, the employer, if he is not negligent in his selection, is not liable to third parties for the contractor's want of care in the performance of it. This rule is applicable not only to individuals: *Allen v. Willard*, 57 Pa. St. 374; but to private corporations: *Ardesco Oil Co. v. Gilson*, 63 Id. 146; *Edmunson v. Pittsburgh etc. R. R. Co.*, 111 Id. 316; and also in Pennsylvania, to municipal corporations: *Painter v. Mayor etc. of Pittsburgh*, 46 Id. 213; *Borough Susquehanna Depot v. Simmons*, 112 Id. 384; 56 Am. Rep. 317. But when certain powers and privileges have been specially conferred by the public upon an individual or corporation for private emolument, in consideration of which certain duties affecting the public health or the safety of public travel have been expressly assumed, the individual in receipt of the emoluments cannot be relieved of liability by committing the performance of these duties to another. In such cases, liability cannot be evaded, by showing that the injury resulted from the fault or neglect of a third person employed to per-

form these public duties: Wood on Master and Servant, 621, 624.

In Pennsylvania, municipal corporations, although invested with public privileges, and charged incidentally with correspondent public duties and obligations, may in certain cases cast the responsibility upon an independent contractor, whose negligence caused the injury: *Painter v. Mayor etc. of Pittsburgh*, 46 Pa. St. 213; *Reed v. Allegheny City*, 79 Id. 300; *City of Erie v. Caulkins*, 85 Id. 247; 27 Am. Rep. 642; but this is because they are municipal and public corporations.

The rule has never been extended, here or elsewhere, to private corporations of the class we have referred to. The maintenance and repair of roads and streets is merely a burden imposed upon a municipality, whilst a corporation created for the purpose is compensated by tolls. "There is certainly a very important distinction," says Redfield, C. J., in *Davis v. Lamoille County Plank Road Co.*, 27 Vt. 602, "between the liability of towns for damages accruing to travelers by reason of defects in the highways within their limits, and that of turnpike and other corporations, who derive a revenue from the use of their roads by travelers. In the former case, the support of the road is a mere burden upon the towns, without any corresponding equivalent. The traveler pays no consideration for the use of the road. It is no advantage to the towns to have the roads used by travelers, so that in this case there is, properly speaking, no privity, by way of a *quasi* contract, between the traveler and the town. . . . But in the case of corporations created for the purpose of maintaining a road for their own advantage, to be compensated by means of tolls, collectible of all who use the road, the case is very different. In such cases, the liability to pay tolls is a consideration for the undertaking on the part of the corporation to furnish a safe road for the use of the traveler as an equivalent. It is the same in principle as any other case where service is performed for pay. There is an implied undertaking, resulting from the general rules of law applicable to similar subjects, that the person undertaking such service, whether it be a natural or artificial person, shall perform it faithfully, and in case of failure, shall respond to the party thus paying his money, by way of damages, as an equivalent. Indeed, the liability of such corporations as the defendants is more analogous to that of a railroad which undertakes to carry for fare, which is but another name for toll, than to the liability of

towns. And it was never doubted that railroads are liable for all damages accruing to travelers by reason of defects in their road or in its management."

A rule less stringent applies to public than to private corporations: *School District of Erie v. Fuess*, 98 Pa. St. 606; 42 Am. Rep. 627. No case in Pennsylvania has been cited which covers the precise point in question, nor has any case been brought to our notice which is in conflict with the rule as we have stated it. In *Pennsylvania etc. Canal Co. v. Graham*, 63 Pa. St. 290, 3 Am. Rep. 549, the nature and extent of the company's liability was expressly defined by the statute, and hence the case is not applicable here to the full extent of what was there ruled; but it recognizes the general principle that where special privileges have been granted by the legislature, the duties imposed as the price of those privileges are imperative, and must be performed. Mr. Justice Sharswood, delivering the opinion of the court, says: "The principle of *Painter v. Mayor of Pittsburgh*, 46 Pa. St. 213, has no application. That was an action for an injury sustained by the plaintiff from the negligence of the contractors of the defendants while engaged in the actual construction of a sewer. Had the plaintiff in this case fallen into the canal in consequence of the negligence of the contractors employed by the defendants while actually employed either in the construction or repair of this bridge, the case presented would have been entirely different." From this *dictum* an inference is sought to be drawn that in the "repair" of the bridge, the company would have been relieved of responsibility for the negligence of a contractor; but as the words "construction or repair" are used together, it is more reasonable to suppose that the learned justice intended such repairs as were made when the bridge was closed for the purpose from the public travel.

The defendant company, by the terms of its charter, was invested with special public privileges, that of "constructing and maintaining a turnpike road" for the private gain of the company; the road had been completed, and was open to public travel, and the company had for several weeks been in the regular receipt of tolls. In consideration of the right to collect such tolls, the proprietors of the road undertook to exercise due care and diligence in keeping the road in such repair that it might be traveled with safety to life and property.

Having undertaken to lower the grade whilst the road was

open to travelers, it was the plain duty of the defendants to guard that part which they retained for public use; it was their duty to warn travelers of any danger that threatened by reason of obstructions in the road, and by suitable devices to direct them in the proper route; and of these duties, attaching to them as trustees for the public, they could not divest themselves by shifting the responsibility upon others. If the road had been in process of construction, or had been closed for repairs, a different case would, of course, be presented.

The plaintiff, it is true, is not shown to have paid any toll, but he was liable to the regulations and requirements of the company; he was not obliged to pay until he reached a point on the road where the tolls were demandable. He was not a trespasser; he was traveling the turnpike under the general invitation extended to the public, and was entitled to the protection which the law secured to the public; he was not required to pay in advance; he complied with the rules of the company by paying when and as the company required; the toll was demandable, and that was sufficient.

In this view of the case, it is wholly unnecessary for us to consider the evidence as to the relation subsisting between the company and Shandley in the performance of this work. As to the traveling public, Shandley must be regarded as the agent or servant of the company only, and not as a contractor engaged in an independent employment. Upon a careful examination of the whole case, the judgment is affirmed.

MASTER CANNOT EVADE DUTY TO HIS SERVANT BY DELEGATING ITS PERFORMANCE TO ANOTHER: *Bushby v. New York etc. R. R. Co.*, 1 Am. St. Rep. 843; *Flike v. Boston etc. R. R. Co.*, 13 Am. Rep. 545; *Corcoran v. Holbrook*, 17 Id. 369.

CONTRACTOR, LIABILITY OF EMPLOYER FOR ACTS OF: See *Detroit v. Corey*, 80 Am. Dec. 78, and cases collected in note 82, 83; *Linnahan v. Rollins*, 50 Am. Rep. 287; *Wilson v. White*, 51 Id. 269; *Hexamer v. Webb*, 54 Id. 703; *Bennett v. Truebody*, 56 Id. 117.

WHEN MUNICIPAL CORPORATION IS NOT LIABLE FOR ACTS OF APPOINTEES: *Mazmilian v. Mayor etc.*, 20 Am. Rep. 468, and note 474; and see *Borough of Susquehanna Depot v. Simmons*, 56 Id. 317.

LIABILITY OF MUNICIPAL CORPORATION FOR ACTS OF CONTRACTOR employed by it: *Joliet v. Harwood*, 29 Am. Rep. 17; *Logansport v. Dick*, 36 Id. 166; *Jacksonville v. Drew*, 45 Id. 5; compare *Blumb v. City of Kansas*, 54 Id. 87, and note 90.

POTTSVILLE IRON AND STEEL COMPANY v. GOOD.

[116 PENNSYLVANIA STATE, 335.]

MASTER AND SERVANT—NOTICE TO QUIT SERVICE.—The plaintiff was employed to work for the defendant by the week, at a fixed rate, but no definite time of employment was fixed. When the first payment was made, the plaintiff signed a receipt providing as follows: "Employees must give fourteen days' notice when they wish to leave our employ. If they do not give the notice required, it is agreed and understood that they forfeit all that is due them at the time they so quit work without the required fourteen days' notice." The plaintiff quit work upon a notice of a day and a half. *Held*, that the terms of the first engagement did not necessarily extend beyond the time of the first payment, and that the plaintiff was bound by the rule embodied in the receipt signed by him.

ACTION before a justice of the peace to recover wages alleged to be due the plaintiff from the defendant. The judgment was for the plaintiff, and the defendant appealed. The material facts appear in the head-note and opinion.

D. C. Henning, for the plaintiff in error.

William Wilhelm, for the defendant in error.

By Court, GREEN, J. While it is true that when the plaintiff was employed to work for the defendant nothing was said as to the fourteen days' notice of an intention to quit, it is also true that no definite time of employment was fixed, and the terms of the first engagement would not necessarily extend beyond the time of the first payment. When the first payment was made, the plaintiff signed a receipt which contained the following provision: "Employees must give fourteen days' notice when they wish to leave our employ. If they do not give the notice required, it is agreed and understood that they forfeit all that is due them at the time they so quit work without the required fourteen days' notice." The plaintiff was under no obligation to sign any receipt containing such a provision. If the company had refused his pay because of his declining to sign the receipt, he could have compelled them to pay by means of an action. But he signed it without objection, and he testifies that at that time he knew of the rule embodied in the receipt, and continued to work for the company with that knowledge. This was in February, 1886, and the wages paid were due for the month of January. In March he signed a similar receipt for the February pay, and quit working for the company on March 31st, upon a notice of a

day and a half. The present action is brought to recover the wages earned in March, which the defendant refused to pay because the fourteen days' notice had not been given.

This defense seems to be an ungracious one, in view of the fact that the defendant had received the benefit of the plaintiff's work for the whole month, and because he was compelled to choose between the loss of a much better job on the one hand or the forfeiture of a month's pay on the other, and therefore cannot be said to have left his employment arbitrarily and without reason. It is possible that some employers might in such circumstances have been willing to waive the defense founded upon the strict terms of the contract, but this defendant insists upon its rights, and we have no discretion to refuse them.

The regulation requiring the fourteen days' notice of an intention to quit work is not an unreasonable one. Indeed, in large establishments like this, where very great loss may be inflicted by a sudden and extensive strike of the men, such a rule seems to be an entirely proper and reasonable means of protection against wanton and ruthless injury in this manner. We said this in the case of *Wright v. Trainer*, 32 Leg. Int. 62, holding the party bound by mere knowledge of such a rule posted up in the factory. We decided that mere knowledge of the rule made it part of the contract, saying: "If the third rule was known by the plaintiff when he hired his minor children to the defendant, it forms a part of his contract. It became an agreement that if the children left without notice, he should not be entitled to receive their wages for the last two weeks." The present case is far stronger in its facts. Here the stipulation is inserted in the receipt for the wages paid, and is a part of the express contract of the parties under which the future employment continues. The past wages are no part of the consideration for the future engagement. The paper is to be treated as the evidence of a new contract for the future, made with a full knowledge of its exact meaning on the part of the plaintiff. There is no escape from this conclusion. There is nothing in the case but the construction of a written agreement.

Judgment reversed.

SPECIAL CONTRACT FIXING TERMS AND CONDITIONS ON WHICH ONE PARTY SHALL SERVE ANOTHER IS, IN ABSENCE OF PROOF ALTERING OR RESCINDING IT, CONCLUSIVE: *Wallace v. Floyd*, 72 Am. Dec. 620; and see *Diefenback v. Stark*, 43 Am. Rep. 719; *Steeple v. Newton*, 33 Id. 705.

WHEN MASTER WAIVES FORFEITURE OF WAGES FOR SERVICES PERFORMED BY SERVANT WHO VOLUNTARILY LEAVES BEFORE HIS TERM OF SERVICE HAS EXPIRED: *Pataote v. Sanders*, 98 Am. Dec. 564, and see cases collected in note 867.

WHERE SERVANT IS WRONGFULLY DISCHARGED, BUT HIS WAGES ARE PAID UP TO THAT TIME, HE CANNOT RECOVER FOR FUTURE INSTALLMENTS, but only for breach of contract: *James v. Allen County*, 98 Am. Rep. 821, and see cases collected in note 828.

MORROW'S APPEAL.

[116 PENNSYLVANIA STATE, 440.]

TESTAMENTARY PAPER, BY ITS TERMS TO TAKE EFFECT ONLY ON HAPPENING OF CERTAIN CONTINGENCY, CANNOT BE ADMITTED TO PROBATE as a will if the contingency does not happen.

TESTAMENTARY PAPER, WHEN INEFFECTUAL AS WILL. — One who was about to leave home for a neighboring town wrote and signed a paper, commencing: "I am going to town with my drill and i aint feeling good and in case if i shouldend get back do as i say on this paper," etc. He went to town, where he became ill, but was taken home, and died soon afterwards. *Held*, that said paper could not be admitted to probate as the will of the decedent.

APPEAL from the orphans' court of Perry County. Letters of administration upon the estate of Thomas W. Morrow, deceased, were granted to two of his sons. Soon afterwards, Joseph M. Morrow, another son, petitioned the register of wills, setting forth that he had, since administration granted, come into possession of a testamentary writing (the material part of which appears in the head-note and opinion), which he believed to be the last will and testament of said Thomas W. Morrow, and praying that the same might be admitted to probate. A day was appointed, and the testimony of witnesses taken to show the due execution of the instrument offered for probate, but the register refused the offer, on the grounds that it was a conditional or contingent will; and the contingency not having happened, the instrument became void as a will. From this decision of the register the said Joseph M. Morrow appealed to the orphans' court, which affirmed the decision of the register; whereupon the proponent took the present appeal. Other facts appear in the head-note and opinion.

Sponsler and Martel, for the appellant.

W. A. Sponeler, for the appellees.

By Court, GREEN, J. It is scarcely possible to add anything to the very lucid and exhaustive opinion of the learned court

below in this case. We agree entirely with the conclusion arrived at, and the reasoning in support of it. The authorities cited are numerous, and altogether convincing in their character. Our own case of *Todd's Will*, 2 Watts & S. 145, is exactly in point, and controls the present contention. The essential words there were: "If I should not return . . . what I own shall be divided as follows." The words here are: "In case if i shouldend get back, do as i say on this paper." The meaning in both these cases is the same. A testament is to take place if there is no return. But there was a return in both instances, and the testament does not transpire. There is no will because the condition on which it was to come into existence has not occurred. In both cases the deceased did return.

It is useless to speculate as to what the deceased would have done had he foreseen the precise facts which were to happen. He has made no provision for them. The condition which he has expressed is one which attaches to the operation of the instrument, and the effect of this is strongly expressed by Gibson, C. J., in *Todd's Will* case, thus: "No text-writer seems to have distinguished between a condition attached to a particular testamentary disposition, and a condition attached to the operation of the instrument." But in *Parsons v. Lanoe*, 1 Ves. Sr. 191, Lord Hardwicke said without hesitation that he would not require an authority for such a distinction, and that a paper subject to a condition ought not to be admitted to probate after failure of the contingency on the happening of which it was to have taken effect. "Why should it be proved as a will when it could not have the effect of one?" And so here. The decedent did return from the journey he was about to take, and the contingency upon which the paper was to take effect as a testament did not happen. Whether the journey was long or short is not material; it is the fact of the return which defeats the contingency. It is true he was sick at his return, but as he lived several days after, this fact also is immaterial. Further discussion seems unnecessary.

Decree affirmed.

WHETHER OR NOT WRITING IS WILL: See *Sims v. Sims*, 99 Am. Dec. 450, and cases in note 453; *Brewer v. Baxter*, 5 Am. Rep. 530.

CONDITION IN WILL, WORDS CREATING: *Robert's Appeal*, 98 Am. Dec. 312, and note 315; *Bradford v. Bradford*, 2 Am. Rep. 419; *Thomas v. Kelly*, 15 Id. 716; *Webster v. Morris*, 57 Id. 278; condition held valid: *Holt v. Holt*, 59 Id. 43.

JOINT WILL, CONDITIONED TO TAKE EFFECT ON DEATH OF BOTH, IS INVALID: *Hershey v. Clark*, 37 Am. Rep. 1.

TESTAMENTARY PAPER WRITTEN BY TESTATOR WAS WORDED AS FOLLOWS: "If any accident should happen to me that I die from home, my wife, J. A. L., shall have everything I possess," etc. He died at home, and it was held that his wife was entitled to take under it: *Likfield v. Likfield*, 56 Am. Rep. 908.

PENNSYLVANIA RAILROAD COMPANY v. LIPPINCOTT.

[116 PENNSYLVANIA STATE, 472.]

WHERE RAILROAD COMPANY TAKES, BY RIGHT OF EMINENT DOMAIN, part of tract of land, and damage to balance is to be measured by the advantage over the disadvantage resulting from the company's works, contingent and even imaginary damages may be considered by way of offset to the alleged advantages; but such damages cannot be taken into account as a substantive claim for damage.

LAWFUL USE BY RAILROAD COMPANY OF LAWFUL ERECTION, on its own ground, cannot be subject of damage except on proof of negligence, even under the constitutional provision (Penn. Const., art. 16, sec. 8) that corporations "invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed in the construction or enlargement of their works," etc.

RAILROAD COMPANY—LIABILITY FOR CONSEQUENTIAL DAMAGES ARISING FROM OPERATION OF ITS ROAD.—A railroad company erected upon property owned by it in fee, and fronting on one side of a street, a viaduct, or elevated roadway, and railroad thereon, and operated it for the transportation of passengers and freight by steam. In consequence of the noise, smoke, and dust arising from the use of the engines and cars, and necessarily incident to the use of the property as a steam railway, injury was done to the plaintiff's property on the opposite side of the street, no part of which property, or any right of way, or other appurtenance thereunto belonging, had been taken or used in the erection or construction of the road. In an action on the case to recover damages for such injuries, *held*, that the court's instruction to the jury, that the plaintiff was entitled to recover, and that the legal measure of damages was the difference between the market value of the property before the railroad was built and its market value after the completion of the structure, was erroneous.

CASE for the recovery of damages for injuries to real estate. The material facts are stated in the opinion. Verdicts were rendered in favor of the plaintiffs; and judgments being entered thereon, the defendant took these writs.

Wayne MacVeagh, James A. Logan, and A. H. Wintersteen, for the plaintiff in error.

E. G. Platt, G. Heide Norris, and M. Hampton Todd, for the defendants in error.

By Court, GORDON, J. The above-named three several cases, involving, as they do, similar facts and principles of law, and having been argued together, we dispose of in one opinion. The actions are case, and the plaintiffs, who own property on the north side of Filbert Street, in the city of Philadelphia, severally complain that the Pennsylvania Railroad Company, being a corporation duly chartered under the laws of this state, and invested with the privilege of taking private property for its corporate use, did, on the first day of May, 1881, construct, as an extension of its system of tracks and road-bed, a viaduct, or elevated roadway, and railroad thereon, along the south side of Filbert Street, opposite to their several lots of ground; that since December 1, 1881, the said company defendant has used and operated the said viaduct, in connection with its other tracks, as a continuous line of railroad for the transportation of passengers and freight to and from its terminal passenger and freight station, and as a yard for shifting and making up trains; that in consequence of the noise, disturbance, smoke, sparks, and noisome and unhealthy vapors occasioned and emitted by the defendant's cars and locomotives, great injury has been done to the plaintiff's property. It is not alleged that any injury has resulted from the erection of this elevated roadway, nor indeed could it truthfully be so alleged; for the erection is on the defendant's own ground, on the south side of the said street, which street is some fifty-one feet wide, so that no part of the plaintiff's property, or any right of way, or other appurtenance thereunto belonging, has been taken or used in the erection or construction of said viaduct. The damage complained of results wholly from the manner in which the roadway is used; results from the noise, smoke, and dust arising from the use of the engines and cars,—the necessary consequence of the use of the property as a steam railway. As the allegations thus made were in whole or in part supported by evidence, the learned judge instructed the jury that the measure of damage would be the difference between the market value of the several properties before the building of the viaduct, and the same value after the structure was completed. In other words, the same rule was applied to the cases in hand as that which applies in the case of an appropriation or taking under the right of eminent domain, excepting, of course, that as no property of any kind was taken, that element of damage was not considered. This instruction, together with the negative

answer of the court to the defendant's first point, raises all the questions that require consideration in this case.

That there was error in the instruction above stated, is to us very clear. This structure having been erected on the defendant's own land, and no property or right of the plaintiffs having been seized, appropriated, or interfered with, we cannot understand how a rule which applies only to a taking, and never did apply to anything else, can be adapted to a case where there has been no such taking. It is not pretended that the erection itself did the plaintiffs any harm, but its use only; that is, the running of locomotives on it. We agree, indeed, that if the ordinary and proper use of the railway is to be regarded as an element of damage, as to a certain extent it is in the case of a condemnation, the rule stated is the correct one; but as this rule is not one of common law, but of statute, it cannot apply to the case now being considered: *Railroad Co. v. Yeiser*, 8 Pa. St. 366. Unless, therefore, the case can be brought within some statute, the rule by which damages are measured by advantages and disadvantages ought not to have been adopted; for, as was said in the case cited, per Mr. Justice Rogers, "it is a principle well settled by many adjudicated cases, that an action does not lie for a reasonable use of one's right though it be to the injury of another. For the lawful use of his own property, a party is not answerable in damages, unless on proof of negligence." How, then, we ask, can a lawful erection by the Pennsylvania Railroad Company, on its own ground, be the subject of damage to the adjoining land-owners? And why may it not, as put by the defendant's first point, operate and use in a lawful manner its Filbert Street branch without subjecting itself to an action for damage? It seems to be very clear that a private person could do with impunity on his own property just what the railroad company has done. He might build a house, and thus shut out his neighbor's view, light, and air; he might build an embankment, or run a road on or along his own line, and be liable for nothing as long as he used his house, embankment, or road in a lawful manner, although in either case an injury may have been done to the adjacent property.

Who does not know that even in the country no householder escapes injury and annoyance from clouds of dust raised in dry weather by the passage of teams over the common roads? And in the cities this grievance is further aggravated by the intolerable noise occasioned by the use of stone pavements.

Nevertheless, we have yet to hear of a case where one lawfully using such road or street was held liable for the injury thus occasioned.

When a company takes by its right of eminent domain part of a tract of land, and the damage to the balance is to be measured by the advantage over the disadvantage resulting from the company's works, in such case, as we held, in *Searle v. Railroad Co.*, 38 Pa. St. 57, contingent and even imaginary damages may be considered by way of offset to the alleged advantages. But whilst this is so, such damages cannot be regarded as a substantive claim. And we have a reiteration of the same doctrine in the case of *New Castle and Franklin R. R. Co. v. McChesney*, 85 Id. 522, wherein Mr. Justice Woodward remarks, citing the case above named: "It is well settled, even under more comprehensive legislation than this, that contingent damages cannot be taken into account as a substantive claim for damage." How, then, can we apply to the case in hand a rule of damages that never was applicable except under special circumstances which do not here exist?

It is contended, however, that this case is governed by the constitution of 1874, which provides (art. 16, sec. 8): "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed in the construction or enlargement of their works, highways, or improvements"; and the cases of *Pusey v. City of Allegheny*, 98 Pa. St. 522, *Pittsburgh Junction R. R. Co. v. McCutcheon*, 18 Week. Not. Cas. 527, *Pennsylvania R. R. Co.'s Appeal*, 18 Id. 418, and *Pennsylvania R. R. v. Duncan*, 111 Pa. St. 352, are cited in support of the rule contended for by the plaintiffs. But it is a mistake to suppose that these cases are in point. In the first, there was not only the construction of a road, but an actual taking; in the Junction Railroad and Duncan cases, the injury arose directly from the construction of the works, and the taking and obstruction of the plaintiffs' rights of way; whilst the *Pennsylvania R. R. Co.'s Appeal*, *supra*, covers a case where, without warrant of law, the company laid its tracks on a public street of the borough of Middletown. In the case in hand, the plaintiffs sustained no injury from the construction of the viaduct; none of their property was taken, neither was any of their rights infringed; so that neither by the constitution nor by the cases quoted is there a warrant for

the plaintiffs' contention. We agree that over and beyond the damages which arise from a taking of property, whether in the shape of land or a right, the constitution does impose on corporations a direct responsibility for every injury for which a natural person would be liable at common law; so we have held in the case of *Edmundson v. Pittsburgh etc. R. R. Co.*, 111 Pa. St. 316, and to this doctrine we adhere, for such, we think, is the spirit of that instrument; but beyond this we cannot go. Nor is there any reason why we should depart from a rule so reasonable, and subject artificial persons to a burden which cannot be imposed upon natural persons.

As was said by Mr. Chief Justice Tilghman, in the case of *Shrunk v. President etc. Schuylkill Navigation Co.*, 14 Serg. & R. 71, in his comments on the company's charter, which provided that compensation should be made "if any person or persons shall be injured by means of any dam or dams being erected as hereinafter mentioned"; "compensation shall be made," says the learned chief justice, "for all damages arising from immediate injury to property, but not for any damages where there is no legal injury, which is called *damnum absque injuria*. And upon reflection, we will find that this was a wise restriction. There would be no end to damages for injuries, considered in the most extensive sense of the word. For not only may owners of land contiguous to the river complain of injury by obstruction of the ascent of the fish, but all other persons living in towns or on lands near the river. There are other kinds of injury, too, sustained, particularly by owners of lands on the river, between Fairmount Dam and the Lower Falls; all these persons have lost the benefit of navigation free from toll, in batteaus, flats, etc., which were very useful, as it served for carrying produce to market, and bringing up manure for their lands; yet it has not been contended that for such injuries compensation is to be made. Suppose the health of the country to be injured by the evaporation from the dam; is compensation to be made for this, the greatest of all injuries? I presume not. Where, then, are we to stop, or what is to be the boundary, if we go beyond the line which I have mentioned?"

This is the language of a very learned jurist, and the case is all the more in point in that the wording of the charter of the navigation company and that of the present constitution are very much alike. Nor would the onerous and ruinous consequences be less to the defendant than those which the

learned chief justice shows might befall the canal company were the doctrine contended for adopted. Every person who has property in city or country within hearing of the noise or in reach of the dust of a railroad—or for that matter, of a common road—might, in the case supposed, have damages, to be estimated as in the taking of land, or as from a permanent injury arising from the construction of the railroad.

If this Pennsylvania company has been guilty of a nuisance; if in the use of its road it makes more smoke or dust than is lawfully allowable in the working of its machinery, and the plaintiffs are thereby injured,—they have their remedy, but not for anything short of this. Any other rule would lead to this remarkable result: that the plaintiffs would be entitled to damages without having suffered any injury; that is, for anticipated damages, and for which a natural person could not be held liable. Moreover, the corporation would thus be made responsible for the manner in which it proposed to exercise its right, though such manner might not only be lawful, but the best possible and the least injurious to the property of others. That the defendant might have hauled its freight and passengers by ordinary carriages drawn by horses from its West Philadelphia depot, through Filbert Street to its station at Broad and Market, without the risk of actionable damage, will, I suppose, not be doubted; yet certainly, the resulting noise, dust, and annoyance to the adjacent property holders would in such case be greater than under the present arrangement. Why, then, for a better method of transportation shall it be held liable? To this question no answer has been given but the dogmatic one already alluded to, “The constitution so provides.” But as the constitution does not so provide, and as the plaintiffs’ contention has no support either in statute or common law, we must refuse to entertain it.

The judgments are reversed, and a *venire facias de novo* in each case is awarded.

TRUNKY and STERRETT, JJ., dissented.

RULE FOR ESTIMATING DAMAGES ARISING FROM CONSTRUCTION OF RAILROAD ACROSS PRIVATE PROPERTY: *Wilmington etc. R. R. Co. v. Stauffer*, 100 Am. Dec. 574, and note 577; *Walker v. Old Colony etc. R. R. Co.*, 4 Am. Rep. 509; *Adden v. White Mountains R. R. Co.*, 20 Id. 220.

RAILROAD COMPANY IN LAWFUL PURSUIT OF ITS BUSINESS IS REQUIRED TO BE VIGILANT in making use of every reasonable safeguard, to avoid unjust interference with others, which the nature of its business will admit: *Baltimore etc. R. R. Co. v. State*, 96 Am. Dec. 523, and note 532; *Stone v. Fairbury*

etc. R. R. Co., 18 Am. Rep. 556; railroad company using a public street for a terminal yard, without having made compensation to the adjoining land-owners, and thereby causing a nuisance to neighboring dwellings, may be restrained by injunction, although such use is authorized by the legislature and is necessary to the business: *Pennsylvania R. R. Co. v. Angel*, 56 Id. 1, and see extended note on subject 6-16.

JEANES'S APPEAL.

[118 PENNSYLVANIA STATE, 573.]

IN CASES OF IMPORTANCE, INVOLVING LARGE INTERESTS, ORDERLY COURSE OF PROCEDURE REQUIRES that an opinion of the court be filed explaining the reasoning and principles upon which its conclusions were founded, especially where there are conflicting decrees made by the same court upon the same question.

IN ORDINARY CASE OF PLEDGE, PLEDGEE HAS NO RIGHT TO SELL THING PLEDGED AT PRIVATE SALE, and without notice to the pledgor. He must first give notice to redeem, and if the pledge is not redeemed, and he proposes to sell it, he must sell at public sale, after notice to the pledgor. If this be not done, the pledgor's rights are unaffected by the sale.

PLEDGER OF STOCK HAS LAWFUL RIGHT TO SELL IT, WITHOUT NOTICE TO REDEEM AND WITHOUT NOTICE OF SALE, the stock having been pledged to secure the payment of loans on notes authorizing the holder, upon non-payment, to so sell the stock at private or public sale, immediately upon the dishonor of the notes, and the notes having been dishonored. Nor is the right to so sell, under such power of sale, affected by the fact that the company substituted genuine shares of stock for fraudulent ones, constituting a part of the stock originally pledged, and a sale divests the interest of the pledgor therein.

BILL in equity, filed in the court below by William T. Elbert against Isaac Jeanes, surviving William J. Morris, trading as Isaac Jeanes & Co., and the West Philadelphia Passenger Railway Company. The plaintiff averred, in substance, that he had procured discounts of his notes from the said firm of Isaac Jeanes & Co., for which he pledged as collateral security certain shares of stock of the West Philadelphia Passenger Railway Company; that since said shares had been pledged by him, they were sold at a great advance, and that crediting the said firm with the amount of the notes and interest, and charging the value of the stock as sold and the dividends received, there would be a large balance due the plaintiff, which the said firm refused either to pay or to account for; and the bill prayed for an account and payment of the balance found to be due, a surrender of the plaintiff's notes, and an injunction against the transfer of the stock. To this bill the said

Jeanes answered, and the railway company, after answering, filed a certain cross-bill, to which Elbert answered. The cause was referred to a master, before whom certain facts were established, the substance of which, and all that is necessary to a proper understanding of the case, appears in the opinion. The master recommended that the plaintiff's bill, as well as the cross-bill by the railway company, be dismissed; but the cause coming on to be heard, the court ordered a decree in favor of the plaintiff, and against the defendant Jeanes, whereupon this appeal was taken by Jeanes.

John G. Johasen, for the appellant.

F. Carroll Brewster, Henry S. Cattell, F. H. Cheyney, and J. Cooke Longstreth, for the appellee.

By Court, GREEN, J. It is much to be regretted that no opinion was filed by the learned court below, with a statement of their reasons for reversing the report of the master, upon the vital, fundamental question in this case. A decree for almost a hundred thousand dollars has been entered against a citizen, without a solitary reason for the rendition of such a decree appearing on the record, while very substantial reasons appear there, in the master's report, showing why no decree should be made against him for any amount. The magnitude of the judgment alone was sufficient to impel any court to justify its action by a most careful and well-considered opinion. In addition to that, the orderly course of procedure in this class of cases, especially where a master's report is reversed, requires that an opinion of the court be filed explaining the reasoning and principles upon which its conclusions were founded, so that we might be fully informed upon that subject. We have several times called attention to this matter, and in a few instances have refused to hear causes brought up on appeals from *pro forma* decrees without opinions, although they were confirmations of the master's reports. In this particular case the situation is especially anomalous, because there are five other appeals from the same court, from decrees made upon the reports of the same master, upon substantially the same facts, and in all of them the final and controlling question being the very same as in this; and yet, while the master's report dismissed the plaintiff's bill in all six of the cases, the court's decree sustains the report in five of the cases, and reverses it in one. In the five cases, as in this, there is

no opinion of the court, and we thus have the unpleasant spectacle of conflicting decrees made by the same court upon the same question, and without any reason assigned for any of them. If we were in doubt about the determination of these causes, we would refer them back in order that opinions might be filed giving us some information as to the occasion of the seeming conflict of decision which we have indicated. But we have no doubt as to how they ought to be decided, and will therefore dispose of them finally.

In the view that we take of the present case there is but one question which requires consideration, and that is, whether the pledgees of the stock had the lawful right to sell it at private sale and without notice to the pledgor. In an ordinary case of pledge of course there is no such right. The pledgee must first give notice to redeem, and if the pledge is not redeemed and he proposes to sell it, he must sell it at public sale, and after notice to the pledgor. If this be not done, the pledgor's rights are unaffected by the sale. But this is not an ordinary case of pledge. It is affected by a special contract. The pledgees made loans of money to the pledgor upon pledges of certain passenger railroad stock, and the notes given by the pledgor for the loans expressed the terms of the contract of pledge as well as of the loan. They were all alike, and in the following words:—

PHILADELPHIA, 1887.

Two months after date I promise to pay to the order of myself \$ without defalcation, for value received, having deposited herewith shares of West Philadelphia Passenger Railway Company stock, which I authorize the holder of this note, upon the non-performance of this promise at maturity, to sell, either at the broker's board, or at public or private sale, without demanding payment of this note, or the debt due thereon, and without further notice, and apply the proceeds, or as much thereof as may be necessary, to the payment of this note, and all necessary expenses and charges, holding me responsible for any deficiency.

WILLIAM T. ELBERT.

It is not for one moment pretended that there is anything illegal about this contract, and therefore it needs no discussion except an exposition of its terms, an application of them to the subsequent facts, which are quite undisputed so far as they are material, and a brief consideration of the rights and duties of the parties respectively. The extreme plainness and

simplicity of the language of the instrument make it manifest at once that the pledgee of the stock delivered with the note had the undoubted right, immediately upon the dishonor of the note, to sell it, at either public or private sale, without notice to redeem, and without notice of the sale. The subsequent facts were, that all the notes were dishonored, amounting to over a hundred thousand dollars, for which 1,160 shares of stock had been pledged. This occurred in August and September, 1877.

The plaintiff Elbert, who was the pledgor, failed to pay a single dollar of his indebtedness to the defendants, who were the pledgees, and who, with a good faith which has not been questioned for an instant, advanced the whole of this very large sum of money upon the credit of the collaterals. Shortly after the last loan was made, it was discovered, and the fact became public, that some of the officers of the company, whose stock had been pledged, had made large over-issues of stock fraudulently, and without right; and it was developed, on the hearing of this case, that five hundred of these pledged shares were of this spurious and illegal issue. The market price of the stock at once depreciated very greatly, so that the aggregate of the stock pledged was entirely insufficient to repay the pledgees for the amount of their loans; and as Elbert was a hopeless insolvent, from whom not a dollar could be or ever was collected, the defendants were left with a large quantity of comparatively worthless collateral on their hands, and were obliged to confront, as they did, an enormous loss upon their transactions with the plaintiff. They did not, however, exercise their right to sell the collateral, but held it for several years. In the mean time, upon proper proceedings against the corporation whose stock had been fraudulently issued, it was held to be responsible for the acts of its officers, and as a consequence, five hundred new and legitimate shares were issued to the defendants in place of the same number of spurious shares which the plaintiff had pledged to them. The defendants surrendered the spurious shares which they had received from the plaintiff, and accepted in their place the same number of genuine shares from the company. They thus held 1,160 genuine shares, instead of 660 genuine and 500 false, which they had received from the plaintiff. In adopting this course, they very greatly benefited the condition of the plaintiff, as events later on fully proved. In 1880, the stock of the railway company rose in

value after a long period of depression. The defendant's firm had become dissolved in October, 1877, by the death of William J. Morris, one of its members, and the immense debt due them by Elbert was carried by the liquidating partners, who also carried the collateral until the closing up of the business of the firm in 1880. When this was done, the stock was allotted among the different partners in proportion to their interests in the firm. Subsequently, from August, 1880, to May, 1881, the various members of the firm sold, at private sale, their several allotments of the stock; and while they realized the full market price of the stock at the time of sale, it was altogether insufficient to pay off the debt due them, and a very heavy loss resulted to them upon closing out the transaction. These sales were made without notice to Elbert, and without any special notice to redeem. They were known by Elbert at least as early as April, 1882; but the master finds that, in his opinion, the statement of Mr. Jeanes, that he informed Elbert of the sales immediately after they were made, was true. It is a matter of very little moment, except as it affects the question of the plaintiff's good faith in bringing this action. In the letter he wrote to Mr. Jeanes, in April, 1882, he stated that he assumed the matter as settled in full, and advised them accordingly.

The question then recurs, Had the defendants the legal right to sell the shares without notice, and thereby divest Elbert's interest in them? It is difficult to understand how there can be any question upon this subject, since the right to sell without notice is expressly given by the contract of pledge. A very slight reference to the authorities shows that the right is well recognized and constantly enforced. Thus it is said in *Jones on Pledges*, sec. 611: "A waiver of the requirement of notice of the pledgee's intention to sell, and the time and place of sale, may be made by agreement of parties. A waiver of the common-law rule of notice is generally made when the parties agree upon a special power of sale, for under such a power it is usual either to waive notice of sale altogether, or else to provide for a special notice. Such notice is waived by giving the pledgee the option to sell at private sale. Under authority given a pledgee to sell at public or private sale at his option, he may sell without notice, in the usual manner of selling such property in the market."

Where a party deposited certain township bonds as collateral security for the repayment of certain sums of money bor-

rowed, it was held that the lender, with whom they were deposited, had the right to sell the same, in default of payment, without any personal notice to the pledgor of an intention to do so, it being so stipulated in the agreement: *Loomis v. Stave*, 72 Ill. 623. Other authorities to the same effect are *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 497; *Milliken v. Dehon*, 27 N. Y. 364; *Hamilton v. State Bank*, 22 Iowa, 306.

It is argued for the plaintiff that as the spurious shares were delivered to the railway company by the defendants, and genuine shares were delivered to the defendants in their place, the identity of the pledge was destroyed, and the shares sold were not the same as the shares pledged, and were therefore not covered by the power of sale. It is a most ungracious argument, but as it is altogether untenable, it cannot prevail. The shares pledged were 1,160 shares of the West Philadelphia Passenger Railway Company, and the shares sold were also 1,160 shares of the same company. Their identity was, therefore, absolute as to their number, and as to the particular corporate stock of which they were a part. But 500 of those pledged were false, fraudulent, and spurious shares, which neither Morton, from whom Elbert received them, nor Elbert, who made no advances upon them, could ever have asserted against the company, which was defrauded by their issue. Only the fact that the defendants had loaned money upon them gave them a right to have genuine shares issued in their place, and that fact inures to the benefit of the plaintiff by no merit of his. When he pledged the original 1,160 shares for value which he received, he thereby gave an implied warranty that they were actual, legal, genuine shares of this particular company, and it was that kind of shares that he empowered the defendants to sell. All the parties bargained upon the faith of the shares being genuine, and the plaintiff, above all others, is bound by that quality of the shares. But he was guilty of a breach of this warranty; whether innocently or not is quite immaterial. Legally, he was bound to make those shares good. It has been done for him by the act and the merit of the defendants, and they held, after they received the genuine shares, exactly what he agreed to give them, and no more. As a matter of course, as between him and them, he never would be permitted to allege his own want of title to the property which he had delivered to them upon ample consideration paid by them to him. *A fortiori* he cannot be heard to aver their want of title to the identical thing he assumed to

deliver them, because they had simply assented to a change in the certificates necessary to perfect the plaintiff's title as well as their own. He is estopped from making any such averment. It would be a monstrous wrong to permit such an iniquity to be perpetrated. To say of this plaintiff that he was denied the rights of an innocent stockholder because he could not prevent the company from issuing the genuine stock in place of the false, is to ignore, first, the fact that he never was an innocent stockholder, and secondly, that the issue of the new stock was done by the decree of a court, to which his assent was in no manner essential. Even if the company had voluntarily increased their capital stock while the defendants held the pledge, that circumstance could not possibly affect the determination of such a question as this, although it might be true that the aliquot proportion which the genuine shares originally pledged bore to the total capital stock was greater before than after the new issue. It has nothing to do with this question.

It is also argued that the sale of the stock pledged was not the single act of the firm in its collective capacity, and was therefore not an execution of the power. In point of fact, the sales were all made by individual members of the firm, but as all assented, and none of them are here complaining, so far as the plaintiff is concerned the sales must be regarded as the act of all. The defendants were not bound to sell all the shares at one time, or through any particular member of the firm, and the details of the sales are not of his concern unless some right of his was violated. The defendants, by their long holding of the shares through the time of their great depression, conferred a most signal benefit upon the plaintiff by obtaining a much higher price for them than was possible at an earlier date. Had the price then receded, this proceeding would never have been heard of. It happened to advance far beyond the wildest calculations. Of this advance the plaintiff now seeks to take advantage at the ruinous cost of the defendants, although he never tendered a dollar of his indebtedness, or made the slightest attempt or offer to redeem the pledge. If by the law he were entitled to this advantage, of course he would obtain it no matter how great the hardships; but as it is, neither the rules of law nor the principles of equity can give him the decree he seeks, and he must therefore be content without.

The decree of the court below is reversed, and the plaintiff's bill is dismissed; and it is ordered that the costs be paid as

recommended by the master, to wit, the costs in the original action and of this appeal be paid by the plaintiff Elbert, and the costs in the cross-action by the West Philadelphia Passenger Railway Company; the master's fee to be paid, three fourths by Elbert, and one fourth by the railway company.

RIGHTS AND REMEDIES OF PLEDGEE OF PROPERTY WHICH HE HOLDS AS COLLATERAL SECURITY: *Donohue v. Gamble*, 99 Am. Dec. 399; *Robinson v. Hurley*, 79 Id. 497, and note 499-505.

IF SUBJECT OF PLEDGE IS DIVISIBLE, and pledgee sells more than is necessary to satisfy the debt, he is liable in damages to pledgor: *Fitzgerald v. Blocker*, 29 Am. Rep. 3.

PLEDGE OF STOCKS — RIGHT TO REDEEM LOST BY UNREASONABLE DELAY: *Gilmer v. Morris*, 60 Am. Rep. 85.

LEWIS v. SEIFERT.

[116 PENNSYLVANIA STATE, 625.]

ONE WHO ENTERS UPON SERVICE OF ANOTHER takes on himself all ordinary risks of the employment in which he engages, and the negligent acts of his fellow-workmen, in the general course of the employment, are within such ordinary risks.

TO CONSTITUTE FELLOW-SERVANTS, employees need not be at the same time engaged in the same particular work. It is sufficient that they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose, although one injured may be inferior in grade, and is subject to the direction and control of a superior, whose act caused the injury.

MASTER OWES TO EVERY EMPLOYEE duty to provide reasonably safe place in which to work, and reasonably safe instruments, tools, and machinery; and when these duties are delegated to an agent, such agent stands in the place of the principal, and the latter is responsible for his acts.

MASTER OR SUPERIOR IS LIABLE FOR NEGLIGENCE OF AGENT OR SUBORDINATE to whom he intrusts the entire charge of his business, or a distinct branch of it, exercising no discretion or oversight of his own.

IT IS DUTY OF RAILROAD COMPANY TO FRAME AND PROMULGATE SUCH RULES AND SCHEDULES for the moving of its trains as will afford reasonable safety to the operatives engaged in moving them; and for a failure to perform this duty, it is responsible to any person injured, whether a passenger or an employee.

GENERAL TRAIN DISPATCHER, wielding power and authority of railroad company in moving trains, and who has the absolute control of all the trains upon the road, is not the fellow-servant of the engineer of a train, or other train employee, and the company is liable for his negligence, which is the approximate cause of an injury to such employee.

TESTIMONY OF PRACTICAL RAILROAD MEN, called as experts, is admissible as to what is or is not good "railroading," in respect to the modes of passing trains on a single-track road.

CASE by Charles Seifert against Edwin M. Lewis and others, receivers of the Philadelphia and Reading Railroad Company. The plaintiff was a locomotive engineer in the employ of the defendants, and while in such employ was injured in a collision, and brought this suit for the recovery of damages. The facts in detail appear in the opinion. Upon the trial, witnesses for the plaintiff were allowed to give testimony as to what, in their judgment, was good railroading or bad railroading, as it respected the passing of trains in safety on a single-track road. The verdict was for the plaintiff, and judgment being entered thereon, the defendant took this writ.

William Mutchler and R. E. Wright, for the plaintiffs in error.

William C. Shipman and Robert E. James, for the defendant in error.

By Court, PAXSON, J. It is clear that if this railroad accident was the result of the negligence of the station-agent at Rockhill, the plaintiff cannot recover, for the reason that said station-agent and the plaintiff were engaged admittedly in the same common employment. Seifert, the plaintiff, was the engineer of No. 71 freight train, and was injured by No. 8 passenger train colliding with it just as it was entering the switch at Rockhill to allow No. 8 to pass. Roth, the station-agent, had been ordered by wire to "stop and hold No. 8 express at Rockhill until No. 71 local freight arrives." When he received the order he proceeded to flag No. 8 with the red signal. This was all he was required to do by the rules of the company in obedience to the telegram. This fully appears by the testimony of Mr. Sellers, the train dispatcher, who sent the telegram, and who was called as a witness by the defendant company. We must look elsewhere for a solution of this difficulty.

It is equally clear that had no order been sent from Philadelphia, there would have been no accident. In the absence of special orders, No. 71 would, under the rules of the company, have taken the siding at Perkasia, and have waited until No. 8 passed. The accident was the direct result of the order from the office in Philadelphia to the conductor and engineer of 71, which was as follows: "You will meet and pass No. 8 express at Rockhill." It remains to be seen whether the defendant company is responsible to the plaintiff below for the injuries he received in consequence of this order.

The facts briefly stated are as follows: —

No. 71 local freight train, with the plaintiff below on board as engineer, left Philadelphia at 3:30 A. M. for South Bethlehem, and arrived at Perkasio, two miles and a half south of Rockhill. This portion of the road at that time had but a single track. When No. 71 arrived at Perkasio it was behind time, and it was the duty of the conductor to do one of two things, viz., either to take the long siding at Sellersville, or wire to Philadelphia for orders. He chose the latter course. He went into the office at Perkasio, called up the Philadelphia office by telegraph, and asked for orders for No. 71. The Perkasio operator was asked by Philadelphia how soon No. 71 would be ready to leave, and the answer was wired back, "In a few minutes." Then at 8:55 A. M. the operator at Philadelphia sent the following telegram to the agent at Rockhill: "Agent Rockhill: Stop and hold No. 8 express at Rockhill until No. 71 local arrives there." Signed, "W. Bertolette." Bertolette was the train dispatcher at Philadelphia, and had full authority to start out and control the trains, even to the suspension of the regular schedules. The telegram was signed by Sellers, his assistant, for Bertolette; but that is immaterial. Sellers had the same power as Bertolette, in the absence of the latter.

No. 71 was going north. No. 8 express passenger train should have left South Bethlehem at 8:30 A. M. It was delayed for connections, and did not leave until about 9. It was behind time, as before observed, and having the right of way, ran at a high rate of speed. It does not appear that any attempt was made to notify No. 8 of the whereabouts of No. 71, until the order to start the latter train had been given. Then an attempt was made to intercept it by calling up the operators along the line above Rockhill, but it met with no response. It was alleged the wires were not working above Rockhill, and there was a dense fog along the line between that place and Bethlehem, but none in Philadelphia. No. 8, having the right of way, and no warning of danger, kept on at a speed of from thirty to thirty-five miles an hour, until it reached Rockhill. The fog prevented the danger-signal there from being seen, and No. 8 struck No. 71 just as the latter was entering the switch. When No. 71 arrived at Rockhill, the engineer and conductor thereof observed the signal-board at the telegraph-office turned in their favor as a signal to enter the siding. As the engine slacked its speed, the conductor jumped off and

inquired of the operator "how No. 8 was." He was informed that it had left Quakertown four minutes ago. The distance between the two places was only two or three miles. The conductor then told his brakeman to go and flag No. 8. It was too late. Before the brakeman could proceed any distance, the collision occurred.

It will be seen that each of these two trains, running in opposite directions, had the right of way. The train dispatcher in Philadelphia doubtless expected that No. 71 would be safe on the siding at Rockhill before No. 8 should arrive there. And so it would, had it started at once upon receiving its order. It will be remembered that before issuing the order to No. 71, the dispatcher asked how soon it would be ready to start. The reply was, "In a few minutes." With the knowledge that No. 71 could not start immediately, the order was given to proceed. No time was limited. In point of fact, No. 71 did not move for about twenty minutes. The delay was in part caused by the pulling out of a drawhead. No. 71 did not ask for fresh orders before stating, nor was it bound to; it had told the dispatcher it would be ready to start in a few minutes, and it did so. A "few minutes" is an indefinite period of time, by far too uncertain for railroad purposes.

Just here is the pinch of the case. If Bertollette had ordered No. 71 to proceed in five minutes, or if not ready by that time, to take the siding, there would have been no collision. But he left the whole matter indefinite, depending upon what the conductor of No. 71 might regard as a "few minutes," when a delay of a single minute might involve life or death. In every view which we can take of this case, we regard this order as an act of negligence and the proximate cause of the collision.

This involves the further question whether the company defendant is responsible for the negligence of its train dispatcher. Upon this point the authorities are numerous and far from uniform. A volume might be written upon it, and not exhaust the subject. I prefer to state our conclusions, without elaborating them to any considerable extent.

The precise question is, whether Sellers, the train dispatcher, was a fellow-workman with the plaintiff, within the meaning of that rule of law which holds that the master is not responsible for an injury received by an employee caused by the negligence of a co-employee or fellow-workman. That rule rests upon the sound principle that each one who enters

upon the service of another takes on himself all the ordinary risks of the employment in which he engages, and that the negligent acts of his fellow-workmen in the general course of his employment are within the ordinary risks: *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432. To constitute fellow-servants, the employees need not be at the same time engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose. The rule is the same, although the one injured may be inferior in grade, and is subject to the direction and control of the superior whose act caused the injury, provided they are both co-operating to effect the same common object: *Keystone Bridge Co. v. Newberry*, 96 Id. 246; 42 Am. Rep. 543. Thus we have repeatedly held that a "mining boss," under the act of March 3, 1870, is a fellow-workman with the miners, and that the mine-owners are not responsible for his negligence: *Delaware and Hudson Canal Co. v. Carroll*, 89 Pa. St. 374. This, however, is in part owing to the fact that the duty of appointing a mining boss is imposed upon the mine-owners by the act of assembly; hence the responsibility of the latter would seem to cease when they had exercised due care in the selection of that person. Be that as it may, it is well settled that mere difference in rank or grade does not change the rule.

But there are some duties which the master owes to the servant, and from which he cannot relieve himself except by performance. Thus the master owes to every employee the duty of providing a reasonably safe place in which to work, and reasonably safe instruments, tools, and machinery with which to work. This is a direct, personal, and absolute obligation; and while the master may delegate these duties to an agent, such agent stands in the place of his principal, and the latter is responsible for the acts of such agent. And where the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is held liable for the negligence of such agent or subordinate: *Mullan v. Steamship Co.*, 78 Pa. St. 25; 21 Am. Rep. 2; *New York etc. R'y Co. v. Bell*, 112 Pa. St. 400.

It is very plain that it was the duty of the defendant company, as between said company and its employees, to provide a reasonably good and safe road, and reasonably safe and good cars, locomotives, and machinery for operating its road.

It is equally clear that it was its duty to frame and promulgate such rules and schedules for the moving of its trains as would afford reasonable safety to the operatives who were engaged in moving them. This is a direct, positive duty which the company owed its employees, and for the failure to perform which it would be responsible to any person injured as a consequence thereof, whether such person be a passenger or an employee. It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably or even probably result in collisions and loss of life. This is a personal, positive duty; and while a corporation is compelled to act through agents, yet the agents in performing duties of this character stand in the place of and represent the principal. In other words, they are vice-principals.

If it be the duty to provide schedules for the moving of its trains, which shall be reasonably safe, it follows logically that when the schedules are departed from, when trains are sent out without a schedule, such orders should be issued by the company as will afford reasonable protection to the employees engaged in the running of such trains. I am not speaking now of collisions caused by a disobedience of orders on the part of conductors and engineers, but of collisions or other accidents the result of obeying such orders.

At the time of the collision referred to, Wellington Bertolletto was the general dispatcher of the defendant company, and from his office in Philadelphia had the general power and authority of moving the trains. In this he was not interfered with by the company or any one else. For the purpose of sending out the trains, he wielded all the power of the company. He could send a train out on schedule time, or he could hold it back. He could change the schedule time, or make new schedules, as the exigency of the case required. He could send a train out without schedule, and direct its movements from his office in Philadelphia. When he issued an order, the train was bound to move as he directed. The engineer and conductor had but one duty, and that was obedience. In *Slater v. Jewett*, 84 N. Y. 61, 29 Am. Rep. 627, the late Chief Justice Folger thus clearly stated the duties of railways in this particular: "It is urged, and with reason, that clearly arranging and promulgating the general time-table of a great railway is the duty and the act of the master of it; and that when there is a variation from the general time-table for a special occasion and purpose, it is as much the duty and

act of the master, and he is as much required to perform it; that it is the duty and act of the master to see and know that his general time-table is brought to the knowledge of his servants who are to square their actions to it; that the same is his duty and act as to a variation from it, which is but a special time-table; and therefore whoever he uses to bring those time-tables to the notice of his servants, he puts that person to do an act in his stead, inasmuch as the responsibility is upon him to see and know that it is done, and done effectually, and that if, instead of doing it in person, he chooses to do it through an agent, that agent *pro hac vice* is the master, and he, the master, is responsible for a negligent act therein of that agent, whereby a fellow-servant of him is harmed. This rule has been laid down in repeated cases in this court."

It is true, the order in this case was sent by John J. Sellers. But Sellers was the assistant of Bertolette, and in his absence was clothed with all his powers. For the purposes of this case, Sellers was Bertolette, and Bertolette was the company.

The distinction between a general dispatcher—one who has the absolute control of all the trains upon the road—and the conductor or engineer of a train is manifest. The latter have the duty of obedience. Their business is to run their trains under orders from the dispatcher; and if an employee is injured as the result of their negligence, the company is not liable. They are in the same common employment, and are laboring together to the same end, under orders from superior authority. The argument for the plaintiff in error, if carried to its logical conclusion, would wholly obliterate all distinction between railroad employees from the president down, as they may all be said to be in one sense in the same common employment, and paid by the same corporation.

While the cases are not uniform upon this subject, the weight of authority is with the foregoing views. In addition to the authorities cited, we may refer to *Flike v. Railroad Co.*, 53 N. Y. 549; *Pittsburgh etc. R. R. Co. v. Henderson*, 5 Am. & Eng. R. R. Cases, 529; 37 Ohio St. 549; *McKune v. C. S. R. R. Co.*, 21 Am. & Eng. R. R. Cases, 539; 66 Cal. 302; *Phillips v. Chicago etc. R. R. Co.*, 23 Am. & Eng. R. R. Cases, 453; *Phillips v. Railroad Co.*, 64 Wis. 475; and *Washburn v. Railroad Co.*, 3 Head, 638; 75 Am. Dec. 784. Against these authorities we have only *Robertson v. T. H. & I. R. R. Co.*, 78 Ind. 77; 8 Am. & Eng. R. R. Cases, 175; 41 Am. Rep. 552; and *Bles-*

sing v. St. Louis etc. R. R. Co., 77 Mo. 410, and 15 Am. & Eng. R. R. Cases, 298. These cases, however, do not sustain the broad principle contended for here, and if they did, we would not be disposed to adopt them in the face of so much respectable authority the other way. Aside from authority, I am of opinion that the doctrine we have announced is founded upon the better reason, and is a rule both valuable and necessary for the preservation of the lives, not only of railroad employees, but of the traveling public as well.

This disposes of all that is important in the case.

The sixth, seventh, and eighth assignments refer to the questions asked of the expert witnesses. We think they were competent under *Laros v. Commonwealth*, 84 Pa. St. 200, and *Yardley v. Cuthbertson*, 108 Id. 461; 56 Am. Rep. 218.

Judgment affirmed.

SERVANT ASSUMES ORDINARY RISKS OF EMPLOYMENT, including risk of injury from neglect of fellow-servants: *Fisk v. Cent. Pac. R. R. Co.*, 1 Am. St. Rep. 22; *Columbia etc. R. R. Co. v. Troesch*, 18 Am. Rep. 578; *Brown v. Winona etc. R. R. Co.*, 38 Id. 285; *Bryant v. Burlington etc. R. R. Co.*, 55 Id. 275; *Columbus etc. R. R. Co. v. Arnold*, 99 Am. Dec. 615.

MASTER IS BOUND TO FURNISH REASONABLY SAFE MACHINERY AND APPLIANCES IN CARRYING ON HIS BUSINESS, and a reasonably safe place in which the work may be performed: *Mormell v. Maine Cent. R. R. Co.*, 1 Am. St. Rep. 321; *Smith v. Peninsular Car Works*, 1 Id. 542; *Bushby v. New York etc. R. R. Co.*, 1 Id. 843; *Gibson v. Pac. R. R. Co.*, 2 Am. Rep. 497; *Cone v. Delaware etc. R. R. Co.*, 37 Id. 491; *Pennsylvania etc. R. R. Co. v. Mason*, 58 Id. 722; *Columbus etc. R. R. Co. v. Arnold*, 99 Am. Dec. 615, and note 626.

COMMON EMPLOYMENT—WHO ARE CO-SERVANTS: *Laning v. New York etc. R. R. Co.*, 10 Am. Rep. 417; *Conolly v. Davidson*, 2 Id. 154; *Lawler v. Androscoggin R. R. Co.*, 16 Id. 492, and note 495; *Ryan v. Chicago etc. R. R. Co.*, 14 Id. 32; *Mathews v. Case*, 50 Id. 151; *O'Brien v. Boston etc. R. R. Co.*, 52 Id. 279; *Abend v. Terre Haute etc. R. R. Co.*, 53 Id. 616; *Rankin v. Merchants' etc. Transp. Co.*, 54 Id. 874; *Chicago etc. R. R. Co. v. Harney*, 92 Am. Dec. 286; *Fox v. Sandford*, 67 Id. 588-597, note; who are not co-servants: *Coleman v. Wilmington etc. R. R. Co.*, 60 Am. Rep. 516; *Louisville etc. R. R. Co. v. Conroy*, 56 Id. 835; *Tierney v. Minneapolis etc. R. R. Co.*, 53 Id. 35; *Darrigan v. New York etc. R. R. Co.*, 52 Id. 590; *Smith v. Wabash etc. R. R. Co.*, 1 Am. St. Rep. 729, and note.

RAILROAD COMPANY IS BOUND TO ADOPT AND PROMULGATE RULES for the protection of its employees against one another's negligence: *Abel v. President etc. of Del. & Hudson Canal Co.*, 57 Am. Rep. 773.

THE PRINCIPAL CASE IS CITED to the point that the master is required to provide materials and implements for the use of his servant, such as are ordinarily used by persons in the same business; but he is not required to secure the best known materials, or to subject such as he does provide to a chemical analysis, in order to settle by experiment what remote and possible hazard may be incurred by their use, in *Allison Mfg. Co. v. McCormick*, 118 Pa. St. 528.

LYNN v. FREEMANSBURG BUILDING AND LOAN ASS'N.

[117 PENNSYLVANIA STATE, 1.]

PENNSYLVANIA GENERAL LAW, ACT OF 1859, confers no special power upon building association, incorporated thereunder, to impose fines; and the general authority of such association in this respect is limited to such fines as are imposed under by-laws which are reasonable and lawful.

BY-LAW OF BUILDING ASSOCIATION, INCORPORATED UNDER PENNSYLVANIA ACT OF 1859, is oppressive, extortionate, and unreasonable, and is therefore void, in so far as it provides that every stockholder delinquent in the payment of his monthly dues and interest "shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him."

POLICY OF LAW IN PENNSYLVANIA IS, THAT BUILDING ASSOCIATIONS shall not exact oppressive and extortionate fines from their defaulting members; and in the absence of statutory authority to exact any specified fine, the imposition of fines in excess of two per cent per month is to be deemed oppressive and unreasonable by policy of law.

BUILDING ASSOCIATION—MEMBER OF NOT ESTOPPED BY PAYING ILLEGAL FINE. —A member of a building association became indebted to it for a loan, to secure the payment of which, with interest, he gave his mortgage, and also deposited his stock as collateral. Becoming delinquent in the payment of his monthly dues and interest, he was charged, under a by-law of the association, with a fine of ten cents monthly on each dollar of his indebtedness at the time the fines were imposed. Under a threat that his mortgage would be foreclosed, and his stock forfeited under the by-laws, he paid the association a sum sufficient to cancel his entire indebtedness for fines, dues, and interest, which payments were made voluntarily for the purpose of squaring his accounts with the association; and they were so applied. He subsequently became delinquent in the payment of his monthly dues and fines, when the association declared his stock forfeited, and proceeded by *scire facias* on the mortgage. *Held*, that the fines having been imposed under an invalid by-law, the defendant was not concluded by his payment of them, and that credit therefor should be given on the amount legally due under the mortgage.

SCIRE FACIAS SUR mortgage by the Freemansburg Building and Loan Association against Josephus Lynn. By agreement of parties, the case was submitted to the decision of the court without a jury. The facts, so far as material to the points decided, appear in the head-note and opinion. Upon the findings of fact and conclusions of law, the court made a calculation and decree as to the amount for which judgment should be entered against the defendant. Exceptions to the decision were filed by both parties, when the court entered a modified judgment in favor of the plaintiff, whereupon the defendant took this writ.

Edward J. Fox and Edward J. Fox, Jr., for the plaintiff in error.

B. F. Fackenthall and O. H. Meyers, for the defendant in error.

By Court, GREEN, J. We are clearly of opinion that the literal meaning of the by-law of this plaintiff which imposes fines upon members for non-payment of dues or interest is, that the fine of ten per cent is imposed upon the aggregate amount of all money due at the end of each month, no matter for what cause. This would include fines previously imposed, as well as the amount previously owing for dues and interest. The question then arises, whether such a by-law is a valid exercise of the legislating power of the association.

It is not claimed that the general law of 1859, under which the plaintiff was incorporated, confers any special power to impose fines, and hence we assume that the right to enact the by-law in question is merely the general right which all corporations possess, of enacting suitable by-laws for their government. The provision of the sixth section of the act of 1859, that no premiums, fines, or interest on such premiums that may accrue according to the provisions of the act shall be deemed usurious, must be held, so far as fines are concerned, to be limited to such fines as are imposed under by-laws which are lawful. Is, then, the by-law in question a valid by-law? That depends upon a consideration of its meaning and effect.

We have stated the meaning of this by-law to be that the fine is imposed each month upon the whole amount due at the end of each month, no matter for what cause. The words are, "each and every stockholder or trustee who shall neglect or refuse to pay his monthly dues or interest as often as the same shall become due and payable shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him." It is clear the ten cents penalty or forfeiture is to be paid monthly. This being so, it is to be repeated every month during which the amount due remains unpaid. The effect of this would be that if at the end of December in any year the member was indebted fifty dollars to the association, and remained so throughout the year following, he would then owe as a fine twelve times the original penalty on that one default; in other words, 120 per cent upon the principal sum for which default was made. In addition to this, he would also owe the full interest he might be paying on the amount expressed in his obligation, no matter how usurious that interest

might be. Still further, as the balance is to be struck at the end or each month, the member would owe at that time all that he owed at the end of the preceding month, and in addition thereto, the interest and penalty for the current month besides the dues; and the account would be made up by charging him with ten per cent upon the principal, the interest and the fine due at the end of the preceding month, and adding them to the dues and interest of the current month. If another default was then made, the same process would be repeated at the end of each succeeding month during the continuance of the defaults. It is needless to enter into a detailed computation to show what the aggregate result of such a process would be in any given case. That it is unreasonable, extortionate, and oppressive to the last degree, must be at once conceded. If the monthly penalty were a hundred per cent instead of ten, it would only be a difference in degree, not in character. Of course if there is an unlimited right to impose, by means of a by-law, any amount of fine or penalty which the association may please to ordain, and the law is powerless to interfere, the results must be accepted, no matter how unjust or oppressive they may be. But we do not so understand the law upon this subject.

The fines in this case were imposed by means of a corporate by-law. While it may be conceded that as between a corporation and one of its members a somewhat different rule would prevail from that which would be applicable as between the corporation and strangers, yet there is a limit of authority even when corporators only are affected. We have not been referred to any case in which an unlimited authority to impose fines by a building association has been declared by any court. A number of decisions adverse to such a right have been made by courts of last resort, though none by this court, the direct question having, apparently, never been before us. The legislature of Pennsylvania, by the sixth section of the act of April 10, 1879 (Pamph. Laws, 17), enacted that "fines or penalties for the non-payment of installments of dues, interest, and bonus or premiums, shall not exceed two per centum per month on all arrearages." If this plaintiff were subject to this law, the question would be settled at once, and all of the fines in excess of two per cent per month would be undoubtedly illegal. But the plaintiff was chartered under the act of 1859, and it is admitted, or at least found by the court below, and the finding not challenged, that it has never accepted the provisions

of the act of 1879, and therefore is not subject to it. We do not, however, see that this circumstance is very material, because there is no previous statutory authority to exact any specified fine, and the open question we are considering is, What is the law in the absence of such authority? It is very clear now, and since 1879, that the policy of the law in this commonwealth is, that building associations shall not exact oppressive and extortionate fines from their defaulting members; and we feel amply justified in deciding, as we now do, that a fair inference flows from this legislation that fines in excess of two per cent per month are oppressive and unreasonable by policy of law. That policy is put in the form of explicit statutory mandate as to all associations which are subject to the operation of the act of 1879, whether by subsequent incorporation, or by previous incorporation and subsequent acceptance. As to the time anterior to the statute, we feel no hesitancy in saying that a monthly penalty of ten per cent, repeated by arithmetical progression with each succeeding default, was clearly oppressive, extortionate, and unreasonable, by policy of law and by the teachings of the enlightened conscience of men. The effect of such a taint upon a by-law is to render it void, and hence we are not called upon to fix upon any rate of fine which would have been reasonable, and hold the by-law good for that rate and void only as to the excess. The taint is fatal to its validity, and it is therefore without any force. The purpose of the fine is merely to enforce the payment of the dues and interest, and as this is only an obligation for the payment of money, the extortionate character of the penalty becomes the more conspicuous in proportion to the amount by which it exceeds the ordinary rate allowed by law, and by general consent, for the use of money. No sound reason can be advanced for the necessity of exacting so gross a penalty for a mere omission to pay a debt.

The question has been before other courts than ours, and has been adjudged in accordance with the principles stated. Thus in Ohio the legislature of the state expressly authorized building and loan associations to levy and collect from their members "such sums of money, by rate of stated dues, fines, . . . as the corporation by its laws may adopt." Here would seem to be an unlimited authority to the associations to impose any amount of fines they might see fit, but the supreme court of Ohio said, in a case arising under its provisions: "It is to be regretted that the legislature was not more specific in making

the grant of power thus intended to be conferred. . . . That there are limits, however, beyond which the corporation by its by-laws cannot go, is undoubted: 1. The amount of the fine must be reasonable; 2. It can be imposed only by way of punishment for some delinquency in the performance of a duty which the member may owe to the corporation by reason of his membership; 3. It is unreasonable, and therefore we assume that the legislature did not intend that more than one fine should be imposed for the same delinquency": *Hagerman v. Ohio B. & S. Ass'n*, 25 Ohio St. 186; *Forest City United Land and Building Ass'n v. Gallagher*, 25 Id. 208.

In Endlich on Building Associations, sec. 412, the writer says: "But the courts have been unanimous in discountenancing a repeated imposition of the same fine increased every time upon the principle of arithmetical progression. Thus where the fine upon each share's dues in arrear was for the first month 12 cents, for the second month 37 cents, for the third month 75 cents, for the fourth month \$1.25, and for every following month 50 cents more than the amount charged in the preceding one, the rate was held to be unreasonable and exorbitant"; citing *Second New York Building Ass'n v. Gallier*, cited by Birdseye, J., in *Citizens' Mutual Loan and Accumulating Fund Ass'n v. Webster*, 25 Barb. 263. Mr. Endlich, in section 413 of his excellent work, says: "The proper measure of fines is the real damage the building association sustains from the failure of a member to pay his dues, which damage is really equal to interest upon the amount, together with the proportion coming to it from the then attainable premiums upon the sale of money. The fine should be slightly in excess of this, so as to make it more profitable to the member to pay promptly than to lag behind. . . . A fine of from one to two per cent per month would in nearly all cases be sufficient and just"; citing *Ocmulgee Building and Loan Ass'n v. Thomson*, 52 Ga. 427. While we express no binding opinion upon this subject, as it is not necessarily before us, there is much good sense in the suggestion, and the amount of the reasonable fine intimated in such cases seems to accord very closely with the amount fixed by our own law of 1879.

The argument that only one fine could be imposed, because the legislature could not be presumed to have intended to authorize more than one, is not applicable in the present case, because we are construing, not a legislative enactment, which must be enforced as far as may be, but a by-law of a corpo-

ration, which is plainly in violation of the principles we have stated, and therefore of no effect whatever. In Maryland the same ruling appears to have been made in the cases of *Shannon v. Howard Building Ass'n*, 36 Md. 383, and *Monumental Building Ass'n v. Lewin*, 38 Id. 445.

The general rule that by-laws of corporations must be reasonable, and must not be oppressive on peril of invalidity, is such familiar doctrine that a citation of authorities in support of it is unnecessary. In Endlich on Building Associations, at section 271, it is said: "And all by-laws, to be binding, must be in conformity,—1. With existing and supreme laws; . . . 2. With the charter, its letter and spirit; 3. With reason and equity": Angell and Ames on Corporations, sec. 347. The same rule exists as to ordinances of municipal governments as was held in *Kneedler v. Borough of Norristown*, 100 Pa. St. 368; 45 Am. Rep. 384. For the reasons we have stated, we hold that the by-law of the plaintiff imposing the ten per cent penalty in question is unreasonable and oppressive, and therefore invalid and of no effect.

It is argued, however, that the fines, or some of them, were voluntarily paid by the defendant, and therefore cannot be recovered back. This is not an action to recover back the illegal fines, but a *scire facias* by the association on the mortgage given by the defendant; and the question is, For what amount shall judgment be entered? or rather, how much is legally due on the mortgage? There is a clear distinction between a suit to recover back moneys which have been paid by mistake either of law or fact, and interposing as a defense such payments as could not have been recovered on account of their illegality. In the latter class of cases, the payments, as a rule, are credited on the amount legally due. This is always done in cases of usurious payments where the obligation is still outstanding. We can see no difference in principle between that class of cases and the present. While it may be true that the fines are no part of the mortgage debt, it is also true that they are moneys paid by defendant to plaintiff in consequence of a relation of debtor and creditor existing between them; and if the creditor have no right to receive them as fines, he has no right to receive them in any other capacity than as creditor. Being received by a creditor, it is obvious the moneys thus paid must be applied to whatever was legally due. Even if the question depended upon whether the defendant made the payments distinctively as

for fines, the evidence is not at all clear that such was the fact. A gross sum was paid, of which the fines were a part; but no specific receipt was given, and the credits entered in the account were in aggregate sums. But we think this feature of the case quite immaterial, since the payments, so far as the fines are concerned, were for illegal demands which the plaintiff could not claim, and having received them, cannot, either in law or in conscience, retain them. The question in this proceeding is only how much is legally due upon the obligation in suit; and in determining that question, credit should be given for all moneys claimed and received as fines.

Judgment reversed, and record remitted, with directions that the amount due, if any, upon the mortgage in suit be determined in accordance with the foregoing opinion.

WHAT BY-LAWS PRIVATE CORPORATION MAY ADOPT: *Sayre v. Louisville etc. Ass'n*, 85 Am. Dec. 613, and note 617; *Plint v. Pierce*, 96 Id. 691, and note 692.

BY-LAWS, VALIDITY OF, AND HOW DETERMINED: *State v. Overton*, 61 Am. Dec. 671; *Mechanics' Bank v. Merchants' Bank*, 100 Id. 388.

CORPORATION CANNOT, BY RESOLUTION OR BY-LAWS, impose personal and individual liability upon its members, unless the power is specially granted in the charter or by general statute: *Reil v. Eatonton Mfg. Co.*, 2 Am. Rep. 563.

BUILDING AND LOAN ASSOCIATIONS, HISTORY AND OBJECTS, ETC.: See *Robertson v. Homestead Ass'n*, 69 Am. Dec. 145, and extended note 150; *North American Building Ass'n v. Sutton*, 78 Id. 349, and note 353; *Stein v. Indianapolis Building etc. Ass'n*, 81 Id. 353.

SYLVIVS v. KOSEK.

[117 PENNSYLVANIA STATE, 67.]

EVIDENCE REQUISITE TO REFORM WRITTEN INSTRUMENT on ground of fraud, accident, or mistake must be clear, precise, and indubitable. If the evidence, when admitted, is not such as would move a chancellor to reform the contract or deed, the case should not be submitted to the jury without binding instructions as to its insufficiency.

WHEN IT IS SOUGHT TO IMPEACH WRITTEN CONTRACT BY DEFENSE PURELY EQUITABLE, opposing testimony of plaintiff to such defense is conclusive, unless contradicted by two witnesses, or one witness and corroborating circumstances equivalent to a second witness.

EVIDENCE TO REFORM WRITTEN CONTRACT IS INSUFFICIENT, which only shows that a third person, to whom it was intrusted merely for the purpose of delivery to the defendant, fraudulently misread it to the latter when he signed it.

ASSUMPSIT by George D. Sylvius against John Kosek, to recover the contract price for materials furnished and work done in the construction of certain tenement houses. The plaintiff's claim was founded upon a written contract, which he put in evidence, and made out his case by proof of performance according to its terms. The defendant sought to defeat the recovery of the contract price, upon the ground that a material part of the verbal agreement arrived at between the parties for the erection of the houses was fraudulently omitted from the written contract put in evidence by the plaintiff, and that in order to complete the buildings as contemplated by the true contract, the defendant had expended \$1,050, which he claimed should be deducted from the plaintiff's claim. The substance of the defendant's testimony, and the material assignments of error, appear in the opinion. The jury found a verdict for the plaintiff for the contract price, less the deduction claimed by the defendant, whereupon the plaintiff took this writ.

J. V. Darling, E. P. Darling, and William Penn Ryman, for the plaintiff in error.

John T. Lenahan, for the defendant in error.

By Court, STERRETT, J. In response to the *prima facie* case presented by plaintiff's evidence, including the written contract on which the action is grounded, defendant undertook to prove that an important provision of their verbal agreement in relation to building the houses was fraudulently omitted from the written contract prepared in duplicate by plaintiff, and submitted to him for his signature. He testified in substance that plaintiff, having verbally agreed to build the houses for a fixed sum, including wainscoting in lieu of plastering, undertook to prepare and send him for execution duplicate copies of their agreement, embodying that and all other provisions thereof; that, instead of doing so, he wrote and sent by the hand of Roushey duplicates from which the provision in question was omitted; that inasmuch as he was not sufficiently familiar with English to read the contract, he asked Roushey to read it, and he read it as though it contained the provision in regard to wainscoting, and thereupon he executed the contract in duplicate, believing it embodied all the provisions of their verbal agreement.

In view of the foregoing testimony, and the uncontradicted evidence as to Roushey's authority in the premises, plaintiff,

in his third point, requested the court to charge as follows: "In order to bind the plaintiff by the alleged representations, made by Roushey at the time of the execution of the written contract, it must be shown affirmatively that Roushey had authority from plaintiff to make such representations, and that the burden of proof is on defendant, who seeks to take advantage of those representations. The simple testimony that Roushey was authorized to take the contract to Kosek to be signed is not sufficient evidence to establish that authority. There being no other evidence in this case tending to establish or prove such authority, the jury must find, as matter of fact, that none existed, and plaintiff is not bound by representations alleged to have been made by Roushey." The court declined to affirm this point as a whole, saying: "We cannot say, gentlemen, in the language of the point, that there is no other evidence in the case than that alluded to. In its length and breadth, we cannot affirm this point; it is therefore disaffirmed."

In plaintiff's fourth point, the court was further requested to charge: "It being the uncontradicted evidence that Roushey's authority was to deliver the contract to Kosek, and that if read at all, such reading was at the request and by direction of Kosek, this constitutes and makes Roushey the agent of Kosek, and nothing that may have been said or done by Roushey, so acting, can in any way bind the plaintiff." This point was also refused.

Each of these points was fully warranted by the evidence before us; and as correct legal propositions, based upon the undisputed facts of the case, they should have been severally affirmed. Roushey was intrusted with the papers merely for the purpose of delivering them to defendant. The evidence proves this, and nothing more. If he read them to Kosek at his request, he did so as the agent of the latter, and not of the plaintiff. If Kosek chose to make him his own agent for that purpose, and the contract was incorrectly read, it was neither the fault nor the act of the plaintiff. The ninth and tenth assignments of error are sustained.

It is conceded by the learned counsel for defendant that the defense is in the nature of a bill brought to reform the written contract on the ground of fraud. The rules of evidence applicable to such cases are too well established to admit of any doubt. The evidence requisite to reform a written instrument on the ground of fraud, accident, or mistake must be clear,

precise, and indubitable: *Murray v. New York etc. R. R. Co.*, 103 Pa. St. 37. If the evidence, when admitted, is not such as would move a chancellor to reform the contract or deed, the case should not be submitted to the jury without binding instructions as to its insufficiency: *Phillips v. Meily*, 106 Id. 536. Again, the answer of a plaintiff to such a defense as is set up in this case is conclusive, unless contradicted by two witnesses, or one witness and corroborating circumstances equivalent to a second witness; and now that parties are competent witnesses, and each may oppose his oath to that of the other, when written contracts or obligations are sought to be impeached by defenses purely equitable, the reason is stronger than ever for enforcing the rules of equity applicable to such cases: *Phillips v. Meily*, *supra*; *Juniata Building Ass'n v. Hetzel*, 103 Pa. St. 507. Tested by these and other rules of evidence applicable to such defenses as the one under consideration, we think the evidence was insufficient to justify the submission of the alleged fraud to the jury.

It is unnecessary to notice specially the remaining specifications of error. What has been said disposes of the controlling questions in the case.

Judgment reversed, and a *venire facias de novo* awarded.

MISTAKE, ACCIDENT, AND FRAUD, RELIEF AGAINST IN EQUITY: *Emerson v. Nasarre*, 96 Am. Dec. 534, and note 539; *Simpson v. Montgomery*, 99 Id. 228; *Kilmer v. Smith*, 33 Am. Rep. 613; *Griffith v. Townley*, 33 Id. 476; *Gardner v. Moore*, 51 Id. 454, and note 458.

PAROL EVIDENCE, ADMISSIBILITY OF TO REFORM WRITTEN INSTRUMENT: *Dunham v. Chatham*, 73 Am. Dec. 228, and note 235; the proof must be clear and satisfactory: *Smith v. Jordan*, 97 Id. 232.

IN ABSENCE OF MUTUAL MISTAKE, FRAUD, OR CONVEALMENT, equity will not reform instrument, even as between the parties, where the plaintiff executed it without reading it, having been sent to him by his attorney, and supposing it to be a copy of a different instrument previously executed by him: *Kennerty v. Lithuan Phosphate Co.*, 53 Am. Rep. 669.

FIRST NATIONAL BANK OF TAMAQUA v. SHOEMAKER.

[117 PENNSYLVANIA STATE, 94.]

HOLDER OF BANK CHECK HAS NO RIGHT OF ACTION THEREON AGAINST BANK, when there has been no acceptance by the bank, although there may be funds of the drawer in the hands of the bank sufficient to pay the check at the time of presentment.

DRAWER OF BANK CHECK PAYABLE TO ORDER OF ANOTHER has no right of action upon the check as an obligation payable to himself, but has a right of action against the bank to recover damages for the dishonor of his check, or specifically to recover the amount of his deposit.

IN ACTION BY PAYEE OF NON-ACCEPTED BANK CHECK AGAINST BANK, it is error to allow amendment of record substituting the drawer as the legal plaintiff for the use of the payee, particularly when the drawer's rights of action against the bank to recover damages for the dishonor of his check, or to recover the balance of his deposit, are barred by the statute of limitations.

AMENDMENT OF DECLARATION WILL NOT BE ALLOWED if new cause of action is thereby introduced, especially where the new cause of action is so old as to have been barred by the statute of limitations.

ACTION of *assumpsit* upon a bank check, brought by Shepp & Co. against the First National Bank of Tamaqua. One Shoemaker, being indebted to D. Shepp & Co., gave them his check, dated August 26, 1874, on said bank in payment. On the same day the firm indorsed the check, and presented it for payment, which was refused. The check was then protested for non-payment, and this suit was commenced by Shepp & Co. to recover its amount. At the time of giving the check, Shoemaker was a depositor in the defendant bank, and had a deposit with the bank more than sufficient to meet the check. On the trial, Shoemaker testified on cross-examination that on the morning of August 26, 1874, and before making the check in suit, he had gone to the bank himself with a check, payment of which was refused. The check in suit was then offered in evidence, with the certificate of protest, and the evidence was admitted. Exception by the defendant. The plaintiffs then moved to amend the record by adding the name of "John A. Shoemaker to the use of D. Shepp & Co.," as party plaintiffs, and the court allowed the amendment. Exception by defendant. The defendant gave evidence that in June, 1874, the bank had discounted for Shoemaker a note of the Tamaqua Rolling Mill Company, to mature on August 26, 1874; that on August 18, 1874, the bank discounted another note of the rolling mill company to the order of Shoemaker, upon the express condition, assented to by him, that the proceeds should be applied to the payment of the other rolling

mill note maturing August 26th; that on August 25, 1874, Shoemaker made a deposit in cash sufficient, with the proceeds of the second note, to make up the amount of the first note to be taken up the day following; that the Tamaqua Rolling Mill Company failed about the time of maturity of the first note, and that the second note discounted was protested for non-payment and was never paid; and that on the morning of August 26, 1874, Shoemaker presented his check to withdraw the amount to his credit, and was refused payment. Shoemaker admitted the cash deposit on August 25, 1874, but denied that such deposit with the proceeds of the second note was intended as sufficient to take up the first note, and also denied the alleged agreement that the proceeds of the second note should be applied to the payment of the first. Other facts appear in the opinion. Under the charge of the court, the jury found a verdict for the plaintiffs for the whole amount of the check, and interest thereon. Whereupon the defendant took this writ.

Guy E. Farquhar, for the plaintiff in error.

S. K. Kaercher and H. B. Graff, for the defendant in error.

By Court, GREEN, J. It has been repeatedly held that the holder of a bank check has no right of action on the check against the bank. Although there may be funds of the drawer sufficient to pay the check in the hands of the bank at the time of presentment, and no other appropriation of them made, yet the bank may refuse payment without subjecting itself to a suit by the holder: *Saylor v. Bushong*, 12 Week. Not. Cas. 81; *Northumberland Bank v. McMichael*, 106 Pa. St. 460; 51 Am. Rep. 529; *Bank of Republic v. Millard*, 10 Wall. 152. In *Harrisburg Nat. Bank's Appeal*, 10 Week. Not. Cas. 41, we said that an ordinary bank check "is neither a legal nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee. It gives the payee no right of action against the drawee, nor any valid claim to the funds of the drawer in his hands." Of course if the bank has accepted the check in the hands of the holder, it then becomes liable to pay, and must respond in an action by the holder.

In the present case there was no acceptance of Shoemaker's check in favor of Shepp & Co., nor any acts done indicating an intention to accept it. On the contrary, payment was refused as soon as it was presented. The action was brought

by Shepp & Co. in their own name only, in August, 1874. On the trial in November, 1885, the court permitted an amendment of the record by adding "John A. Shoemaker to the use of D. Shepp & Co.," and a recovery was then had upon the theory that the cause of action was the same, and it was simply adding the name of the legal plaintiff. But it is very clear that the cause of action is not the same in any point of view, and that John A. Shoemaker could not be the legal plaintiff in an action upon the check in suit. It is a check drawn by Shoemaker payable to the order of Shepp & Co., and hence the whole right of action upon it was vested in Shepp & Co. when accepted by the bank. Shoemaker could in no circumstances bring an action upon the check as an obligation payable to himself. He could sue the bank to recover damages for dishonoring his check, or he could bring an action of *assumpsit* to recover the amount of his deposit as for money had and received; but in no event could he maintain any action upon the check itself. In 2 Parsons on Bills and Notes, 61, it is thus said: "One of the many reasons why the holder of a check, upon the refusal of the bank to pay it, having sufficient funds of the drawer therefor, cannot maintain an action against the bank, is the existence of such a right of action on the part of the drawer, who may sue the bank in tort for the wrong done, or in *assumpsit* for the breach of the implied contract to honor promptly the customer's checks. In such action nominal damages may be recovered, though no actual damage be shown." The writer further states that the jury may give the plaintiff in such an action such reasonable damages as he may have sustained from the dishonor. It follows that adding Shoemaker's name as legal plaintiff conferred no additional right of action upon Shepp & Co. in relation to the check in suit.

As to Shoemaker's right of action to recover damages for the dishonor of his check, or specifically to recover his deposit, it was of course entirely different from any right of action possessed by Shepp & Co. either on the check or for any other cause, and hence the amendment could not properly be allowed. Either of Shoemaker's rights of action was subject to the bar of the statute of limitations several years before the amendment was allowed; and therefore it was error to permit the amendment against the present defendant, who would thereby be deprived of the privilege of pleading the statute. An amendment to a declaration will not be allowed

if a new cause of action is thereby introduced, especially where the new cause is so old as to have been barred by the statute of limitations: *Wright v. Hart's Adm'r*, 44 Pa. St. 454. See also *Smith v. Smith*, 45 Id. 404, and *Tyrrill v. Lamb*, 96 Id. 464.

The assignments of error are all sustained.

Judgment reversed.

BANK IS NOT LIABLE TO PAY CHECK DRAWN THEREON BY DEPOSITOR, except by its acceptance thereof in writing: *Lynch v. First Nat. Bank*, 1 Am. St. Rep. 803; and see *National Bank v. Second Nat. Bank*, 35 Am. Rep. 236; *Nelson v. First Nat. Bank*, 95 Am. Dec. 510. Compare *Bickford v. First Nat. Bank*, 89 Id. 436, and note 442; *Chicago etc. Fire Ins. Co. v. Stanford*, 81 Id. 270.

DRAWING CHECK UPON BANK IN WHICH DRAWER HAS NO FUNDS, AND UTTERING IT, IS FRAUD: *Peterson v. Union Nat. Bank*, 91 Am. Dec. 146.

BANK CHECK, RIGHTS OF HOLDER OF: *Fogarties v. State Bank*, 78 Am. Dec. 468, and note 475; *Etna Nat. Bank v. Fourth Nat. Bank*, 7 Am. Rep. 314; *Carr v. National Security Bank*, 9 Id. 6, and note 9; *Exchange Bank v. Rice*, 9 Id. 1; *Seventh Nat. Bank v. Cook*, 13 Id. 751, and note 752; no action lies in favor of the holder against the drawee before acceptance: *Dickinson v. Coates*, 49 Id. 228; *Creveling v. Bloomsbury Nat. Bank*, 50 Id. 417; *Northumberland Bank v. McMichael*, 51 Id. 529.

RICHARD v. ALLEN.

[117 PENNSYLVANIA STATE, 199.]

PARTNERSHIP IS DISTINCT ENTITY, JOINT EFFECTS OF WHICH BELONG TO IT, and levies upon the partnership effects for the several debts of the individual members of the firm create no lien upon those effects, and are, in fact, as nugatory as though levied upon the property of a stranger.

LEVY UPON PARTNERSHIP PROPERTY UNDER EXECUTION ISSUED ON JUDGMENT AGAINST FIRM creates valid lien, though made subsequent to a levy on the same property under executions against the several members of the firm, and a sale thereon vests in the vendee the absolute ownership of the property.

ACTION in trespass *vi et armis* against the defendant Allen, as the sheriff of Warren County. It appeared that Sargent and Holt were partners, and that the property in suit belonged to the firm. The property was levied upon by a constable under executions issued against the individual members of the firm, and he advertised a sale of the same to be made September 7, 1883. The executions were in form the usual executions issued by a justice of the peace, and were levied on the property prior to September 4, 1883, on which date Holt, with Sargent's consent, executed a judgment note in the firm name

to one Copeland for seven hundred dollars, due one day after date. On September 6, 1883, judgment was entered on this note, and an execution was issued thereon, which came to the hands of the sheriff early in the evening of that day. On the morning of September 7, 1883, and before the constable's sale, the sheriff and defendant herein, by virtue of the Copeland execution, levied upon the property in dispute. On the same day the constable, by virtue of the separate executions against Sargent and against Holt, sold the property by one sale to the plaintiffs herein for fifty dollars, which was paid by them. On September 22, 1883, the sheriff by virtue of the execution in favor of Copeland, and after notice of the plaintiffs' claim of title, sold the same property to Copeland for \$250. Under the agreement of parties, the jury fixed the damages at \$373.75, as of the date of the trial. The court entered judgment for the defendant, and the plaintiffs took this writ.

Charles H. Noyes, J. H. Dorley, Wilbur, and Schnur, for the plaintiffs in error.

S. T. Neill, R. Brown, and Charles W. Stone, for the defendant in error.

By Court, GORDON, C. J. We may admit, for the purposes of this case, however doubtful the proposition, that a constable may levy an execution which he holds against an individual member of a firm on his interest in the goods and assets of the partnership; yet, even with this admission, the case in hand is by no means determined in favor of the plaintiffs in error. The constable's levies were necessarily confined to the property of the individuals against whom they were issued, *qua* individuals, and his seizure of the goods of the firm was a trespass, and legally void. A partnership is a distinct entity, and the joint effects belong to it, and not to the several partners: *Doner v. Stauffer*, 1 Penr. & W. 198; 21 Am. Dec. 370. It follows that the levies on the goods of the firm of Sargent and Holt, for the several debts of the individual members of that firm, created no lien upon those goods, and were, in fact, as nugatory as though levied upon the property of a stranger. Admittedly, had the sale been on but one of the writs, the purchaser would have taken no right in the firm assets, but only the right to compel an account with the continuing partner, and such also is the purport of the first sec-

tion of the act of the 8th of April, 1873. If, however, a levy on the interest of a single partner would have created no lien on the goods in controversy, we cannot see how a levy on the individual interests of both could alter the legal aspect of affairs, for in either case those interests were several, and the firm rights remained unaffected. The action of the constable did not deprive the partnership of the control of its own goods; the several partners still continued to be the agents of the firm, and it would not be proper to say that a sale by both or either of them, as such, would not have passed a good title to a purchaser of those goods regardless of the levies. But the sheriff's levy, made by virtue of an execution issued on a judgment against the partnership, was a lien on the goods themselves, and his sale was not the disposition of a mere right in the firm, but of the property itself, and therefore vested in his vendee the absolute ownership thereof, leaving to the constable's vendees the right to have so much of the proceeds of the sale as remained after the satisfaction of the sheriff's writ.

Had there been no levy by the sheriff on the property in question until after the sale to the plaintiffs, their case would have been different; in that event, the interest of both parties having been disposed of, there would thereafter have been no partnership in existence, hence no firm goods on which to levy: *Doner v. Stauffer, supra*. The equities of partnership creditors depend on the equities of the partners, and as long as a partner continues to have an interest in the partnership, so long do the equities of the firm creditors continue; but when the rights of all the partners have been disposed of, either by judicial or private sale, neither partnership nor partnership rights remain; and consequently they, the creditors, have no longer anything to which they can look for a satisfaction of their claims except individual responsibility. But as a levy on the right of a partner neither divests that right nor dissolves the partnership, clearly the power of the firm to dispose of its own goods is not thereby affected, and, as a consequence, the equities of firm creditors remain. That the judgment was confessed by the firm subsequently to the levies by the constable, even though the debt for which it was given was contracted after those levies, is not of material consequence; it was, nevertheless, a debt of the firm for the payment of which the goods might have been assigned, or converted into cash; and as the levies by the constable cre-

ated no lien, the property was entirely free for seizure on the execution against the partnership.

The judgment is affirmed.

RIGHT OF PARTNER TO CLAIM STATUTORY EXEMPTION FROM EXECUTION PROCESS: *McCoy v. Brennan*, 1 Am. St. Rep. 589.

RESPECTIVE LIENS AND PRIORITIES OF PARTNERSHIP AND INDIVIDUAL CREDITORS: *Happgood v. Cornwall*, 95 Am. Dec. 516, and cases collected in note 519; *White v. Parish*, 73 Id. 204; *Meily v. Wood*, 10 Am. Rep. 719; *Farley v. Moog*, 58 Id. 585.

JUDGMENT ON JOINT OBLIGATION OF ALL PARTNERS — RIGHTS OF CREDITORS: *Sawnders v. Reilly*, 59 Am. Rep. 472.

SALE BY PARTNER OF PARTNERSHIP PROPERTY IN PAYMENT OF HIS PRIVATE DEBT: See *Locke v. Lewis*, 26 Am. Rep. 631; *Cotthausen v. Judd*, 28 Id. 539; *Hurt v. Clarke*, 28 Id. 751.

PARTNER MAY PAY FIRM DEBT OUT OF HIS INDIVIDUAL PROPERTY, even at the expense of his individual creditors: *Gallagher's Appeal*, 60 Am. Rep. 350.

EVANS v. PHILLIPI.

[117 PENNSYLVANIA STATE, 226.]

GENERAL STATUTE DOES NOT, AS GENERAL RULE, REPEAL a local enactment by mere implication.

PROHIBITIONS IN PENNSYLVANIA CONSTITUTION, article 3, section 7, against local or special legislation are prospective only, merely imposing restrictions on future legislation, and do not repeal local statutes containing provisions inconsistent therewith, and in force at the time of the adoption of the constitution. Nor was it the intent and meaning of the constitution that all future legislation should be conditioned on the repeal of such local laws.

IN ORDER TO GIVE EFFICIENCY TO GENERAL LAW, legislature is not bound to repeal any and all local statutes which may be supposed to limit its application.

PENNSYLVANIA ACT OF JUNE 25, 1835, regulating collection of taxes in boroughs and townships, is to be regarded as a general law, and is not rendered local, and obnoxious to the provisions of the state constitution, article 3, section 7, and article 9, section 1, by the provision of its concluding clause, that said "act shall not apply to any taxes the collection of which is regulated by a local law." The act is therefore constitutional, and applicable to the whole state, excepting in so far as its operation is obstructed by existing local statutes, enacted prior to the new constitution of 1874.

PENNSYLVANIA ACT OF APRIL 21, 1869, providing for collection of school tax, is local statute, inasmuch as its application is restricted to such school districts within certain parts of the state as may formally accept its provisions.

PETITION for a *mandamus*. The opinion states the case.

E. K. Martin, for the plaintiff in error.

Marriott Brosius, for the defendants in error.

By Court, CLARK, J. The plaintiff in error was, on the 16th of February, 1886, elected tax collector of the township of Warwick, in Lancaster County, under the provisions of the act of the 25th of June, 1885, entitled "An act regulating the collection of taxes in the several boroughs and townships of this commonwealth"; he gave bond, which was approved, and now claims to perform the functions of that office. The defendants were the school directors of the same township for the same year, and although as such directors they levied a school tax for the year 1886, they refused to issue their warrant to the plaintiff authorizing him to collect the same, but delivered a certified duplicate of the assessment and levy to one E. R. Shirk, the treasurer of the school board, pursuant to the act of the 21st of April, 1869 (Pamph. Laws, 87), under the provisions of which the board had for several years previously, by resolution, authorized the collection of the school taxes of the said district. This proceeding by *mandamus* was thereupon instituted, to enforce compliance with the provisions of the act of 1885.

It is contended on part of the defendants that the act of the 25th of June, 1885, is in conflict with section 7, article 3, of the constitution of the commonwealth, prohibiting local and special legislation; that there were at the time of the passage of that act, and still are, local and special acts in force in various parts of the state, relating to the collection of school taxes, some of them relating especially to Warwick township; and that the concluding clause of the last section of the act of 1885, which provides that "this act shall not apply to any taxes the collection of which is regulated by a local law," necessarily gives to the statute a limited and local effect only.

But if this clause of the last section of the act of 1885 had been omitted, the force and effect of the statute would certainly have been the same. A local enactment, as a general rule, is not repealed by a general statute. "Rarely, if ever," says our brother Trunkey in *Malloy v. Commonwealth ex rel. Reinhard*, 115 Pa. St. 25, "does a case arise when it can justly be held that a general statute repeals a local statute by mere implication. The constitution of 1874 upon many subjects prohibits local or special legislation, but it changes no rules relative to the repeal by legislation of local laws existing when

it was adopted." The clause which we have quoted from the act of 1885, therefore, does not change the effect of that statute in the slightest degree; for, as we have said, the force of its provisions would have been precisely the same if it had been omitted.

The single question then is, whether or not a statute, although general in form, is to be treated as a local one simply because of the intervention of some local statute unrepealed, which prevents it from taking general effect. There is an obvious distinction between a statute which upon its face is local and special, and one which although general in form is thus obstructed in its application; in the one case, the local law cannot become general, except by a re-enactment in general form; whilst in the other, by the repeal of the local law the special subject affected by it is brought under the general law, the operation of which was previously obstructed. Thus the act of the 21st of April, 1869, could be extended to the whole state only by the re-enactment thereof as a general law, but the act of the 25th of June, 1885, upon the repeal of the local statutes obstructing its operation, would *ipso facto* take effect throughout the state. The latter is therefore in this modified sense a general law; it was passed for the whole state, and may, upon certain contingencies, become applicable and operative throughout the state without change or amendment thereof.

Prior to 1874 the legislature, in its wisdom, by special laws settled the practice of the courts in specified parts of the state; prescribed the form and requirements of affidavits of defense in actions at law; established methods of procedure in the laying out and opening of public and private roads in certain counties, etc.; these, and many other enactments of a similar character, which in the mind of the legislature were by local circumstances made necessary, are still upon our statute books, have been for many years received and acquiesced in by the profession and the people, and their repeal is neither sought for nor suspected. Can it be that no general statute can be constitutionally enacted upon any one of the various subjects embraced in this great body of private legislation, without an express repeal of every local provision which may be construed to prevent its general application? Peculiar and special provisions, too, have been made from time to time by local statutes, prior to the constitution of 1874, for the regulation or prohibition of the sale of intoxicating liquors in many

of the townships, boroughs, and counties of the commonwealth, which provisions still remain unrepealed and are admittedly in full force; can it be that the legislature has no constitutional power to frame a general law regulating the liquor traffic in the state without repealing all these local provisions? Has any one ever supposed that the general liquor law of the 12th of April, 1875, was upon this ground an invalid enactment? and is the more recent act of May 13, 1887, popularly known as the high-license law, to be set aside as unconstitutional and void upon similar grounds?

The prohibitions of the constitution in respect of special legislation are prospective only. That instrument did not repeal local statutes whose provisions were inconsistent therewith, in force at the time of its adoption: *Indiana County v. Agricultural Soc.*, 85 Pa. St. 359; it merely imposed restrictions on future legislation: *Coatsville Gas Co. v. Chester County*, 97 Id. 476. Nor was it the intent and meaning of the convention that all future legislation was conditioned upon the repeal of these local laws; no such thing can be found in the work of the convention; such has not been the understanding of the profession throughout the state.

All of these local statutes were in conformity with the constitution when enacted, and they are valid until they are repealed; and we think that the legislature, in order to give efficiency to a general law, is not bound to repeal any and all of them which may be supposed to limit its application. We are of opinion, for the reasons we have expressed, that the act of June 25, 1885, must be regarded as a general law applying to the whole state, excepting in so far as its operation is obstructed by existing local statutes passed prior to the new constitution, upon the repeal of which it will take effect throughout the state.

Nor is the act of 1885 obnoxious to clause 27, section 7, article 3, or to section 1, article 9, of the constitution. What we have already said is sufficient to show why no such conflict exists. We hold the act of 1885 to be a general law. It is a general law relating to the collection of taxes in the boroughs and townships of the state; boroughs and townships are created by general laws, and are the proper subjects of appropriate, independent, general legislation as such; and the act establishes a general system peculiarly adapted to the convenience and necessities of the municipal divisions named.

But that the act of 1869 is a local statute admits of no doubt whatever; it expressly provides that none of its provisions shall apply to the cities of Pittsburgh or Allegheny, or to the counties of Cumberland, York, Franklin, Adams, etc. About one third of the whole state is permanently excluded from the operation of the act. Nor does it apply to all of the school districts within the territory which it does embrace, but to such only of them as, by resolution of the board of school directors therein, may authorize the collection of the school tax in the manner therein provided. It is thus limited to the districts that may formally accept its provisions, and, according to the doctrine of *Scranton's City Appeal*, 113 Pa. St. 176, it must be regarded as a local law. A law is said to be local and special, however, not because of the new constitution, or of any decision under it, but because it falls within the proper definition of a local law both before and since 1874.

The act of 1885 has therefore no application to the collection of school taxes in Warwick township for the year 1886; the provisions of the act of 1885 are express to this effect; it would have had no application to that township if in the act it had not been so expressed; the taxes were collectible under the act of 1869, which was a local law unrepealed and in full force.

The judgment is affirmed.

CONSTITUTIONAL LAW, AMENDATORY ACTS AND EFFECT OF: See *People v. Gadoway*, 1 Am. St. Rep. 578; *State v. Thurston*, 1 Id. 720; *Mayor etc. v. Groshon*, 96 Am. Dec. 591; *Hope Mut. Ins. Co. v. Flynn*, 90 Id. 438; *Nichols v. Evansville St. Ry Co.*, 41 Am. Rep. 561.

AMENDMENT OF STATUTE, WHAT PROVISION CONTROLS: *Underwood v. McDuffee*, 93 Am. Dec. 194, and note 198.

GENERAL ACTS, WHAT ARE: *Fitzgerald v. New Brunswick*, 54 Am. Rep. 182; *Neuendorf v. Duryea*, 25 Id. 235, and note 239.

SPECIAL ACTS, POWER OF LEGISLATURE TO PASS: *Brodhead v. Milwaukee*, 88 Am. Dec. 711; *Ex parte Lichtenstein*, 56 Am. Rep. 713.

STATUTE NOT REPEALED BY MERE DEDUCTION: *Homer v. Commonwealth*, 51 Am. Rep. 521.

MAGOCHAN'S APPEAL.

[1817 PENNSYLVANIA STATE, 220.]

WILL.—PRECATORY PARKER ACCOMPANYING BEQUEST OF TRUNK AND CONTENTS, EFFRONT OF.—A married woman died, leaving a will, and in a codicil thereto bequeathed her trunk and its contents to her sister. The trunk was opened after the death of the testatrix, and was found to contain, among other things, a savings bank book, with a credit of \$765, and a large envelope addressed to the sister, inclosing \$1,800 in money, and a letter in the handwriting of the testatrix, also addressed to the sister, and written subsequently to the will. A part of the letter was in these words: "Now, as to what I want done with the money, for God's sake do the following: In case my child lives, save the principal for it, and use the interest as you please; see that the child gets a proper education, and do not let it want for anything you can give it. In case it dies, you will have the money, and no one will know anything about it." The child died in a few months after the death of the testatrix. *Held*, — 1. That the letter not being attested, as required by statute, nor referred to in the original will, it could not be treated as a part of the will itself, nor as a codicil thereto, and the eighteen hundred dollars in money passed to the sister, but that the money represented by the savings bank book passed to the surviving husband of the testatrix; 2. That the alleged fraud of the testatrix on her husband, in concealing from him the ownership of the money, would not affect the rights of the sister, as she was ignorant of it.

APPEAL from the decree of the orphans' court, Philadelphia County. Under the facts as substantially set out in the head-note, a distribution was ordered by the auditing judge, allowing to Mary Magoochan, sister of the testatrix, the eighteen hundred dollars, and to William Fitzpatrick, as the surviving husband of the testatrix, and heir to his deceased minor child, the balance of the account, being the savings bank fund, less costs and expenses. Both parties appealed from this decree, and the court below sustained the exceptions on the part of William Fitzpatrick, that the court erred in awarding the eighteen hundred dollars to Mary Magoochan instead of to the exceptant, with the savings bank fund, and modified the adjudication accordingly, awarding both funds to Fitzpatrick. This appeal was then taken by Mary Magoochan.

John B. Thayer, for the appellant.

William Gorman, for the appellee.

By Court, GORDON, C. J. After giving this case our very careful attention, we fail to understand why the conclusion of the auditing judge was not adopted by the court below. By

the codicil of the 2d of February, 1882, the trunk and its contents were bequeathed to Mary Magoochan, and that that bequest, without more, did vest in her a good title, not only to the trunk, but also to its contents, is not a matter of doubt or question. What, then, is there in this case to defeat her right?—the paper which she, Mary Magoochan, after the testator's death found in the trunk? But certainly that paper was neither a will in itself nor a codicil to the original will, for it was not executed in such a manner as to make it either. The learned judge, however, who delivered the opinion of the court below endeavors to support his conclusion by the following process of reasoning: "Had the testatrix in the codicil given the trunk and its contents upon the terms set forth in a paper there to be found, it would be no undue extension of the principle illustrated by *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478, to hold that the paper thus referred to was to be treated as incorporated in the codicil, under the maxim, *Verba illata inesse videntur*. But the manner of reference is immaterial; it may be either by express language or by implication. The question is one of intention only, and when among the contents given is found a carefully expressed paper defining precisely how far the legatee is to hold beneficially, no one can doubt the existence of the intention." Two errors are obvious in the above-stated argument. The first is, that any analogy whatever applicable to the case in hand can be found in the case cited, for there the reference was in the will itself to the next page, "See next page"; so that nothing was left for inference. Hence the maxim, *Verba illata inesse videntur*, was properly invoked; but it is impossible to apply any such maxim to the case under consideration, for neither was the paper referred to in the will, nor, as we have said, was it written at the time of the execution of that instrument. The second error is, that the intention of the testatrix, as such, can possibly be found in a paper which was not written for more than a month after the execution of the codicil. The effect which the court below sought to give to that paper was that of an executory trust which operated to defeat the original bequest, but without a proper execution under the statute. Such a thing as this cannot be done in this state by a married woman. And that this instrument was conveyed to the donee through the trunk rather than by the hand of the testatrix, or that of some one else, can make no difference. The fact remains that it was but a precatory paper, written

after the will, and which cannot be made to operate as a testamentary revocation of the original bequest.

As to the question of the alleged fraud of the testatrix on her husband, it can have no place in the present controversy.

The appellee knew nothing about it, hence her rights cannot be affected by it. It must affect the will itself, if anything, and that is not now called in question.

The decree of the court below is now reversed at the costs of the appellee, and it is ordered that the adjudication of the auditing judge, dated January 8, 1886, be and stand for the decree of the court.

BEQUEST OF "BANK STOCK," how construed: *Tomlinson v. Bury*, 1 Am. St. Rep. 464; of "household furniture": *Hoope's Appeal*, 100 Am. Dec. 562; of "the balance of my money": *In re Miller*, 17 Am. Rep. 422; of "my worldly goods": *Fariak v. Cook*, 47 Id. 107; of "personal property": *Benton v. Benton*, 56 Id. 512.

LEGACY — EVIDENCE OF INTENT TO VEST: *Robert's Appeal*, 98 Am. Dec. 312.

WILL — REFERENCE TO EXTRANEOUS WRITING: *Baker's Appeal*, 52 Am. Rep. 478.

WILL — PRECATORY WORDS: See *Anderson v. Hammond*, 31 Am. Rep. 612; *Williams v. Worthington*, 33 Id. 286; *Knox v. Knox*, 48 Id. 487; *Foose v. Whitmore*, 37 Id. 572.

SEGELBAUM v. ENSMINGER.

[117 PENNSYLVANIA STATE, 242.]

HUSBAND IS NOT LIABLE TO VENDOR FOR GOODS, NOT NECESSARIES, SOLD TO HIS WIFE ON HIS CREDIT, after an express notice from him to the vendor not to so sell to her without his authority, and the fact that the husband suffers the goods to remain in his house, where the vendor placed them, and does not offer to return them or notify the vendor that he may remove them, does not amount to such a ratification of the unauthorized purchase as will render him liable.

ASSUMPSIT for merchandise sold and delivered. The articles in the account sued for were carpets and house-furnishing goods, purchased by the defendant's wife without his knowledge or consent, and delivered at his house and fastened upon his floors and windows in his absence. Other facts appear in the opinion. The verdict was for the plaintiff, and judgment was entered thereon. The defendant assigned error.

L. W. Hall and Francis Jordan, for the plaintiff in error.

A. J. Herr and John E. Patterson, for the defendant in error.

By Court, GREEN, J. It was not questioned in the court below that the plaintiff had sold one or two bills of goods to the defendant's wife prior to the sale of the bill in suit, and that the defendant had refused to pay for them on the ground that they were sold to his wife without his knowledge, and contrary to his wish. It was also admitted by the plaintiff, and positively testified by the defendant, that the defendant had orally notified the plaintiff, before any part of the present bill was sold, that he, the plaintiff, must not sell any more goods to defendant's wife without the defendant's authority, and if he did the defendant would not pay for them. On November 3, 1885, a written notice by defendant to plaintiff, dated November 2, 1885, was served upon the plaintiff, in which the defendant most explicitly notified him that he would not pay for any goods or articles which the plaintiff might sell to anybody without defendant's written order. Some of the goods charged in the present bill were sold and delivered after this notice, and the plaintiff neither took away nor offered to take away any of those which had been previously delivered, if any such there were. The legal sufficiency of these notices, both oral and written, was admitted by the learned court below to relieve the defendant from liability, but he left to the jury the question whether the defendant had not subsequently ratified the purchase by his wife, and thereby become liable to pay. In this we think there was error.

It is difficult to understand how there could be ratification in the face of such notices as were given in evidence, from mere acquiescence on the part of the defendant; that is, simply permitting the goods to remain in the house; and there certainly was no evidence of express ratification. But we do not understand that there is any duty to return the goods resting upon the defendant when they were sold after express notice not to sell them, nor to notify the plaintiff, that he may remove them, in order to relieve the defendant from liability. After notice not to sell, the plaintiff sold to the wife at his peril. He could not charge the husband as his debtor for goods sold to the wife simply because he delivered the goods to the wife. A silent acquiescence by the husband in such a delivery was no acquiescence in a delivery to himself. If the seller chose to take his chance of recovering from the husband by a delivery to the wife after notice not to deliver to her, he had a right to take such a chance, but he could not improve it into a right of action against the husband simply because the hus-

band was an indifferent spectator. No duty whatever was imposed upon him by such a delivery. He was not bound to remain out of his house in order to prevent an implication of ratification arising from the user of the articles by the mere occupancy of his own home. Nor was he in any manner bound to abstain from the use of articles thus voluntarily placed in his house by the plaintiff against his own will. He was subject to no duty to the plaintiff in such circumstances, and hence cannot be held responsible as for the breach of a duty. We have examined the evidence most carefully, and can find nothing in it showing or tending to show a subsequent ratification of the wife's purchase, as his agent, by the husband; and therefore are clearly of opinion that the defendant's points should all have been affirmed under the testimony, and the jury directed to render a verdict for the defendant.

Judgment reversed.

LIABILITY OF HUSBAND FOR WIFE'S NECESSARIES: *Owningham v. Reardon*, 96 Am. Dec. 670, and cases in note 671; *Morrison v. Holt*, 80 Id. 120, and note 123; *St. John's Parish v. Bronson*, 16 Am. Rep. 17; *Kenyon v. Ferris*, 36 Id. 86.

LIABILITY OF HUSBAND FOR WIFE'S DEBTS: *Tuttle v. Hoag*, 2 Am. Rep. 481; *Allen v. McCullough*, 5 Id. 27.

HUSBAND IS NOT LIABLE AT COMMON LAW FOR FEES OF WIFE'S ATTORNEY in a suit brought by her for divorce: *Clarke v. Burke*, 56 Am. Rep. 631, and note.

BURRELL TOWNSHIP v. UNCAPHER.

[117 PENNSYLVANIA STATE, 332.]

HUSBAND IS FORMAL, AND NOT REAL, PARTY TO RECORD, in an action brought by husband and wife, in the right of the wife, to recover damages for injury sustained by her; and the defendant is not entitled to call him for cross-examination, to testify adversely to his wife's claim.

TOWNSHIP OWES DUTY TO PUBLIC TO KEEP HIGHWAY IN REASONABLY SAFE CONDITION, and is responsible in damages to one injured in consequence of its neglect to do so; and it is no defense that the negligent act of a third party contributed to the injury sustained.

IT IS COMPETENT FOR PLAINTIFF TO PROVE, IN ACTION TO RECOVER DAMAGES for injury sustained by reason of the alleged negligence of a township in failing to keep a highway in repair, that notice of the dangerous character of the highway, without limit to any particular part, was given to one of the supervisors.

WHETHER IT IS NEGLIGENCE ON PART OF TOWNSHIP TO MAINTAIN HIGHWAY at a particular place, in a condition unguarded by a barrier, is a question of pure fact for the jury to determine.

ACTION for the recovery of damages for injuries sustained through the alleged negligence of the defendant. The plaintiffs, Albert Uncapher and wife, were driving along a township road and down a hill, the grade of which was steep. Near the foot of the hill the horse became frightened at a steam-thrasher standing on the side of the road, and sprang to the opposite side and over a steep declivity, which was unguarded by barriers. The wagon was upturned, and falling on Mrs. Uncapher, caused the injuries complained of. The steam-thrasher had been left at the roadside by the owners, and the supervisors of the township were ignorant of it. On the trial, the plaintiffs were permitted to show by a witness that he notified one of the supervisors of the township of the dangerous character of the road, and told him that it should be guarded (first assignment of error). The defendant offered to prove by witnesses certain admissions and declarations of Albert Uncapher, adverse to the claim of his wife. Objected to as incompetent, and the objection sustained (second, third, and fifth assignments of error). The defendant then called Albert Uncapher, as if on cross-examination, to elicit testimony unfavorable to his wife's claim. Objected to on the ground that the husband was not a real party to the action, and the objection sustained (fourth assignment of error). The subject of further assignments of error appears in the opinion. The verdict of the jury was in favor of the plaintiffs, and judgment being entered thereon, the defendant took this writ.

David Barclay and J. P. Coulter, for the plaintiff in error.

J. M. Hunter, E. S. Golden, and H. L. Golden, for the defendants in error.

By Court, GREEN, J. The several assignments of error which relate to the admissibility of the plaintiff's husband as a witness, and of his declarations against her, may be considered together. The action was brought in the names of the husband and wife, but in right of the wife, and for the recovery of damages for an injury sustained by her. It was her action, and she was the plaintiff. The husband was merely joined in his capacity as husband, and to conform to the rules of pleading. In such circumstances, when called to testify against his wife, he cannot be regarded merely as a party to the record in order to make him competent as a party called for cross-examination. He is a formal, and not a real, party,

and as the purpose of the offer was to elicit from him testimony adverse to the claim of his wife, he must be regarded as incompetent to deliver such testimony. The same is true as to declarations made by him. They could not be given in evidence against his wife. This disposes of the second, third, fourth, and fifth assignments.

There was no error in admitting proof of notice to Wilcox, one of the supervisors, of the dangerous character of the road, and therefore the first assignment is not sustained.

The assignments numbered six to fourteen, both inclusive, relate to the subject of proximate cause, and may be considered together. In our judgment, no question involving the distinction between proximate and remote cause arises in this case. The defendant owed a duty to the plaintiff, as one of the public, to keep a reasonably safe road at the place where this accident happened. If that was not done, the omission was an act of negligence on the part of the defendant, and if, in consequence of that negligence, an injury was sustained by the plaintiff, the defendant is responsible in damages to the plaintiff. It is no answer to this to say that some one else was also guilty of another act of negligence, in consequence of which the plaintiff's injury was suffered. If both the defendant and other parties were derelict, the plaintiff might proceed against either, though of course only one actual recovery of damages for the same injury could be permitted. Between the two alleged acts of negligence in the present case there is no relation of proximity or remoteness, in the sense in which the law regards that subject, so as to postpone the liability of one, because of the liability of another, or because of the intervention of an intermediate agency. The parties who placed the engine by the roadside, and thereby caused the plaintiff's horse to frighten, might readily be held liable for their act of negligence, and it would be no answer for them to say that the unguarded roadside was the immediate cause of the injury, and therefore they should not be held liable. They violated a distinct and independent duty to the public when they placed an object along the roadside which was calculated to frighten reasonably gentle horses. For this breach of that particular duty they are responsible, if injury results in any way by a fright being communicated to a passing horse.

And so, as to the defendant, if, in consequence of a breach of duty in not properly guarding the side or edge of a public

road, an injury is sustained by a passing traveler. Whether the traveler be a foot-passenger, who falls over a roadside precipice in the dark, or rides on horseback or in a wagon, and the horse goes over in the dark, or in consequence of a sudden fright, is immaterial; the culpable breach of duty is the same in each event. Whether there be a special cause which induced an accelerated motion on the part of the horse, is of no consequence in considering the liability of those whose duty it is to keep the roadside reasonably safe. Their duty is irrespective of the duty of others, and for its breach they are responsible, whether others are responsible for another violated duty, or not. Thus in *Shearman and Redfield on Negligence*, section 401, it is said: "As a general principle, the fact that an injury to a traveler on a highway was caused by the combined effect of the unsafe condition of the road and the negligence of a third person is no defense to the party who is bound to keep the highway in repair." In section 10 of the same work, it is said: "Negligence, however, may be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time." *Id.*, section 46: "The fact that the injury was caused by the joint negligence of the defendant and a stranger is, of course, no defense; and unless the person whose fault is relied upon by the defendant as an excuse was subject to the direction of the plaintiff, his fault cannot properly be charged upon the latter." And in section 403: "The town is liable for an injury of which a defect in the highway is the proximate cause."

It is not necessary to multiply quotations or the citation of decided cases; the subject is too simple and too free of doubt. The immediately producing cause of the accident in the present case was the unguarded condition of the roadside at the place where the accident occurred. If that unguarded condition of the roadside was an act of negligence on the part of the defendant, it follows that the defendant is responsible. Whether it was negligence in the defendant to maintain the road at the place in question without some kind of protection,

was a question of pure fact, which it was the province of the jury alone to determine. Much testimony was given upon that subject on both sides, and the question was fairly and correctly left to the jury. The verdict in favor of the plaintiff decides the question against the defendant, and it is not possible for us to reverse that finding. We cannot say there was no evidence, or only a *sciintilla*, to support the verdict, and on no other principle can we interfere. On another trial, if it were granted, the question would have to be decided by the same tribunal, and in view of the extreme smallness of the verdict, consequences far more disastrous to the township might easily result.

Judgment affirmed.

ADMISSIBILITY OF TESTIMONY OF HUSBAND AND WIFE FOR OR AGAINST EACH OTHER: See *Burnett v. Burkhead*, 76 Am. Dec. 358, and cases in note 360; *Westlake v. Westlake*, 32 Am. Rep. 397.

OBLIGATION OF TOWNS TO KEEP HIGHWAYS IN GOOD REPAIR: See *Hutchinson v. Town of Concord*, 98 Am. Dec. 584, and cases collected in note 587; *Morse v. Town of Richmond*, 98 Id. 600, and note 603; *Gilman v. Laconia*, 20 Am. Rep. 175; *Town of Waltham v. Kemper*, 8 Id. 652; *White v. County of Bond*, 11 Id. 65.

NOTICE TO TOWN OF DEFECT IN HIGHWAY, SUFFICIENCY OF: *Goodnough v. Oshkosh*, 1 Am. Rep. 202; *Colley v. Inhabitants of Westbrook*, 2 Id. 30; *Rapho etc. Townships v. Moore*, 8 Id. 202; *Weisenberg v. City of Appleton*, 7 Id. 39.

SMITH v. SEATON.

[117 PENNSYLVANIA STATE, 522.]

DECREE FOR AMOUNT OF INDEBTEDNESS DUE ESTATE BY DECEASED EXECUTRIX, made on conclusion of proceedings on accounting by her executor after her death, being unreversed and unappealed from, is a final decree, having the legal effect of a decree for a debt due by her at the time of her death.

HUSBAND WHO SUCCEEDS TO WIFE'S REAL ESTATE under her will takes title thereto subject to its obligation to be applied to the payment of her debts.

DEVISEE'S TITLE, INTEREST ACQUIRED BY PURCHASER OF. — A devisee's title to land under the will of his wife was sold at sheriff's sale, under an execution for his individual debt. Subsequently, the land was sold under process from the orphans' court to enforce payment of a debt of his wife. The devisee, as executor of his wife's estate, had full notice of the proceeding in the orphans' court, and the purchaser of the devisee's title at the sheriff's sale was fully notified of such proceeding at the time of his purchase. *Held*, that such purchaser took only the interest of the devisee, namely, the interest in the surplus after payment of his wife's debt,

and that the purchaser under process from the orphans' court acquired true title to the land.

LANDS OF DECEDENT ARE NOT DISCHARGED OF HIS DEBTS because certain personal property which came into the hands of his executor was wasted.

ACTION of ejectment to recover the possession of land, brought by S. M. Seaton, administrator *de bonis non cum testamento annexo* of Gideon Grubb, deceased, against William G. Smith. The material facts appear in the head-note and opinion. The verdict was in favor of the plaintiff, and judgment being entered thereon, the defendant assigned error.

A. T. Black, for the plaintiff in error.

Newton Black, for the defendant in error.

By Court, GREEN, J. When the proceedings upon the account of Mary Erickson, executrix of her deceased husband, Gideon Grubb, reached a conclusion, they resulted in a decree of the orphans' court that she was indebted to the estate of Gideon Grubb in the sum of \$402.26. That decree, being unreversed and unappealed from, was a final decree, the legal effect of which was, that it was a decree for a debt due by her at and before the time of her death, which occurred in 1881.

It matters not that the account was filed by her own executor, her second husband, who was also the sole devisee of all her real estate, nor that the final decree was not made until in the year 1884. The delay in ascertaining the debt was due only to the successive stages of the contest, which was rendered necessary by the opposition and resistance of Mary Erickson's executor in the settlement of the account. But when all was finished, the decree was against her estate, and represented her indebtedness. When, therefore, her husband and devisee, J. A. Erickson, succeeded to her real estate by virtue of the provisions of her will, he took title thereto, subject to its obligation to be applied to the payment of her debts. In discharge of that obligation, it was subsequently sold, upon appropriate execution process issued out of the orphans' court upon the decree above mentioned.

The purchaser at that sale claims title to the land in the present contention, and his adversary is one who purchased the same land at a sheriff's sale under a judgment and execution against the same J. A. Erickson for his individual debt. The latter sale was made about a year and a half before the sale upon the decree of the orphans' court, and the question is, Which sale passed the true title to the land? The defend-

ant Smith claims that he holds the true title, because he bought at a sheriff's sale upon a judgment and execution against one who, at the time of the sale, was the sole owner of the land, and that by that sale the land was divested of all liens, as well those against Mary Erickson as those against her devisee. There are some decisions of this court which seem to support this contention; but upon examination, they will all be found to have preceded the case of *Horner and Roberts v. Hasbrouck*, 41 Pa. St. 169. This case was decided in the year 1861, and it raised substantially the same question that is presented on this record. There the estate of an heir was sold upon judgment and execution against him, and here it is the estate of a devisee, but the source of the title was the same in both cases,—a decedent whose land passed in the one case by inheritance, and in the other by devise. In both, the sale of the successor's interest was made before the sale of the decedent's estate. In the present case, the sale was made upon execution process issued out of the orphans' court, upon petition for leave to issue the same in order to obtain payment of a particular debt, to wit, the debt recovered against the estate of Mary Erickson, the deceased owner of the land. In the case cited, the sale was made upon an order of the orphans' court, granted upon a petition for an order for the payment of debts. In neither of the cases was the purchaser of the title at sheriff's sale warned by *scire facias* of the proceeding for the sale in the orphans' court. In the present case, the executor of Mary Erickson was also her devisee, and of course had full notice of the proceeding, and was a party to it, and W. G. Smith, the defendant, was expressly and fully notified of the proceedings in the orphans' court at the time of his purchase at the sheriff's sale.

In the case of *Horner v. Hasbrouck*, *supra*, as in this, it was contended that the sheriff's sale divested all liens, including the debts of the ancestor, and the whole question as to the title taken by the purchaser at that sale was fairly presented and distinctly decided. The opinion of this court was delivered by Mr. Justice Woodward, who discussed the entire subject most elaborately and exhaustively. It was held that the sheriff's sale did not divest the lien of the intestate's debts; that the estate of the heir was an interest only in the surplus left after the payment of the debts of the decedent; and that the purchaser at the sheriff's sale took no other or greater interest than that of the heir. In the course of the opinion

Judge Woodward said: "If it be said, as for some purposes it is correct to say, that the estate vests in the heir directly the ancestor dies, it must be understood to be a contingent interest, defeasible in behalf of creditors. What really vests in the heir is a title to the residuum, or in the language of our act of 1834, the surplusage of the estate. This is what the law casts on the heir. It can be nothing else consistently with our system of administration and distribution." Again he says: "And that inheritance in Pennsylvania, where the decedent dies intestate and in debt, is limited to the 'surplusage' of the estate after the debts are paid, and does really vest, for any practicable and available purpose, in nothing more than that surplusage. If this were not so, a sheriff's sale on a judgment against an only heir after descent cast would take away the estate wholly from the creditors of the ancestor, and give it to the creditors of the heir. In other words, the principle that lands of a decedent are assets for payment of debts would be eradicated from the foundations of our jurisprudence, in which it was implanted by the hand of Penn himself." In the course of the opinion all the adjudged cases were fully reviewed and considered, and a deliberate judgment was reached which has remained the undoubted law of this commonwealth to the present day. It disposes of the case now before us, and requires its affirmance.

It was argued for the plaintiff in error that because there were personal assets of Mary Erickson which came to the hands of her executor, her lands were discharged of her debts though the assets were wasted. Such is not the law, and none of the cases cited in its support sustain the proposition. The same is true of another argument that the sale of the land by the sheriff as the property of the devisee discharged the lien of the decedent's debts.

Judgment affirmed.

DEBTS OF ANCESTOR, HEIR'S LIABILITY FOR: *Wilson v. Miller*, 96 Am. Dec. 568, and cases collected in note 571; *Chambers v. Wright*, 93 Id. 311.

DEVISEE IS BOUND BY TESTATOR'S DEED EQUALLY WITH TESTATOR: *Thompson v. Thompson*, 68 Am. Dec. 638.

TITLES OF PURCHASERS UNDER JUDICIAL SALES ARE FAVORED BY COURTS: *Wilson v. Miller*, 96 Am. Dec. 568; *Cockey v. Cole*, 92 Id. 683, note 688.

PERSONAL ESTATE OF TESTATOR IS PRIMARILY CHARGEABLE WITH PAYMENT OF HIS DEBTS AND LEGACIES, and with the payment of liens on his real estate: *Cock v. Cock*, 1 Am. St. Rep. 161, and note.

SOUTH SIDE PASSENGER RAILWAY CO. v. TRICH.

[117 PENNSYLVANIA STATE, 399.]

IT IS DUTY OF COURT TO DETERMINE QUESTION OF REMOTE OR PROXIMATE CAUSE, where, in an action for negligence, the uncontradicted evidence is that the direct and immediate cause of the injury sustained was an intermediate agency, over which the defendant had no control.

ACTIONS on the case for personal injuries. Two actions were brought, one by E. M. Trich, and the other by said Trich and his wife, in her right, against the South Side Passenger Railway Company, for the recovery of damages for injuries to Mrs. Trich, occasioned by the alleged negligence of a car-driver in the defendant's service. The two causes were tried together in the court below. It appeared that Mrs. Trich was in the city of Pittsburgh, and undertook to get on a street-car of the defendant company. She was partly on the car when the driver whipped up suddenly to avoid collision with a runaway horse and carriage. The abrupt motion communicated to the car threw her off, and she was immediately struck by the runaway and severely injured. Other facts in the opinion fully present the case. The jury found verdicts for the plaintiff, and judgments were entered thereon. The defendant assigned error.

John Dalzell and George B. Gordon, for the plaintiff in error.

A. Blakeley and A. M. Blakeley, for the defendants in error.

By Court, GREEN, J. There is no manner of question as to what was the actual and immediate cause of the injury inflicted upon Mrs. Trich. It was an entirely undisputed fact that she was struck and injured by a runaway horse and buggy. All the witnesses who saw the occurrence so testify. Thus Mr. McCully, the father of Mrs. Trich, who was present with her at the time, and was examined on her behalf, after describing her attempt to get on the car, and saying that she was bounced off, adds: "A moment or two afterwards, here comes a runaway horse and buggy down the street, and the shaft, I suppose it was, caught her under the arm and dragged her to the street-crossing, and she fell away." The only other witness examined for the plaintiffs as to the facts of the occurrence, M. M. Herrington, testified: "There is a banking building there on the corner, and I saw the lady fall,—fall off,—and when she fell, to the best of my knowledge she kind of threw herself back this way, and there was a phaeton or buggy of some kind running,—a horse running down the street with a buggy,—and it struck her, and they picked her up and

carried her into Mr. Johnson's drug store." There was no contradiction of this testimony. But one other witness, Mrs. Vrailing, examined by the defendant, testified to the fact of the injury, and she also said it was done by the buggy striking the woman.

The learned court below, in the charge, said: "The evidence seems to me to preponderate very largely in favor of the fact that the immediate force which caused the injury to this woman was the runaway horse." This was an under-statement of the testimony which might have led the jury to suppose that there was an open question, with a preponderance of evidence only as to whether it was the runaway horse and buggy which inflicted the injury. The defendant had presented a point stating that it was the undisputed evidence that Mrs. Trich was injured by being struck by a runaway horse, so that the question was directly before the court. In view of that circumstance, we think the court should have specifically so charged, and not left it as an open question for the jury to determine, with a mere expression of opinion that the evidence preponderated in that direction.

Assuming, then, as we do, that it was the undisputed evidence that the injury was inflicted by the runaway horse and buggy, the only remaining question is, whether it was the duty of the court to declare whether this was the proximate cause of the injury. The point presented by the defendant asked for such an instruction, but the court refused it, saying it was a question for the jury under the evidence. In this we think there was error. In the case of *West Mahanoy v. Watson*, 112 Pa. St. 574, we reversed the court below for making just such an answer to just such a point; and upon a review of the facts of the case, we held that they did not constitute an instance of proximate cause as against the defendant, and therefore decided that the defendant's point should have been affirmed, which took the case from the jury. Mr. Justice Paxson, in delivering the opinion, said: "While it is undoubtedly true as a general proposition that the question of proximate cause is for the jury, yet it has been repeatedly held that where there are no disputed facts the court may determine it." It is sufficient to refer to *Hoag v. Lake Shore etc. R. R. Co.*, 85 Pa. St. 293; 27 Am. Rep. 653. In that case this court, following *Pennsylvania R. R. Co. v. Kerr*, 62 Pa. St. 353, 1 Am. Rep. 431, and *Pennsylvania R. R. Co. v. Hope*, 80 Pa. St. 373, 21 Am. Rep. 100. laid down the rule as to proximate cause as follows: "In

determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrong-doer as likely to flow from his act."

Applying this rule to the facts of the present case, can it be said that the injury of Mrs. Trich was the natural and probable consequence of the car-driver's negligence in urging his horses to a faster gait? We think not. There was not a particle of evidence to show that runaway horses and vehicles were frequently, or indeed ever, seen upon Smithfield Street, where this accident occurred. There was no evidence upon that subject. It was certainly not a natural consequence of a person being upon that street that he would be struck by a runaway horse. Nor is there the slightest reason for saying that it would be a probable consequence. The utmost that can be said would be, that such a consequence might possibly happen. But things or results which are only possible cannot be spoken of as either probable or natural. For the latter are those things or events which are likely to happen, and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared. We are of opinion that, in the facts of the present case, the direct and immediately producing cause of Mrs. Trich's injury was her being struck by a runaway horse and buggy, over which the defendant company had no sort of control, and for which it is not responsible; and therefore we conclude that the proximate cause of the injury, in the legal sense, was the collision of the horse and buggy with the person of Mrs. Trich, and not the negligence of the defendant.

The case of *West Mahanoy v. Watson* came again into this court, and is reported in 116 Pa. St. 344 [*ante*, p. 604]. The present chief justice, in delivering the opinion of the court, said: "These facts narrow the case down to the single question, Was the upset at the ash-heap on the township road the immediate or direct cause of the loss of the horses? As we have seen,

the facts themselves answer this interrogatory in the negative, and necessarily determine the case in favor of the plaintiff in error. In the case of *Hoag v. Michigan Southern etc. R. R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653, Mr. Justice Trunkey, then president of the common pleas of Venango County, in his charge to the jury on the trial of the above-named cause, said: 'The immediate and not the remote cause is to be considered. This maxim is not to be controlled by time or distance, but by the succession of events. The question is, Did the cause alleged produce its effect without another cause intervening? or was it to operate through or by means of this intervening cause?' As the principle here stated was adopted by the affirmance of this court following *Pennsylvania R. R. Co. v. Kerr*, 62 Pa. St. 353, 1 Am. Rep. 431, we may regard it as the settled law of this state."

In the facts of the present case, we find a perfect illustration of this principle. Mrs. Trich herself testified that when she was "bounced" from the car, she fell on her feet. Immediately after, she was struck by the runaway horse and buggy, and from them received her injury. The jolting from the car simply landed her on her feet, and inflicted no injury. But another agency intervened which was entirely independent of any act of the defendant, and that agency alone inflicted the injury in question. Following the doctrine of the last case cited, we feel clearly obliged to hold that the plaintiff's injury was inflicted by the special intervening agency stated, and therefore the defendant is not liable. In all the cases cited, as in several others not referred to, this court finally determined them upon its own view of the facts, without regard to the verdicts of the juries. The defendant's point should have been affirmed.

Judgment reversed.

PROXIMATE CAUSE, WHAT NEGLIGENCE CONSTITUTES: *Isbell v. New York etc. R. R. Co.*, 71 Am. Dec. 78; *Webb v. Rome etc. R. R. Co.*, 10 Am. Rep. 389; *Turner v. Buchanan*, 42 Id. 485; *Lee v. Union R. R. Co.*, 34 Id. 668; *Henry v. Railroad Co.*, 43 Id. 762; *City of Galveston v. Poenainsky*, 50 Id. 517; *Campbell v. Stillwater*, 50 Id. 567, and note 569; *Railway Co. v. Stahy*, 52 Id. 74; *Flagg v. Hudson*, 56 Id. 674; *Seale v. Railroad Co.*, 57 Id. 602.

QUESTION OF NEGLIGENCE IS ONE OF LAW, WHEN FACTS ARE UNCONTROVERTED: *Gonzales v. New York etc. R. R. Co.*, 98 Am. Dec. 53, and note 61; and see *Lewis v. Railroad Co.*, 52 Am. Rep. 790.

RULE THAT PLAINTIFF CANNOT RECOVER if his own wrong conduced to his injury is confined to cases where his wrong or negligence has proximately contributed to the result: *Kline v. Central Pacific R. R. Co.*, 99 Am. Dec. 282, and note 289.

PRATT'S APPEAL.

[117 PENNSYLVANIA STATE, 401.]

IN PROCEEDING TO ENJOIN USE OF TRADE-MARK, QUESTION IS, whether defendant's symbol or device is calculated to deceive and mislead the public; and if so, it is immaterial that he had no intention or thought of fraud, so far as the law of the case is concerned.

MERE NAME OF PERSON OR PLACE CANNOT, AS GENERAL RULE, BE APPROPRIATED as a trade-mark, nor can any word, which is generally used to designate the name or quality of an article, be so appropriated.

USE OF DEFENDANT'S NAME ON SPURIOUS TRADE-MARK IS NO DEFENSE to a bill for an injunction to restrain the piracy.

ONE WHO ADOPTS DEVICE OR SYMBOL TO MARK HIS GOODS ACQUIRES a property in such device or symbol of which he cannot be deprived by any other person whatever.

BUSINESS AND ITS ACCOMPANYING TRADE-MARK MAY PASS FROM PARENT TO HIS CHILDREN without administration; and the business may be divided among the children, and each will have the right to the trade-mark to the exclusion of all the world except his co-heirs.

TRADE-MARK, INJUNCTION TO RESTRAIN INFRINGEMENT OF. — The plaintiffs were engaged in the dairy business, and made butter of superior quality and established reputation. At rare intervals they purchased milk and cream from others to enable them to supply their customers with butter, and in some instances purchased small amounts of butter for the same purpose. *Held*, that this fact was not such a fraud upon the public as would lead a court of equity to refuse an injunction restraining an infringement of the plaintiffs' trade-mark.

BILL in equity to restrain the defendant from using the plaintiffs' trade-mark. The facts appear in the opinion.

John M. Broomall and Isaac Johnson, for the appellant.

George E. Darlington and A. Lewis Smith, for the appellees.

By Court, PAXSON, J. This bill was filed in the court below to restrain the defendant from using plaintiffs' trade-mark. The plaintiffs are farmers, residing in Delaware County, and engaged in the dairy business. They make what is now widely known in many portions of this country as the "Darlington butter," an article of such superior quality as to command a ready sale and a high price. The plaintiffs and their immediate ancestors have been engaged in making this butter for a period of about three quarters of a century. The business was commenced by Jesse Darlington, the grandfather of the plaintiffs, about the year 1810, who continued it to about 1831, when he relinquished it in favor of his son, Jared Darlington, residing on the same farm. Jared continued it until his death in 1862. Since that time it has been conducted by three of his sons, and the widow of a deceased son, the plain-

tiffs in this bill. During all this period the butter has been stamped with a peculiar print, claimed as a trade-mark, the distinguishing features of which are a cornucopia and the name "Darlington." During the lifetime of the elder Darlings (Jesse and Jared) the name "J. Darlington" was imprinted on the margin below the lower or smaller end of the horn. Since the death of Jared, and the use of the trade-mark by an amicable understanding between his children, each of the plaintiffs has stamped his butter with the cornucopia, and his own or individual name, the name of "Darlington" being common to it all. So extensive has the business become that their aggregate production of butter amounts to over two thousand pounds weekly.

The defendant owns a farm in the same neighborhood, and also makes butter for the market. He has been so engaged since 1873. For some years he used as a print for his butter a stamp which had on it the name of "Pratt," and the words "Cumberland Dairy, 333," which appears to be the print his father, Thomas Pratt, had used before him. Some time after the death of Jared Darlington, the defendant changed his print, using the cornucopia, and stamping the butter with his name.

The court below granted the injunction prayed for in the bill, from which decree the defendant appealed and removed the record into this court for review.

If the defendant's print is an imitation of that of the plaintiffs, if it is calculated to deceive and mislead, the motive of the defendant in adopting it is not material so far as the law of the case is concerned, however much it might affect it in a moral point of view. The protection which equity extends in such cases is for the benefit of the manufacturer, and to secure to him the fruits of his reputation, skill, and industry. The protection of the public is another consideration, and one that does not usually enter into such cases. A man may be adjudged a wrong-doer, and yet have no intention or thought of fraud; as where two traders take the same symbol, each in ignorance that the other uses it, or with an honest doubt as to who has the legal right therein: *Brown on Trade-marks*, sec. 449. The question therefore is, whether the defendant's label or mark is calculated to deceive the public, and to lead them to suppose they are purchasing an article manufactured by the complainants instead of the defendant.

The master finds as a fact that defendant's print is calcu-

lated to mislead the public. In this we cannot say that he committed an error. It is true, the two prints when placed side by side present several points of dissimilarity; and the fact that defendant's butter is stamped with his own name was pressed as a reason why there was no danger of deception. The defendant denies any intention of deception, and in this he is sustained by the master. But the thought naturally suggests itself, Why did the defendant abandon the trade-mark or print which he had used for years, and his father before him, and adopt the symbol which had been in use in the Darlington family for over seventy years, unless at some time or in some way he hoped to benefit by the wide reputation which the Darlington butter had obtained?

The master has found, and we think correctly, that the distinguishing feature of the plaintiffs' trade-mark is the cornucopia. It is a symbol, a device, which the plaintiffs have adopted to mark their butter. Had they used merely the name "Darlington," any other person of that name could have stamped his butter as Darlington's butter. The mere name of a person or of a place cannot, as a general rule, be appropriated as a trade-mark, at least not in the sense of preventing another person having the same name, or residing in the same place, from using it. Nor can any word which is generally used to designate the name or quality of an article be so appropriated. This is familiar law, and hardly needs the citation of authority. It is sufficient to refer to *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467; 15 Am. Rep. 599; *Brown on Trade-marks*, secs. 167, 177, 182, 195, 243. But when the plaintiffs adopted the cornucopia as a device or symbol to mark their butter, they acquired a property in such device or symbol which they cannot be deprived of by any other Darlington, or any other person whatever. This device when applied to a pound of butter means "Darlington butter," and is so understood, and in this way indicates origin and ownership. The name of the particular plaintiff stamped upon each pound, in addition to the symbol, indicates which particular Darlington made that pound of butter.

The use of the defendant's name on a spurious trade-mark is no defense to a bill for an injunction to prevent a piracy: *Dixon Crucible Co. v. Guggenheim*, 7 Phila. 416; *Gillott v. Esterbrook*, 47 Barb. 455; *Boardman v. Meriden Britannia Co.*, 36 Conn. 207. It is a circumstance, and nothing more, to be con-

sidered in connection with the whole appearance of the trade-mark, to determine whether it is an imitation.

It was urged, however, that, conceding this symbol to have been a valid trade-mark in the hands of Jesse Darlington, or even of Jared, upon the death of the latter it ceased to be the property of any one, and that its use by several members of the family of the latter destroyed its distinctive features, and left it open to the public to appropriate it.

We cannot assent to this proposition. We do not think it necessary, however, to enter upon an elaborate discussion as to the modes by which a trade-mark may be transferred, nor how far it is descendible upon the death of the person who originally appropriated it. We do not see that the exigencies of this case require it. When Jared Darlington died, his children appropriated this device or symbol to their own use. They did so before any one else appropriated or attempted to appropriate it. By an amicable arrangement between themselves, each one was allowed to use the cornucopia as a device, each pound of butter being stamped in addition with the name of its manufacturer. It was all Darlington butter. There was no fraud upon the public nor any one else in this. It was not sold as the butter of either Jesse or Jared Darlington. They were both deceased, and it is fair to presume their customers knew it. The business was continued by their descendants bearing the name of Darlington, in the same place and with the same skill. There is no pretense that the butter now made by the present members of the family is not equal in every respect to the best made by their ancestors. Under such circumstances, their trade-mark cannot be interfered with by a stranger who has never acquired a right in any way to use it. There is no analogy between this case and the Howqua Tea case: *Pidding v. How*, 8 Sim. 477; the Night Blooming Cereus case: *Phalon v. Wright*, 5 Phila. 467; the Balm of a Thousand Flowers case: *Fetridge v. Wells*, 13 How. Pr. 385; and other instances in which courts of equity have refused to enjoin because of the fraud practiced upon the public. It is not the province of a chancellor to aid any one in fraud and imposition. The fact that the plaintiffs at rare intervals purchased milk or cream from others to enable them to supply their customers with butter, and in yet rarer instances purchased small amounts of butter for the same purpose, is not of sufficient importance to require discussion. It was not done for the purpose of imposing upon or deceiving their

customers. The latter are not complaining, and the defendant has no standing to do so. There was no fraud in it. If the plaintiffs were to purchase all their cream from other farmers and manufacture it into butter, the defendant would have no right to pirate their trade-mark.

While the cases are not uniform upon the subject, there is ample and recent authority for saying not only that a business and its accompanying trade-mark may pass from a parent to his children without administration, but that the business may be divided among the children, and each will have the right to the trade-mark to the exclusion of all the world except his co-heirs. In *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523, it was said by Lord Cranworth: "The right to a trade-mark may, in general, treating it as property or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser. Difficulties, however, may arise where the trade-mark consists merely of the name of the manufacturer. When he dies, those who succeed him (grandchildren or married daughters, for instance), though they may not bear the same name, yet ordinarily continue to use the original name as a trade-mark, and they would be protected against any infringement of the exclusive right to that mark. They would be so protected, because according to the usages of trade they would be understood as meaning no more by the use of their grandfather's or father's name than that they were carrying on the manufacture formerly carried on by him." In *Kidd v. Johnson*, 100 U. S. 617, it was said by Mr. Justice Field: "When a trade-mark is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it." To the same point are *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217; *Southron v. Reynolds*, 12 L. T., N. S., 75; *Dent v. Turpin*, 9 Week. Rep. 548; see also *Dixon Crucible Co. v. Guggenheim*, *supra*.

We have not before us any question arising between the children of Jared Darlington as to their respective rights to use this trade-mark as against each other; on the contrary, the contention is between them and a stranger who shows no right whatever. We find no error in this record.

The decree is affirmed, and the appeal dismissed at the cost of the appellant.

TRADE-MARK, WHEN RIGHT TO EXCLUSIVE USE OF IS FORFEITED: *Parlett v. Guggenheimer*, 1 Am. St. Rep. 416; when courts will not protect use of: *Laird v. Wilder*, 15 Am. Rep. 707; *Popham v. Cole*, 23 Id. 22, and note 27; *Caswell v. Davis*, 17 Id. 223; *Taylor v. Gillies*, 17 Id. 333; *Ball v. Siegel*, 56 Id. 766; *McClintney v. Garnhart*, 100 Am. Dec. 397.

TRADE-MARK, WHAT IT MAY CONSIST OF: *Foley v. Fassett*, 100 Am. Dec. 275, and note 281; *Candes v. Deere*, 5 Am. Rep. 125; *Dunbar v. Glenn*, 24 Id. 395; *Gillott v. Esterbrook*, 8 Id. 553; *Glendon Iron Co. v. Uhler*, 15 Id. 599; *Marshall v. Pinkham*, 38 Id. 756; *Royal Baking Powder Co. v. Sherrell*, 45 Id. 229; *Larrabee v. Lewis*, 45 Id. 735; *Rogers v. Rogers*, 55 Id. 78.

TRADE-MARK, WHEN COURTS WILL RESTRAIN INFRINGEMENT OF: *Palmer v. Harris*, 109 Am. Dec. 557, and note 560; *Alexander v. Morse*, 51 Am. Rep. 209; *Hook v. Chaney*, 58 Id. 149; *Pierce v. Guitard*, 58 Id. 1.

MCDADE v. CHESTER CITY.

[117 PENNSYLVANIA STATE, 414.]

MUNICIPAL CORPORATION IS NOT LIABLE TO ACTION FOR DAMAGES, EITHER FOR NON-EXERCISE OF, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character.

WHEN POWER IS GIVEN TO DO ACT WHICH CONCERNS PUBLIC INTEREST, ITS EXERCISE, when applied to a public officer or body, may be insisted upon as a duty, although the phraseology of the statute be permissive only; but when the power is lodged with persons exercising, or to exercise, legislative or judicial functions, and the subject-matter of the statute and its phraseology concur in showing that the authority is essentially discretionary, no absolute duty is imposed.

MUNICIPAL CORPORATION — LIABILITY FOR FAILURE TO REMOVE NUISANCE. —

The corporate authorities of a city were authorized by its charter to cause the removal of any nuisance, and to limit or prohibit altogether the manufacture, sale, or exposure of fire-works within the corporate limits, and to provide such safeguards for the security of the citizens as in their judgment might be necessary. A fire occurred in a manufactory of fire-works, operated in the city on private premises, and the plaintiff was injured while assisting to extinguish the fire. In an action against the city for the recovery of damages, *held*, that the authority given to the city was essentially discretionary, not giving rise to an absolute duty, and that the plaintiff was not entitled to recover.

ERROR to the court of common pleas of Delaware County to review a judgment for the defendant on demurrer. The facts appear in the opinion.

John V. Rice and Gamett Pendleton, for the plaintiff in error.

Orlando Harvey, for the defendant in error.

By Court, CLARK, J. This action on the case was brought against the city of Chester to recover damages for a personal injury received by the plaintiff, Cornelius V. McDade, from the explosion of a manufactory of fire-works, operated in that city by Professor Jackson. The manufactory was the individual property of the operator, and was located upon his ground. On the 17th of February, 1882, the manufactory caught fire, and whilst the plaintiff was assisting in the extinguishment of the flames, an explosion of the fire-works occurred, from which the injury complained of was received.

The plaintiff's contention is, that it was the duty of the city to have suppressed this manufactory of fire-works; that this duty was neglected; that in consequence of the neglect, the plaintiff received his injuries; and that the city is liable in damages for the same. The question is raised upon a demurrer to the plaintiff's declaration. The defendant sets forth, as cause of demurrer, that there was no absolute duty or obligation resting upon the city to prohibit the manufacture of fire-works, or limit the quantity of inflammable materials, which might be kept in store by Jackson, or to abate the manufacture or suppress the sale of fire-works as a common nuisance.

The city of Chester was incorporated under a special act of assembly of the 14th of February, 1866 (Pamph. Laws, 30); with the same powers, privileges, etc., as were granted to the city of Harrisburg, under an act approved the 19th of March, 1860 (Pamph. Laws, 175). By the eighth section of the act of 1860, thus extended, the mayor and councils of the city of Chester were empowered "to make, ordain, constitute, and establish all such by-laws, ordinances, resolutions, and regulations as they may deem necessary to preserve the peace and promote the good order, government, and welfare of the said city, and the prosperity and happiness of the inhabitants thereof." By the act of April 2, 1867 (Pamph. Laws, 677), the mayor and councils of the said city, in addition to all the powers theretofore granted, were, *inter alia*, further empowered, —

"11. To prohibit and remove any obstructions in the highways, and any nuisance or offensive matter, whether in the highways, or on public or private ground.

"12. To prohibit within the said city the carrying on of any manufacture, art, trade, or business which may be noxious or offensive to the inhabitants thereof, the manufacture, sale, or

exposure of fire-works, or other inflammable or dangerous articles, and to limit and prescribe the quantities that may be kept in one place of gunpowder, fire-works, turpentine, and other inflammable articles, and to preserve such other safeguards as may be necessary."

And for the purposes aforesaid, the mayor and councils had full power to enter upon the lands or premises of any person or persons by themselves and their duly appointed officers and agents. By the fifth section of the act of March 22, 1869 (Pamph. Laws, 484), it was provided that the said mayor or council shall have power to cause the removal, by such means as to them shall seem best, of any nuisance.

It is contended by the plaintiff in error that this manufactory of fire-works was *per se* a public nuisance, of which the mayor and councils, under the city charter, and the several statutes referred to, were bound to take notice; that the duty to suppress it was legal and absolute; and the city, failing to do so, is liable for all injuries which are the approximate results of its continuance. Upon a careful examination of the whole case, we are unable to adopt this view of the case.

When a legal duty has been imposed by statute upon a municipal corporation, it is undoubtedly liable for injuries resulting from the neglect of that duty; in such case, it stands on the same footing in respect to negligence as a purely private corporation or an individual: *Erie City v. Schwingle*, 22 Pa. St. 388; 60 Am. Dec. 387; Shearman and Redfield on Negligence, 167; Dillon on Municipal Corporations, secs. 961-965. But the duty imposed must be absolute or imperative, not such as, under a grant of authority, is intrusted to the judgment and discretion of the municipal authorities; for it is a well-settled doctrine that a municipal corporation is not liable to an action for damages, either for the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character: Dillon on Municipal Corporations, sec. 949. It is certainly unnecessary to cite further authorities in support of a principle so well settled; indeed, we do not understand the general doctrine to be denied; but it is argued that it is inapplicable to the case now in hand.

It is likewise true that when a power is given to do an act which concerns the public interest, the execution of the power, when applied to a public officer or body, may be insisted upon as a duty, although the phraseology of the statute be permis-

sive only; especially is this so when there is nothing in the act save the permissive form of expression to denote that the legislature designed to lodge a discretionary power merely. But where the power is lodged with persons exercising, or to exercise, legislative or judicial functions, and the subject-matter of the statute and its phraseology concur in showing that the authority is essentially discretionary, no absolute duty is imposed. The true rule is very correctly stated in our own case of *Carr v. Northern Liberties*, 35 Pa. St. 330, 78 Am. Dec. 342, as follows: "Where any person has the right to demand the exercise of a public function, and there is an officer, or set of officers, authorized to exercise that function, there the right and the authority give rise to the duty; but where the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed."

To the same effect is the very recent case of *Lehigh Co. v. Hoffer*, 116 Pa. St. 119 [*ante*, p. 587], where it was held that an act of assembly, which authorized the county commissioners to erect a foot-walk along the side of a county bridge for the public use and benefit, was a discretionary power only, and the county was not liable for the non-exercise of the same. Where the subject-matter is intrusted for legislative or judicial action, the duty, of course, is essentially discretionary; no person has the right to demand the exercise of this public function, and there is, therefore, nothing which can give rise to an absolute duty.

The language of the several statutes above referred to is plainly permissive only. By the act of 1860, the officers of the corporation are vested with full "power and authority" to make, ordain, etc., such ordinances, regulations, etc., as they may deem necessary, etc. By the act of 1867, it is declared that the mayor and councils, etc., in addition to all powers heretofore granted, etc., "shall have the following powers," etc.; and by section 5, act of March 22, 1869, it is provided that they "shall have power" to cause the removal of any nuisance "by such means as to them shall seem best."

If these provisions are held to be imperative, it must be upon some rule of construction which will impart to the words an interpretation beyond their usual signification. Moreover, the powers granted in the act of 1867 are over such matters as constitute appropriate subjects of legislation or judicial action in the government of a municipality. The laying out and

opening of streets, common sewers, public squares, and sidewalks; the regulation of party-walls, and of weights and measures; the prohibition of horses, cattle, or swine from running at large, etc., — are embraced in the same section, and the regulation and control of all these respective matters are committed to the mayor and councils, in the same permissive form of words. It is plain, we think, that all the various matters mentioned in the eighth section, including the prohibition and abatement of nuisances, were given into the control of municipalities as proper subjects for legislation in the government of the city; and as such action necessarily involves the exercise of discretion, no absolute duty was imposed or intended to be imposed by the legislature. The whole question is one of legislative intention, and we find nothing in these several statutes to indicate that the legislature meant more than is plainly expressed.

There can be no doubt whatever that the municipal authorities of the city of Chester had full power to act in the premises. They had undoubted authority either to limit or to prohibit altogether the manufacture, sale, or exposure of fire-works within the corporate limits, and to provide such safeguards for the security of its citizens as in their judgment might be necessary. This subject-matter had been especially intrusted to their judgment and discretion in the charter and acts of assembly mentioned; but certainly no person had any right to demand the exercise of this power in any particular way or to any greater extent than the mayor and councils, in good faith and in the exercise of their discretion, might see proper to provide.

Many of the cases cited by the plaintiff in error refer to the non-exercise of power to repair streets and to remove nuisances therefrom. It has never been doubted that municipal corporations are responsible for the results of the negligence of their officers in the repair of their highways. The repair of the highways is a mandatory and absolute duty; it is expressly imposed by statute on the road supervisors of the respective townships: *Rapho v. Moore*, 68 Pa. St. 404; 8 Am. Rep. 202; and where a municipal corporation, by the acceptance of a charter investing it with the care of the highways within its borders, withdraws the charge from this general peremptory provision, it, by implication, undertakes the duty from which it has absolved the supervisors. Where, under such circumstances, special powers are conferred upon a cor-

poration to open, grade, improve, and exclusively control and regulate the public streets within its limits, and the means are provided by taxation for this purpose, although the duty to repair is not enjoined by statute or an action expressly given, both the duty and the liability will be deduced therefrom: *Dillon on Municipal Corporations*, sec. 789.

We are clearly of opinion that the learned court was right in entering judgment for the defendant, and therefore the judgment is affirmed.

TOWN IS NOT LIABLE FOR NUISANCE WHEN ACTS COMPLAINED OF ARE NOT WITHIN SCOPE OF ITS CORPORATE POWERS, nor performed by its officers in the execution of any corporate duty imposed upon them: *Seels v. Inhabitants etc.*, 1 Am. St. Rep. 314, and note; and see *Hilsdorf v. St. Louis*, 100 Am. Dec. 352, and note 358; *City of Fort Worth v. Crawford*, 53 Am. Rep. 753; *Kiley v. City of Kansas*, 56 Id. 443, and note 446; *Burrill v. Augusta*, 57 Id. 788.

TOWN, LIABILITY OF FOR MAINTAINING NUISANCE: See *Town of Suffolk v. Parker*, 52 Am. Rep. 640, and cases collected in note 643.

IMPERIAL FIRE INS. CO. v. DUNHAM.

[117 PENNSYLVANIA STATE, 400.]

PURCHASER OF LAND UNDER ARTICLES OF AGREEMENT, THOUGH PURCHASE-MONEY IS UNPAID, HAS INSURABLE INTEREST in buildings on the land, within the contemplation of a policy containing a condition that it should be void "if the interest of the assured be other than the entire, unconditional, and sole ownership, or if the property insured be a building standing on ground not owned by the assured in fee-simple." In respect to the insurance, such purchaser is to be regarded as the entire, unconditional, and sole owner.

WHERE INSURANCE COMPANY IS, FROM ANY CAUSE, DISCHARGED FROM LIABILITY, RESPONSIBILITY FOR LOSS WILL NOT REATTACH by waiver without proof of authority in the party whose act of waiver is relied upon, or without a new consideration to sustain it; but where the act of the agent executing the waiver is contemplated in the contract, and the power is expressly conferred upon him in writing, no new consideration is required.

INSURANCE—WAIVER OF FORFEITURE OF POLICY.—A policy of fire insurance contained a provision that it should be void, if assigned before a loss, and without permission of the company therefor indorsed on the policy, and further provided that "no agent has power to waive any condition of this contract." The policy was assigned before a loss, without the assent of the company, but the company's agent, having power to "renew and consent to the transfer of policies," subsequently approved the assignment, and the company silently acquiesced in the act of the agent. *Held*, that the forfeiture of the policy was thereby waived, and the operative force of the policy revived in the hands of the assignee.

ID. — ACTION ON POLICY — PAROL EVIDENCE. — In an action by the assignee of the policy against the insurance company, it appeared that the assured assigned and transferred by articles in writing all his interest in the insured property, and assigned the policy to the vendee: *held*, that it was competent for the plaintiff to show by parol what the contract was with reference to the existing insurance at the time of the transfer of the property to him, in order to explain the subsequent act of the parties in making the assignment of the policy, to exhibit their good faith in so doing, and to fix the admitted consideration therefor; especially as it appeared that the parol understanding was soon afterwards communicated to the company's agent, and met with his approval, which he subsequently entered in due form on the policy.

APPLICATION FOR INSURANCE CONSTITUTES NO PART OF POLICY OR OF CONTRACT between the parties, and is therefore not receivable in evidence, unless a copy is attached to the policy as required by statute, Pennsylvania act of May 11, 1831.

ASSUMPSIT to recover on a policy of insurance. The action was brought by Henry Dunham, to the use of F. T. Page, against the Imperial Fire Insurance Company of London. It appeared on the trial that one Seeley, on April 21, 1880, took a contract for a large tract of land from Smull's Sons, for a valuable consideration, but paid no part of the purchase-money. On November 11, 1881, Smull's Sons sold and conveyed the land to Page, and also assigned to him their contract with Seeley. Seeley had gone into possession and erected a saw-mill on the land, and on February 8, 1883, obtained from the agent of the defendant the policy upon which this action is brought, upon the mill, machinery, etc. Said agent was invested "with full power to receive proposals for insurance," etc., "to receive moneys, and to countersign, issue, renew, and consent to the transfer of policies of insurance," etc. Seeley set out, among other things, in his application for insurance, that the buildings and machinery were both owned in fee-simple by him, and that no other person was interested in the property, or any part of it; and the facts and circumstances set out in the application were made a condition of insurance, and a warranty on the part of the assured. The policy issued to Seeley contained the following conditions: "1. The assured hereby covenants and agrees that any application, survey, plan, statement, or description connected with procuring this insurance, or referred to in this policy, is true, and shall be considered a part of this contract, and a warranty by the assured; and that any misstatement of the condition, situation, or occupancy of the property insured, or the building or premises containing the same, or any concealment or omission to make

known every fact material to the risk, or any over-valuation, or any misrepresentation whatever, either verbal or in writing, shall render this policy void. 2. This policy shall be void and of no effect if, without notice to this company, and permission therefor in writing indorsed thereon, the assured shall now have, or hereafter make or procure, any other insurance, whether valid or not, on the property hereby insured, or any part thereof, or if this policy be assigned before a loss, or if the interest of the assured be other than the entire, unconditional, and sole ownership, or if the property insured be a building standing on ground not owned by the assured in fee-simple, or if any change take place in the title, interest, location, or possession. . . .

7. No agent has power to waive any condition of this contract."

On March 29, 1883, Seeley assigned his interest in the land under his contract from Smull's sons to Page, and on the same day Page sold this property to Dunham, Dunham agreeing in the contract with Page to keep the property insured, and in case of loss by fire the insurance to be paid to Page. On April 14, 1883, the agent of the defendant company wrote on the face of the policy: "In case of loss, this policy payable to F. T. Page, as his interest may appear"; and on April 17, 1883, indorsed on the policy as follows: "Athens, April 17, 1883, for value received, I hereby transfer, assign, and set over to Henry Dunham, and his executors or administrators, all my title and interest in this policy, and all advantages to be derived therefrom. Witness my hand this fourteenth day of April, 1883. [Signed] O. A. Seeley. Assented to this seventeenth day of April, 1883. [Signed] D. A. Clarke, agent." The agent then forwarded to his company a report of what he had done, and no objection was made to it by the company. On May 19, 1883, the insured property was destroyed by fire, and thereafter Dunham assigned his interest in the policy to Page, for whose use the action was brought. At the trial the plaintiff was permitted to show by parol that there was an agreement for the transfer of the policy at the time the contract of March 29, 1883, was made, and that it was communicated to the company's agent. The application of Mr. Seeley for insurance was excluded from evidence on the ground that, not having been attached to the policy, it formed no part of the contract between the parties, and was therefore immaterial and irrelevant. Other facts appear in the opinion. The verdict and judgment were for the plaintiff, and the defendant assigned error.

Rodney A. Mercur and Erastus P. Hart, for the plaintiff in error.

H. F. Maynard, for the defendant in error.

By Court, CLARK, J. It was certainly competent for the plaintiff to show by parol what the contract was, with reference to the existing insurance, at the time of the transaction of March 29, 1883; not, perhaps, to add to or modify the force of the written contract then made, as between the parties, but to explain the subsequent act of the parties in making the assignment of the policy, to exhibit their good faith in so doing, and to fix the admitted consideration upon which this was done; especially as it appears that the parol understanding was shortly afterwards communicated to Clarke, the agent of the company, and met with his approval, which approval he subsequently entered in due form upon the policy. If the parties to the written contract saw fit to allow a portion of their agreement to rest in parol, and subsequently executed the assignment in pursuance of it, in good faith, certainly the company, having approved of it, cannot complain.

It may be conceded that if any change should take place "in the title, interest, or location, or in the possession of the property," or if an assignment of the policy were made without notice to the company, and permission therefor in writing, the policy would have become forfeited; but it must also be conceded that the company, before, at the time of, or even after, the transfer, had the undoubted right to ratify or consent to it, and thus to continue the policy in the hands of the transferee, who had become the owner of the property under the agreement of March 29, 1883. It would certainly be in conflict with the plainest provisions of the law, as well as with the general usage and practice of insurance, to hold that the parties, being *sui juris*, might not, by consent, in conformity with the provisions of the contract itself, renew and continue its obligations, although, according to its terms, without that consent it was null and void.

If it was competent for the company to consent to the transfer, it was competent for the duly authorized officers or agents of the company to give that consent. Corporations, of necessity, act through the agency of persons authorized to act for them, and the act of the agent is in all respects to be regarded as the act of the corporation itself. David A. Clarke was at the time admittedly the agent of the company; his commis-

sion was in writing; he was the "duly constituted agent" of the company, "with full power to receive proposals for insurance against loss and damage by fire in Orcutt Creek and vicinity, to receive moneys, and to countersign, issue, renew, and consent to the transfer of policies of insurance, subject to the rules and regulations of said company, and such instructions as may from time to time be given," etc. Now, there was no rule or regulation of the company, nor were there any instructions to Clarke exhibited in evidence, restricting his authority to the approval of transfers made before or at the time of the conveyance of the property. The authority is conferred in the most general terms. Clarke, as the agent of the company, in the absence of such restriction, possessed the full power of the company in the several matters committed to his charge; he represented the company, and what he did within the scope of his appointment the company did. It was not required of the plaintiff to prove acts of ratification; the company was bound to know that what it directed to be done might or would be done, and without proof of ratification, it must be treated as having itself done what was done under its express authority. Where the property covered by the policy is transferred, and the policy is assigned to the vendee before the consent of the insurer is obtained thereto, although the policy may thereby be rendered void, yet by subsequently assenting to such transfer the policy is revived, and becomes an operative instrument in the hands of the vendee: 1 Wood on Insurance, sec. 116. The consent of the company's agent to the transfer revived the policy: *Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526; 7 Am. Rep. 380.

It is true, Clarke had no power to waive any condition of the contract, but he waived no condition; the contract expressly provided for the contingency of a change in the title and for a transfer of the policy, and Clarke was duly authorized to give the consent of the company to that transfer. How can Clarke be said to have waived any condition of the contract in doing just what the contract provided for, what he was appointed to do, and what, in the exercise of a reasonable discretion for the interest of the company, it was his duty to do? Clarke knew, when he gave his approval to the transfer, that the title had changed; this fact was found by the jury, and the knowledge of Clarke was notice to the company. Moreover, by the report of Clarke to the company's office, the company had notice that the policy had become forfeited, for

that report expressly stated that the title had been transferred on April 14, 1883, and that the agent's consent had not been given until the 17th of the same month. These dates were not strictly accurate, perhaps, the transfer having been effected on the 29th of March preceding, but the forfeiture of the policy was as absolute after the lapse of three days as after the lapse of three months. Yet the company silently acquiesced in the act of the agent; no objection was made that the agent had exceeded his powers; in fact, no objection of any kind or character was made until after the property had been destroyed by fire. In *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 342, the policy was to be void if assigned without the written approval of the secretary; it was assigned, and an approval given in writing by the agent "for the secretary"; the agent was accustomed to approve assignments and report monthly to the company on blanks furnished for that purpose by the company; this assignment was immediately reported, in addition to the monthly reports: held, that the policy was not thereby avoided.

The assignment to Page after the loss is not within this condition of the policy; in such case, the relation of insurer and insured is changed to that of debtor and creditor, and the consent of the company is not required: *West Branch Co. v. Helfenstein*, 40 Pa. St. 289; *Wood on Insurance*, sec. 99.

The cases cited by the plaintiff in error, *Waynesboro Mut. F. Ins. Co. v. Conover*, 98 Pa. St. 384, 42 Am. Rep. 618, and *Pottsville Mut. F. Ins. Co. v. Minnequa Co.*, 100 Pa. St. 142, are wholly inapplicable to the facts in this case. That an agent may not waive the provisions of a policy in a matter outside the scope of his agency, cannot be doubted. Nor is the view we have taken in conflict with *Trask v. State Fire Ins. Co.*, 29 Id. 198, 76 Am. Dec. 622, or with the remaining cases cited by the plaintiff in error. It is undoubtedly true that where an insurance company is, from any cause, discharged from liability, responsibility for the loss will not reattach by waiver without proof of authority in the party whose act of waiver is relied upon, or without a new consideration to sustain it; but where the act of the agent executing the waiver is contemplated in the contract, and the power expressly conferred upon him in writing, no new consideration is required.

The application was rightly excluded from the testimony. The provisions of the act of May 11, 1881 (Pamph. Laws, 20), are conclusive on this point. No copy of the application or of

the by-laws of the company was attached to the policy, as that act requires; it constituted, therefore, no part of the policy or of the contract between the parties, and was not receivable in evidence. The case is to be considered as if no such paper existed.

The insurance company further contends, however, that Seeley, at the time the insurance was effected, was not the absolute owner of the premises insured. By the second condition of the policy it is provided that "if the interest of the assured be other than the entire, unconditional, and sole ownership, or if the property insured be a building standing on ground not owned by the assured in fee-simple," the policy shall be void, and of no effect. On April 21, 1880, O. A. Seeley, by agreement in writing, purchased the lands in question from T. Smull's Sons; the consideration of his purchase was \$5,129.50, payable in three equal annual payments, the first installment becoming due December 1, 1880. On November 11, 1881, T. Smull's Sons conveyed the legal title, and assigned the Seeley contract to F. T. Page, the effect of which was merely to put Page in the place of T. Smull's Sons as to Seeley. On February 8, 1883, the policy in suit was issued to Seeley. There is no evidence that Seeley paid any part of the purchase-money; he erected a saw-mill, however, and made other improvements, and it is claimed that his interest in the land was greatly enhanced thereby at the time the insurance was effected. On March 29, 1883, Seeley, by contract in writing, assigned his interest under the contract with T. Smull's Sons to Page, who thereupon, at the same time, sold, by articles, to Henry Dunham. The consideration of the last-mentioned sale was \$10,000; Page to receive \$5,759.18, being the balance, with interest unpaid, on the contract between T. Smull's Sons and Seeley; the residue, being \$4,240.82, to be paid to and received by Seeley. There was a reservation of the title to certain timber and bark until the purchase-money was paid, an arrangement to apply part of the proceeds thereof to the purchase-money, and a provision that in the event of Dunham's failure to fulfill his contract, Seeley would resume his former relation to Page under the Smull contract. But we find nothing in the details of the several contracts of March 29, 1883, to vary the question already stated, viz., whether or not Seeley's interest in the property insured was such as was required by his contract with the company. Where the title to property passes, and the policy is assigned

to the vendee with the insurer's consent, the policy has sometimes been treated as a new contract with the vendee: Wood on Insurance, sec. 110. But under the decisions of this court, the assignee has always been held to take subject to all the stipulations contained in the policy, and in an action by the assignee, the question of interest to be referable to the time of the issuing of the policy: *State Mut. Co. v. Roberts*, 31 Pa. St. 438; *Lycoming Ins. Co. v. Mitchell*, 48 Id. 367.

At the time the insurance was effected, Seeley, as we have said, had become the purchaser in fee of the property under articles of agreement with T. Small's Sons; he had the equitable title only, but he was to all intents and purposes the "owner" of the property; he was the equitable owner in fee, and in respect to the insurance, we think he may be said to have been the entire, unconditional, and sole owner. This provision of the policy does not necessarily distinguish between the legal and the equitable estate. If the title is conditional or contingent, if it is for years only, or for life, or in common, it is not the entire, unconditional, and sole ownership; but the interest is the same, as it affects the contract of insurance, whether the title of the assured be legal or equitable. The purpose of this provision is to prevent a party who holds an undivided or contingent but insurable interest in property from appropriating to his own use the proceeds of a policy, taken upon the valuation of the entire and unconditional title, as if he were the sole owner, and to remove from him the temptation to perpetrate fraud and crime. For without this, a person might thus be enabled to exceed the measure of an actual indemnity. But where the entire loss, if the property is destroyed by fire, must fall upon the party insured, the reason and purpose of this provision does not seem to exist; and in the absence of any particular inquiry as to the specific nature of the title, or of any express stipulation in the policy that the insured held the legal or equitable title, either being available to secure an entire, unconditional, and sole ownership, the provision referred to can, we think, have no force to defeat the plaintiff's recovery in this case.

Where articles of agreement are entered into for the sale of land, the purchaser is considered the owner. "It does not seem to be necessary, to produce this effect, that any part of the purchase-money should be paid; it results from the contract. When a part of the purchase-money is paid, the interest of the purchaser in the land is not circumscribed by the

extent of the money paid, but embraces the entire value of the land over and above the purchase-money due. He is treated as the owner of the whole estate, encumbered only by the purchase-money. If the land increase in value, it is his gain; if it decrease, if improvements are destroyed by fire or otherwise, it is his loss": *Siter, James, & Co.'s Appeal*, 26 Pa. St. 180. Where the vendor retains the legal title, he has a lien for the unpaid purchase-money: *Zerby v. Zerby*, 9 Watts, 234; *Bradley v. O'Donnell*, 32 Pa. St. 279; *Zeigler's Appeal*, 69 Id. 471; but he may use the legal title to compel payment thereof: *Thompson v. Carpenter*, 4 Id. 132; 45 Am. Dec. 681; *Woodward v. Tudor*, 81* Pa. St. 382; *Washabaugh v. Stauffer*, 81* Id. 497.

Upon these general principles of the law, the case of *Millville Mutual Co. v. Wilgus*, 88 Pa. St. 107, was decided. Wilgus had purchased the premises insured at an orphans' court sale, the terms of which were one half in hand, balance in one year. He made the first payment, the vendor retaining the legal title, and before the year expired the loss occurred. The condition of the policies upon which the company relied was, "that if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured," it must be so represented and expressed. Mr. Justice Sharswood, delivering the opinion of this court, says: "The plaintiff's title was an equitable one, but it nevertheless vested in him the entire, unconditional, and sole ownership, subject to the payment of the balance of the purchase-money. This balance was practically an encumbrance. It is true, the legal title was in the hands of the vendors, but they could use it only to enforce the payment of the price agreed upon. In this respect it is exactly the case of a mortgage which vests the legal title in the mortgagee for the same purpose. Had the property been swallowed up by an earthquake, the entire loss would have fallen on the plaintiff." The case of *Reynolds v. State Mutual Co.*, 2 Grant Cas. 329, which would appear to express a different view of the law, is commented upon in the case last cited, and whilst it is said to have been correctly decided on other grounds, the reasoning of the case is distinctly disapproved.

So in *Kronk v. Birmingham Ins. Co.*, 91 Pa. St. 300, where the assured had executed a bill of sale of the property assured to a third party, retaining the possession, it was held, that as

the bill of sale was simply a security for money advanced, the interest of the assured was, nevertheless, as respects the insurance, to be considered "the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured," whether the bill of sale was delivered before or after the insurance was effected. The *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. St. 568, and *Lebanon Mutual Co. v. Erb*, 112 Id. 149, although not precisely similar, are cases in confirmation of the doctrine as we have stated it.

The purchaser of real estate by articles, being responsible for the purchase-money, is liable to the whole loss that may befall it, including the loss of buildings by fire: *Reed v. Lukens*, 44 Pa. St. 200; 84 Am. Dec. 425; therefore he is not guilty of misrepresentation if he states that the premises are his, that he is the absolute owner, although he has not paid the purchase-money: *Coursin v. Pennsylvania Ins. Co.*, 46 Pa. St. 323.

We believe the doctrine as we have stated it has been generally adopted in this as well as in the other states; no case has been cited which is in conflict with the views we have expressed. In *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581, the insured, in his application, described the property as his house, and the policy contained a condition that "if the interest in the property is less than absolute, it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance shall be void." The legal title to the property was in another party; the insured had an equitable title only; he had made a parol contract for the purchase of the property; had entered into the possession and made valuable improvements; had paid a part and agreed to pay balance of purchase-money. In a suit upon the policy, the company's contention was, that the title was not absolute; that as its true condition was not represented in the application or expressed in the policy, the insurance was void. It was held, however, that if the plaintiff had the equitable title, and his interest was such that the whole loss by fire would fall on him, he must be regarded as the absolute owner of the property. To the same effect is *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Lorillard Fire Ins. Co. v. McCulloch*, 21 Ohio St. 176; 8 Am. Rep. 52; *Noyes v. Hartford Ins. Co.*, 54 N. Y. 668. The omission of the owner of the equitable title to state the nature thereof will not render a policy of insurance invalid, under a condition therein forfeiting the insurance in case the interest

is other than the entire, unconditional, and sole ownership, if the fact is not so represented to the company: *Psilton v. Westchester Fire Ins. Co.*, 77 Id. 605; and he will be regarded as the absolute owner, although he may not have paid the purchase-money: *Remsey v. Phoenix Ins. Co.*, 17 Blatchf. 527.

We are of opinion, upon a full examination of this case in the light of all the authorities, that Seeley's title, under his contract, must be regarded as an equivalent to a fee-simple; that the unpaid purchase-money must be treated as an encumbrance upon it; and that, in respect of the insurance, he must be considered the entire, unconditional, and sole owner. The previous decisions of this court will justify no other conclusion; and the cases in the other states, and the views of the text-writers, we find to be in harmony with our own.

The judgment is affirmed.

EQUITABLE INTEREST IN PROPERTY IS ABSOLUTE INTEREST, AND INSURABLE AS SUCH: *Hough v. City Fire Ins. Co.*, 76 Am. Dec. 581; *Herbert v. Brewer*, 96 Id. 582. Holder of title bond has insurable interest in realty: *Ayers v. Hartford Fire Ins. Co.*, 85 Id. 553; and see *Redfield v. Holland Purchase Ins. Co.*, 15 Am. Rep. 424; *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 60 Id. 162.

INSURANCE—EFFECT OF ALIENATION OR CHANGE IN TITLE TO AVOID POLICY: *Morrison v. Tennessee Ins. Co.*, 59 Am. Dec. 299, and extended note; *Phoenix Ins. Co. v. Lawrence*, 81 Id. 521; *Barnes v. Union etc. Ins. Co.*, 81 Id. 562, and notes; *Sherwood v. Agricultural Ins. Co.*, 29 Am. Rep. 180; *Hathaway v. State Ins. Co.*, 52 Id. 438; *Davidson v. Hancock Ins. Co.*, 60 Id. 818.

INSURANCE—WAIVER OF FORFEITURE OF POLICY: *Diehl v. Adams County Mutual Ins. Co.*, 98 Am. Dec. 302, and note 308; *Kruger v. Western etc. Ins. Co.*, 1 Am. St. Rep. 42, and note.

GOODWIN GAS STOVE ETC. COMPANY'S APPEAL.

[117 PENNSYLVANIA STATE, 514.]

EQUITY WILL NOT, IN GENERAL, ENFORCE SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF CHATTELS, but in case of a sale or transfer of stocks in a merely private or business corporation, when from any proper cause it is plain that the remedy at law is inadequate or damages are impracticable, specific relief may be awarded.

WHERE ATTORNEY ACTS FOR BOTH PARTIES TO ACTION, AND WHILE PREPARING PAPERS AT INSTANCE OF BOTH COMMUNICATIONS ARE MADE TO HIM by either party in the presence of the other, such communications are not privileged, and the testimony of the attorney is competent in regard thereto.

BILL in equity filed by H. Dumont Wagner against the Goodwin Gas Stove and Meter Company and W. W. Goodwin,

to enforce the specific performance of an agreement by Goodwin to transfer certain shares of stock in said company to the complainant. The facts as reported by the master to whom the cause was referred are substantially as follows: In 1879, Goodwin undertook to form a corporation for the manufacture of meters and gas machines, and associated with him the plaintiff, Wagner, who was a gas engineer. They entered into a written contract, wherein it was agreed,—1. To organize a corporation under the general law, to be called the “W. W. Goodwin Meter Company,” with a capital stock of two hundred thousand dollars, divided into two thousand shares; 2. Goodwin to put in the meter-works, machinery, etc., and receive 1,050 shares of the stock, and Wagner to pay into the corporation seven thousand dollars in cash, and receive one hundred shares of stock, full paid; 3. The amount of seven thousand dollars to be paid by Wagner, to be secured to him, and ten per cent per annum guaranteed to him, either by the issue of preferred stock, or in some other manner to be mutually agreed upon between the parties; 4. Goodwin to be president of the company, at a salary for the first year of six thousand dollars; and Wagner to be superintendent, under a written contract for five years, at an annual salary of at least eighteen hundred dollars. The plaintiff, Wagner, went abroad on company business at once, and in his absence Samuel Wagner, as attorney, paid Goodwin the seven thousand dollars, taking his receipt therefor, together with Goodwin’s judgment note for that amount, as the security required under the agreement. The company was incorporated in 1879, after Wagner’s return, under the title of “The Goodwin Gas Stove and Meter Company,” in which both Goodwin and Wagner were named as incorporators. It was soon found impracticable to issue preferred stock to secure Wagner in his investment of seven thousand dollars, and the parties entered into a second contract, of date January 27, 1880, drawn up by Samuel Wagner, who acted as the attorney for both parties. In this second contract Wagner agreed to release his claim for the security provided for in the first contract, in consideration whereof Goodwin agreed to transfer and assign to him seventy shares of the stock of the company; it being, however, understood that the seventy shares were to be held by Wagner in trust, he to have the option of buying them, or any part thereof, at their par value of one hundred dollars per share, by paying to Goodwin all dividends on such shares in

excess of six per cent of the par value of the stock, and one share to become absolutely the property of Wagner for each one hundred dollars so paid on account of the purchase; provided, however, that Wagner was not to be liable for the price of the seventy shares, unless the dividends thereon exceeded six per cent of the par value, and then only to the extent of such excess, nor was he to be liable for interest on the price of the stock unless the dividends thereon should amount to six per cent per annum in excess of the amount the stock should earn; provided, also, that Wagner had the right to terminate the agreement upon reassigning all the seventy shares to Goodwin, excepting such as may have been paid for in full in the manner agreed. It was further agreed that Goodwin had the right to vote such of the seventy shares as were not paid for in full; and the provisions of the agreement were to be binding upon the personal representatives of both parties. Goodwin was the president of the company, and was continued in the office by re-election; and Wagner was elected superintendent of the company, and was re-elected in 1881 and 1882. At the time of the execution of the second agreement, Wagner surrendered to Goodwin his copy of the first agreement, and also the judgment note for seven thousand dollars, which Goodwin had given as security, both of which were put in evidence. In July, 1882, Wagner asked for an indefinite leave of absence, which was refused, and he resigned, Goodwin being present when the board of directors accepted the resignation. Wagner had never signed any contract to act as superintendent for five years. After the dividend of 1881 was declared, Wagner demanded that the company should transfer to him personally such shares as he was entitled to under the contract, and to him as trustee the balance of the seventy shares he was to hold in trust. He made these demands each year, and all were refused, until 1884, when Goodwin sent him the certificate for nine shares, and his check as president for forty-five dollars; also a statement showing that up to July 1, 1882, seventy shares of the capital stock had earned the sum of \$945 in excess of six per cent. Wagner accepted these nine shares on account, but declined to receive the check, and the nine shares were never transferred to Wagner's name on the books of the company. The company having refused to honor his demands any further, this proceeding was instituted. The company in a separate answer denied any knowledge of the facts of the

agreement, and submitted itself to the court in the premises. Goodwin claimed in his answer that the plaintiff agreed to act as superintendent of the company for five years, and failed to do so; and that this agreement on the part of the plaintiff was part of the consideration of the second agreement of January 27, 1880. He admitted, however, that had the plaintiff remained in the employ of the company, and been willing to pay any amount, however small, in addition to the excess of dividends, the stock would have been transferred to him under the agreement. And it was admitted that the stock of the company was not for sale, and that the same could not be purchased in the market. The master found,—1. That Samuel Wagner acted only as a legal scrivener in preparing the agreements for the parties, and was a competent witness to testify in regard thereto; 2. That the plaintiff's agreement to act as superintendent of the company for five years was not a part of the consideration of the second agreement; 3. That under the facts as found the cause was one properly calling for relief in equity. The court confirmed the report of the master, and entered a decree as therein recommended. The defendant appealed.

Samuel C. Perkins, for the appellant.

Henry J. McCarthy and William Nelson West, for the appellee.

By Court, CLARK, J. It is a well-settled doctrine that equity will not, in general, decree the specific performance of contracts concerning chattels. The reason assigned for this is, that their money value, recovered as damages, will enable the party to purchase others in the market of like kind and quality. In the United States, as well as in England, contracts for public securities, government stocks, bonds, etc., will not be specifically enforced; no especial value attaches to one share of stock or one bond over another; the money which will pay for one will as readily purchase another. To this rule there are doubtless exceptions; but the rule is so general in its application that the exceptions are but few: *Stayton v. Riddle*, 114 Pa. St. 464. Although a different doctrine may perhaps exist elsewhere, as to contracts concerning stocks and bonds of merely private or business corporations in the United States, the principle seems to be well established by the weight of authority that they will not be carried into effect in

equity except under very special circumstances, such as render the remedy at law wholly inadequate or damages impracticable: 3 Pomeroy's Eq. Jur., sec. 1402. The same general principles govern in contracts for the sale of stocks of this character as in the sale of other personal property; if the breach can be fully compensated, equity will not interfere; but when, notwithstanding the payment of the money value of the stock, the plaintiff will still necessarily lose a substantial benefit, and thereby remain uncompensated, specific performance may be decreed: Waterman on Specific Performance, sec. 19.

In *Dungan v. Dohwart*, an unreported case, decided at *nisi prius*, and referred to in a note to *Philadelphia and Reading R. R. Co. v. Stichter*, 11 Week. Not. Cas. 325, Mr. Justice Agnew, after referring to the cases, said: "In an ordinary contract for the sale or transfer of stock, where there is no fiduciary relation between the parties, no peculiar circumstances attending the stock, and no trust declared or arising by operation of law, or other fact in the contract, which would make a verdict for damages inadequate relief, there is no reason for specific performance other than in every case of a sale of a chattel. The non-delivery or refusal to transfer can be easily compensated in damages."

The doctrine has in some cases been carried to this extent: that if a contract to convey stock is clear and definite, and the uncertain value of the stock renders it difficult to do justice by an award of damages, specific performance will be decreed: *White v. Schuyler*, Abb. Pr., N. S., 300; 31 How. Pr. 38; *Treasurer v. Commercial Co.*, 23 Cal. 390. This would appear to have been the view entertained by Mr. Justice Thompson, in *Sank v. Union Steamship Co.*, a case tried at *nisi prius*, and reported in 5 Phila. 499. "I incline much," says the learned justice, "towards the distinction made by Vice-Chancellor Shadwell, in *Duncuft v. Albrecht*, 12 Sim. 189, between public stocks of a known market value, and stocks of a particular company with none in market, and recognized by the lord chancellor in *Cheale v. Kenward*, 3 De Gex & J. 27. The former resembles ordinary property with known values, while the latter resembles more the case of specific or peculiar property, with a value contingent or uncertain, which, it has been held, the only adequate remedy is to give the thing itself: 1 Lead. Cas. Eq. 757; 1 Story's Eq. Jur., sec. 724." Whether the distinction taken in the case cited may ultimately be recognized to the full extent stated, we cannot say; but the

general underlying principle seems to be established that in a sale of stocks in a merely private or business corporation, when from any proper cause it is plain that the remedy at law is inadequate or damages impracticable, specific relief may be awarded.

As to the case now under consideration, it is fair to assume that the security for the principal investment of seven thousand dollars, and for the dividends upon it at the rate of ten per cent per annum, was the inducement for Wagner to enter into the contract of July 1, 1879; and when on January 27, 1880, he agreed to waive his right to that security, it was under the special inducement that he was to have, in addition to the shares he then had, seventy other shares on the terms of the latter contract,—shares that would ultimately be paid for, if paid for at all, out of their earnings, in installments equal to the excess of the dividends thereon over six per cent in each year. The contract of 1880 disclosed the special terms upon which the investment was actually made. Wagner was to receive not only the dividends upon the shares he purchased with his original investment, but was entitled, also, from time to time, to such of the seventy shares in dispute as would be paid for by the excess stated; and the title to the seventy shares was actually transferred to him, in trust, under the contract. He held the shares as a trustee; if transferred on the books, the shares must necessarily have been transferred to him on the footing of that trust. As they were earned, however, they were to become Wagner's own shares, freed from the trust, the dividends thereon payable to him, and he was entitled to have such further assurance from Goodwin as would liberate them from the trust, and authorize the transfer to him absolutely on the books of the company. The case is in some respects a peculiar one; Wagner already has the title to these seventy shares; he holds the certificate transferred in writing, and delivered to him by Goodwin; but the transfer being subject to a trust imposed upon them by the parties, he cannot avail himself of them as his own until they are relieved of that trust. The transaction is not therefore a simple sale and purchase of stock. The question presented is, whether or not the terms of the trust have been satisfied, as to the whole or any part of the seventy shares to which Wagner already has title; if they have, he is entitled to a transfer to his own use; if they have not, he must still hold the title subject thereto. It cannot be doubted, we think, that equity has

jurisdiction in such a case, not only against Goodwin, but against the company, especially as the shares have no recognized market value, and their value, even if ascertained, would not necessarily, as against either, be the proper measure of damages. The seventy shares having been transferred to Wagner in trust under the agreement, he was entitled as the trustee to a transfer on the books, and as dividends were declared from time to time, he was entitled, at his option, to an absolute transfer, discharged of the trust, for as many shares as were paid by the excess of the dividends over six per cent annually.

We are of opinion, however, that the agreement of January 27, 1880, was only a modification of a particular part of the previous contract of July 1, 1879. The preamble, which precedes the paper of 1880, clearly shows that the special provision in the first contract, for security to Wagner, was the special subject-matter of modification in the second. But the clause which provides that Wagner "shall be appointed the superintendent of the said corporation, under a written contract for five years, at an annual compensation or salary of at least eighteen hundred dollars," would seem to be a provision made in the interest and favor of Wagner. Wagner does not agree in express terms to serve as superintendent for five years, unless perhaps under a written agreement to that effect, and no such agreement was ever made; on the contrary, he was elected from year to year, and had no assurance whatever of his continuance in office for five years. The company was put under no obligation to retain him as superintendent, and he was under no obligation to continue in the company's service. The parties, we think, did not intend their contract to be a guaranty in this respect. If the condition and ownership in the stock had been such that Goodwin was not elected president of the company at a salary of six thousand dollars, did the parties contemplate that Wagner should be held responsible to Goodwin for that result? We think not; yet this feature of the contract was as certainly obligatory upon one party as upon the other. Moreover, when Wagner tendered his resignation, it was without complaint of any one accepted; Goodwin himself was present, favored this action of the board, and personally dictated the very complimentary response, which was given to Wagner's request. He cannot now complain of that which at the time he approved, and which was

consummated by the company, not only without any objection whatever, but with his full consent.

In the view which we have taken of this case, the testimony of Samuel Wagner becomes unimportant, and the question of his competency of little consequence in the case. Samuel Wagner was, however, without doubt, a competent witness. If he was the legal adviser of any of these parties, he was the adviser of both of them, for the advice he gave was given to both, and the papers he prepared were prepared at the instance of both. The matters communicated to him by either one of the parties were communicated in the presence of the other; they were not in their nature private, and therefore could not have been the subject of any confidential disclosure. Wagner seems to have acted merely as a scrivener, and although of the legal profession, his testimony would not thereby be rendered incompetent.

Upon an investigation of the whole case, we are of opinion that the decree of the learned court is right.

The decree is therefore affirmed, and the appeal dismissed, at the cost of the appellant.

JURISDICTION TO DECREE PERFORMANCE OF CONTRACTS CONCERNING PERSONALTY is limited to special cases: *Young v. Daniels*, 63 Am. Dec. 477.

SPECIFIC PERFORMANCE OF CONTRACT TO SELL SHARES OF NATIONAL BANK WILL NOT BE ENFORCED where it appears that the shares were designed to give control of the bank. Whether the contract would be enforced if lawful, questioned: *Foll's Appeal*, 36 Am. Rep. 671.

ATTORNEY AND CLIENT. — Conversation between two persons in presence of an attorney employed by them to prepare a paper in connection with the subject of conversation is not privileged: *House v. House*, 1 Am. St. Rep. 570, and note.

ELLIOTT v. ASHLAND MUTUAL FIRE INSURANCE CO.

[117 PENNSYLVANIA STATE, 548.]

IT IS COMPETENT FOR INSURANCE COMPANY TO WAIVE FORFEITURE OF POLICY caused by a sheriff's sale of the property insured, and it is an express waiver in writing of such forfeiture, if the company, having notice of such sale, issues a new policy as an extension of the previous one forfeited.

PURCHASER UNDER CONTRACT FOR SALE OF REAL ESTATE IS EQUITABLE OWNER, and is liable to all loss that may befall the property, including the loss of the buildings by fire. For the purpose of insurance, he may be said to be vested with the entire, unconditional, and sole ownership.

ACTION of covenant on a policy of fire insurance, brought by Michael Elliott, for the use of Susan Dougherty, against the

Ashland Mutual Fire Insurance Company. The policy in suit, dated March 15, 1881, was issued to Elliott by the defendant company, immediately after the expiration of a previous policy of the same company, dated March 18, 1881. After the last-mentioned date, certain liens were entered against the property insured, and it was sold at sheriff's sale on December 30, 1882, to one Murphy, who resold to Elliott by articles of agreement, on December 31, 1883; but no deed had been executed by Murphy to Elliott when the policy in suit was issued. The policy contained a clause as follows: "The insurance under this policy shall cease, at and from the time the property hereby insured shall be levied on or taken into possession or custody under any proceeding in law or equity; and should there, during the life of this policy, an encumbrance fall or be executed upon the property insured, sufficient to reduce the real interest of the insured in the same to a sum equal to or below the amount insured, and he neglect to obtain the consent of the company thereto, then in that case the policy shall be void." Other facts appear in the opinion. The plaintiff was nonsuited, whereupon he assigned error.

James Ryan and M. M. L'Velle, for the plaintiff in error.

W. A. Marr, for the defendant in error.

By Court, CLARK, J. The policy in suit was "issued instead of one bearing the same number upon payment by the insured of the policy fee of one dollar, as per resolution of the directors extending the time of all renewed policies to five years." It was not in the form of a renewal; it would seem to have been intended as an extension or continuance of the renewal policy of March 18, 1881. Both bore the same number, referred to the same application, and were upon the same property; one was given "instead" of the other, "extending the time" to five years. It may be, therefore, that neither the policy nor any of the by-laws required a disclosure of the intervening encumbrances; but it is plain that by the sixteenth condition of the policy the contract of insurance had, on December 30, 1882, ceased to exist. Under a proceeding at law, the property insured had been levied upon by the sheriff, and on that day the interest of the assured was sold, and one Charles G. Murphy became the purchaser and owner thereof. After that for almost a year, Elliott had no title whatever in the property, and of course there could be no valid subsisting insur-

ance where there was no insurable interest. There would be nothing, in such case, for the policy to operate upon.

It was competent, however, for the company, after the agreement of December 31, 1883, by the terms of which Murphy had agreed to convey to Elliott, to waive the forfeiture caused by the sheriff's sale; in which event the obligation of the policy would reattach, and the contract be continued. If the policy of March 18, 1884, upon which this suit was brought, was issued as an extension of the previous policy of 1881, with notice of the change which had taken place in the title, it was certainly in itself an express waiver in writing of the forfeiture, which had previously occurred.

It was one of the conditions of the policy, that if the interest in the property was "a leasehold or other interest, not fee-simple absolute, it must be stated in the policy; otherwise the same shall be void." The contention of the company is, that Elliott's interest was under the agreement of December 31, 1883; that his title was not absolute or in fee-simple; that the condition of the title was not stated in the policy, and that therefore the policy was void. But the agreement with Murphy was for a conveyance of the fee; Elliott thereby became the equitable owner of the property subject to the payment of the purchase-money, which was a lien or encumbrance upon it, and this, as respects the contract of insurance, was equivalent to the fee: *Pennsylvania Ins. Co. v. Dougherty*, 102 Pa. St. 568. "When a policy provides that if the title is not absolute it must be so stated in the policy or it shall be void, the question is,—1. Whether the insured had really an insurable interest in the property; and 2. Whether, if the property is destroyed, the entire loss falls upon him": Wood on Fire Insurance, 195, citing *Hough v. City Fire Ins. Co.*, 29 Conn. 10; 76 Am. Dec. 581; see also *Washington Fire Ins. Co. v. Kelley*, 32 Md. 421; 3 Am. Rep. 149; *Lorillard Fire Ins. Co. v. McCulloch*, 21 Ohio St. 176; 8 Am. Rep. 52; and *Pelton v. Westchester Ins. Co.*, 77 N. Y. 605.

The cases in this court are to the same effect. After a contract for the sale of real estate, the purchaser is the equitable owner thereof, and being responsible for the purchase-money, is liable to the whole loss that may befall it, including the loss of the buildings by fire: *Reed v. Lukens*, 44 Pa. St. 200; 84 Am. Dec. 425. He is not guilty of misrepresentation if he state that the premises are his, although he has not paid the purchase-money: *Coursin v. Pennsylvania Ins. Co.*, 46 Pa. St.

323. Upon this ground, it was held in *Millville Mut. Co. v. Wilgus*, 88 Id. 107, that for the purpose of insurance, the holder of an equitable title under articles of agreement may be said to be vested with the entire, unconditional, and sole ownership. This question has been more fully considered by this court in a very recent case in the eastern district, *Dunham v. Imperial Fire Ins. Co. of London*, 117 Pa. St. 460 [*ante*, p. 686], and we think it is unnecessary to further discuss it here.

The substantial question for the jury was, whether or not, at the issuing of the policy of March 18, 1884, the company had notice of the sheriff's sale to Murphy, and of the agreement of Murphy to reconvey the property to Elliott. It must be conceded that the evidence on this point was meager, and to some extent unsatisfactory, but there was some evidence, enough we think to send the case to the jury. We do not desire to discuss the testimony; in so doing we might prejudice the next trial; but having stated the law applicable to the case, and suggested the questions of fact which were proper for the jury, we send the case back for another trial.

The judgment is reversed, and a *venire facias de novo* awarded.

INSURANCE, WAIVER BY INSURER OF FORFEITURE OF POLICY: See *Imperial Fire Ins. Co. v. Dunham*, *ante*, p. 686.

SALE OF REAL ESTATE ON EXECUTION, owner having term for redemption, is not a change in the title or possession, within the meaning of the insurance policy, where the loss occurred during that term: *Hammel v. Queen's Ins. Co.*, 41 Am. Rep. 1.

INSURABLE INTEREST, WHAT IS: See *Imperial Fire Ins. Co. v. Dunham*, *ante*, p. 686.

BRETZ v. DIEHL.

[117 PENNSYLVANIA STATE, 503.]

FUNDAMENTAL DISTINCTION BETWEEN BAILMENT AND SALE IS, that in the former the subject of the contract, although in an altered form, is to be restored to the owner, whilst in the latter there is no obligation to return the specific article, either in the same or an altered form. In the one case the title is not changed, in the other it is, the parties standing in the relation of debtor and creditor.

WHERE BAILEE OF PROPERTY OF OTHERS SO COMMINGLES IT WITH HIS OWN that its identity cannot be traced, all the inconvenience of the confusion is thrown upon him; but if the owners have consented to the commingling, each remains the owner of his share in the common stock.

MERE FACT THAT WHEAT, DELIVERED IN PURSUANCE OF CONTRACT OF BAILMENT, IS MIXED with a mass of like quality, with the knowledge of the bailor, does not convert the transaction into a sale; and the bailee

of the whole can have no greater control of the mass than if the share of each owner were kept separate. If the commingled mass was received on simple storage, each owner is entitled, on demand, to receive his share; if for conversion into flour, to his proper proportion of the product. And in such case, it makes no difference that the bailee had contributed of his own wheat to the mass, for, still standing as a bailee to the others, he cannot abstract more than his own share from the whole.

COURT'S ANSWERS TO PLAINTIFF'S POINTS ARE NOT TO BE HELD MISLEADING AND ERRONEOUS, where it appears that the points were based upon an assumption of facts, the truth or falsity of which was properly for the jury, and the law was stated as upon a finding of these facts by the jury.

FEIGNED issue to determine the ownership of certain flour and bran in a mill of one Newman. The facts appear in the opinion. Verdict and judgment for the plaintiffs, and the defendants assigned error.

J. H. Longenecker, S. L. Russell, and William M. Koontz, for the plaintiffs in error.

John H. Jordan, J. M. Reynolds, and Alexander King, for the defendants in error

By Court, CLARK, J. The defendants in this case are judgment creditors of William D. Newman, a miller, operating a steam flouring mill in the town of Bedford. Having issued executions, they levied on some eighty or ninety barrels of flour, and some bran found on the floor of Newman's mill. The plaintiffs claimed the property levied upon, alleging that it was the product of grain by them delivered to and held by Newman as their bailee. This is a feigned issue, framed under the sheriff's interpleader act, to determine the dispute.

The plaintiffs, who are farmers residing in the vicinity of Bedford, brought their grain to this mill; no special contract or arrangement was made with the miller by any of the plaintiffs when they delivered their wheat, but, in accordance with the practice of the mill in all cases, except when wheat was at once paid for, a receipt or memorandum was given in the following form:—

CRYSTAL MILLS, BEDFORD, PA., Sept. 12, 1884.

Received from D. W. Lee:—

	Amount.
Four hundred and fifty-five $\frac{1}{2}$ b. wheat.....	\$455.14
“ rye,	
“ corn,	
Two hundred and fifty-five $\frac{1}{2}$ “ oats.....	255.12
“ buckwheat.	

For use of self.

W. D. NEWMAN.

The mill was not arranged to keep the several lots of grain in separate parcels. It was so constructed that all the grain delivered into it was hoisted to the second floor, emptied into a sink on the first floor, and from thence carried by elevators into a bin on the third floor, where, at times, there was a large accumulated mass of wheat. Newman also purchased wheat in considerable quantities from time to time, which was delivered into the mill, and disposed of as the other wheat. This promiscuous commingling of the grain into a common mass was in accordance with the known usage of the mill, which was supplied for grinding from the mass of the wheat, without any discrimination as to the several lots or parcels in which it was received. The miller was, of course, under no obligation to restore to the plaintiffs the specific or identical wheat which he received, nor the product of it in flour; indeed, this, owing to the manner in which the business was conducted, was practically impossible.

The fundamental distinction between a bailment and a sale is, that in the former the subject of the contract, although in an altered form, is to be restored to the owner; whilst in the latter there is no obligation to return the specific article; the party receiving it is at liberty to return some other thing of equal value in place of it. In the one case the title is not changed, in the other it is, the parties standing in the relation of debtor and creditor. Thus in *Norton v. Woodruff*, 2 N. Y. 153, a miller agreed to take certain wheat, and to give one barrel of superfine flour for every 4⁵/₈ bushels thereof, the flour to be delivered at a fixed time, or as much sooner as he could make it. As the miller's contract was satisfied by a delivery of flour from any wheat, the transaction was held to be a sale. But in *Mallroy v. Willis*, 4 Id. 76, wheat was delivered under a contract "to be manufactured into flour," and one barrel of the flour was to be delivered for every 4⁵/₈ bushels of wheat; this transaction was by the same court held to be a bailment.

If a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it; where, however, the owners consent to have their wheat mixed in a common mass, each remains the owner of his share in the common stock. If the wheat is delivered in pursuance of a contract for bailment, the mere fact that it is mixed with a mass of like quality, with the

knowledge of the depositor or bailor, does not convert that into a sale which was originally a bailment, and the bailee of the whole can, of course, have no greater control of the mass than if the share of each were kept separate. If the commingled mass has been delivered on simple storage, each is entitled on demand to receive his share; if for conversion into flour, to his proper proportion of the product: *Chase v. Washburn*, 1 Ohio St. 244; 59 Am. Dec. 623; *Hutchison v. Commonwealth*, 82 Pa. St. 472. It makes no difference that the bailee had, in like manner, contributed to the mass of his own wheat; for although the absolute owner of his own share, he still stands as a bailee to the others, and he cannot abstract more than that share from the common stock without a breach of the bailment, which will subject him not only to a civil suit, but also to a criminal prosecution: *Hutchison v. Commonwealth*, *supra*.

But where, as in *Chase v. Washburn*, *supra*, the understanding of the parties was that the person receiving the grain might take from it or from the flour at his pleasure, and appropriate the same to his own use, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depositary, and the transaction is a sale, and not a bailment. To the same effect are *Schindler v. Westover*, 99 Ind. 395; *Richardson v. Olmstead*, 74 Ill. 213; *Bailey v. Bensley*, 87 Id. 556; and *Johnston v. Browne*, 37 Iowa, 200. In *Lyon v. Lenon*, 106 Ind. 567, the distinction is thus stated: "If the dealer has the right, at his pleasure, either to ship and sell the same on his own account, and pay the market price on demand, or retain and redeliver the wheat, or other wheat in the place of it, the transaction is a sale. It is only when the bailor retains the right from the beginning to elect whether he will demand the redelivery of his property, or other of like quality and grade, that the contract will be considered one of bailment. If he surrender to the other the right of election, it will be considered a sale, with an option on the part of the purchaser to pay either in money or property, as stipulated. The distinction is: Can the depositor, by his contract, compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money or other wheat, it is a sale." This distinction is drawn, of course, with reference to cases where grain is deposited in a mass, as in grain elevators, etc.

There are cases in which the doctrine of bailment has been

carried much beyond the rule recognized in the cases we have cited: See *Sexton v. Graham*, 53 Iowa, 181, and *Nelson v. Brown*, 53 Id. 555. We think, however, the rule recognized in *Chase v. Washburn*, *supra*, and *Lyon v. Lenon*, *supra*, is a safe one, and is more in accord with the well-settled principles of the law relating to bailment.

But in the case at bar, we are not called upon to say what would be the effect upon the transaction if Newman had authority, in the regular course of dealing, to ship or sell the wheat of his customers on his own account. Undoubtedly he had a right to sell of the grain or flour to the extent of his own share; that is to say, what he contributed to the common stock and the tolls to which he was entitled. But the jury has found that he had no authority whatever to sell or to abstract from the common stock beyond the amount to which he was himself entitled. In the general charge, and also in the answers to the points submitted, the learned court instructed the jurors in the clearest manner that if they should find from the evidence that Newman, by the nature of his dealings with the several plaintiffs, had acquired such dominion over their wheat as authorized him, at his pleasure, not only to grind it into flour, but also to sell the same for his own use, the transaction must necessarily be treated as a sale, and that, in that event, the plaintiffs could not recover. This instruction was repeated with marked emphasis several times during the progress of the charge, and it seems quite impossible that the jury could have labored under any misapprehension as to the nature of the inquiry they were to make. The verdict of the jury was for the plaintiffs; and we must assume the facts which it is plain the jury, in arriving at such a verdict, must have found, viz., that Newman had no authority to sell the grain delivered into his mill under the arrangement with the plaintiffs, — that is to say, their share of the common stock, nor the flour which was the product thereof. It was the plain duty of Newman, however, to see to it that at all times the mill contained wheat or flour sufficient in amount to answer all demands under the bailment; failing in this, he was derelict in duty, and liable, under the law, for the appropriation and conversion unto his own use of property which did not belong to him.

Nor do we see that the court committed any error in the answers to the plaintiffs' points. These points, according to the general practice, were based upon an assumption of facts,

the truth or falsity of which was for the jury, and the law was stated as upon a finding of these facts by the jury. They were relevant to the issue; they disclosed clearly the specific facts assumed, which were fairly and reasonably consistent with the plaintiffs' theory of the case upon the evidence, and the opinion of the court thereon could not have had any weight with the jurors in their deliberations, unless the facts assumed were, in their judgment, established by the proofs. The points certainly were not such as could be disregarded by the court, and we cannot see how the answers thereto could be supposed to have misled the jury.

The learned court defined a bailment and a sale, marking the distinguishing features of each, and as the nature of the transaction depended not wholly upon the written receipt, but in part on verbal evidence as to the method of conducting the business, the question was undoubtedly one proper to be submitted to the jury. The court instructed the jury that if certain facts existed, the transaction was a sale; otherwise it was but a bailment; and the question was proper for the jury whether or not, under the instruction of the court, according to the facts as the jury might find them, the transaction was a bailment or a sale.

On a careful review of the whole case, we find no error, and the judgment is affirmed.

DISTINCTION BETWEEN SALE AND BAILMENT: *Slaughter v. Green*, 10 Am. Dec. 488, and note 490; *Chase v. Washburn*, 59 Id. 623, and note 630; *Carlisle v. Wallace*, 74 Id. 207, and note 209; *Dole v. Olmstead*, 85 Id. 397; *Irons v. Kentner*, 33 Am. Rep. 119; *Ledyard v. Hibbard*, 42 Id. 474; *Rice v. Nixon*, 49 Id. 430.

WAREHOUSEMAN'S RECEIPT, NATURE AND EFFECT OF: See *Pribble v. Kent*, 71 Am. Dec. 327; *Dole v. Olmstead*, 85 Id. 397; *Rice v. Cutler*, 84 Id. 747, and extended note 752.

DISTINCTION BETWEEN SALE AND BAILMENT. — The distinction recognized in the principal case between a sale and a bailment is well defined, and has often been clearly expressed. Thus, in a recent case, the rule is laid down that when the identical thing is to be redelivered, in the same or in an altered form, the contract is one of bailment, and the title to the property is not changed. But when, by the contract, there is no obligation to restore the specific article, and the bailee is at liberty to return another of equal value, he becomes a debtor under obligation to make a return in kind, the title to the property changes, and the transaction is a sale: *Andrews v. Richmond*, 34 Hun, 20, 23; and to the same effect, see *Austin v. Seligman*, 21 Blatchf. 507. Or, as expressed in an English case, wherever there is a delivery of property on a contract for an equivalent in money, or some other valuable commodity, and not for the return of the identical subject-matter in its original or an altered form, this is a transfer of property for value, — it is a sale, and not a

bailment: *South Australian Ins. Co. v. Randall*, L. R. 3 P. C. 109, 106. The very term "bailment" implies that the owner of an article has placed it in the hands of another, who is at some time to redeliver it to the owner. And if the person to whom the thing is delivered has the option to restore it or to pay for it in money or other property, such option is inconsistent with the character of a bailment, and the transaction is in law a sale: *Lyon v. Lenon*, 106 Ind. 567; *Andrews v. Richmond*, 34 Hun, 20; *Chase v. Washburn*, 1 Ohio St. 244; 59 Am. Dec. 623; *Austin v. Seligman*, 21 Blatchf. 507; *Marsh v. Titus*, 3 Hun, 550; and see *Kaul v. Kessler*, 114 Pa. St. 603.

But notwithstanding the above well-defined distinction between a sale and a bailment, the question whether a given transaction is in law one or the other is not free from difficulty, and the decisions are to some extent conflicting. Thus many of the decisions sustain the doctrine that if a party delivers or deposits grain with another, with an agreement, expressed or implied, that the latter may use and dispose of it, and fulfill his obligations to the former by returning an equal amount of other grain of the same quality, the transaction, in the absence of a statute changing the rule, constitutes a sale, and not a bailment: *Fishback v. Van Dusen*, 33 Minn. 111; *Chase v. Washburn*, 1 Ohio St. 244; *Johnson v. Brown*, 37 Iowa, 200; *Bailey v. Bearly*, 87 Ill. 556; or if the transaction constitutes a contract of bailment, it is converted into a sale whenever the bailee disposes of the grain: *Nelson v. Brown*, 44 Iowa, 455. But according to numerous other decisions, if a warehouseman receives grain to be stored for the owner, and with the owner's assent places it in a common bin with his own grain and that received from other depositors, and sells from this receptacle, retaining always sufficient to supply each owner, the contract continues one of bailment: *Rice v. Nixon*, 97 Ind. 97; 49 Am. Rep. 430; *Battenberg v. Nixon*, 97 Ind. 106; *Sexton v. Graham*, 53 Iowa, 181; *Nelson v. Brown*, 53 Id. 555; *Irons v. Kentaer*, 51 Id. 88; 33 Am. Rep. 119; *Ledyard v. Hibbard*, 48 Mich. 421; 42 Am. Rep. 474; and see *Morningstar v. Cunningham*, 110 Ind. 328, 336. In such case, it is held that the owners of the grain become tenants in common of the entire amount in store of like quality, and that this tenancy in common continues, although the entire mass in store may be changed by continued additions and subtractions: *Sexton v. Graham*, 53 Iowa, 181; *Arthur v. Chicago etc. R. R. Co.*, 61 Id. 648; *Dole v. Olmstead*, 36 Ill. 150; 85 Am. Dec. 397; *Andrews v. Richmond*, 34 Hun, 20. Nevertheless, if grain is received by a dealer under a contract, express or implied, to pay the market price therefor on the demand of the owner, but with no understanding that the latter shall have the right to demand either his own or other grain in return, and the grain so received is mixed with other of like quality in bins from which shipments are made daily, the transaction is held to be a sale, and not a bailment: *Richardson v. Olmstead*, 74 Ill. 213; *Lyon v. Lenon*, 106 Ind. 567. As to the effect of a warehouseman's receipt given to the depositor of grain for storage, see *Pribble v. Kent*, 10 Id. 325; 71 Am. Dec. 327; *Dole v. Olmstead*, 36 Ill. 150; 85 Am. Dec. 397; *Rice v. Cutler*, 17 Wis. 351; 84 Am. Dec. 747, and extended note on subject 752; *Nelson v. Brown*, 53 Iowa, 555.

The earlier decisions illustrating the distinction between a sale and a bailment will be found collected in notes to the following cases: *Slaughter v. Green*, 1 Rand. 3; 10 Am. Dec. 488, and note 490; *Chase v. Washburn*, 1 Ohio St. 244; 59 Am. Dec. 623, and note 630; *Carlisle v. Wallace*, 12 Ind. 252; 74 Am. Dec. 207, and note 209. Additional illustrations of the subject, taken from the more recent decisions, are as follows: Where it is arranged to deliver wheat to a miller, to be paid for on delivery, or at any subsequent time

when payment is demanded, and with an understanding that the miller may use it in his milling business, this is a sale absolute, if no right is reserved to recall or return it: *Jones v. Kemp*, 49 Mich. 9. Where the owner of certain jeweler's sweepings delivered them to a firm to be refined, agreeing to pay a fixed price for the refining, the firm agreeing to return the refined product, or account for the value thereof, held, that the contract was not one of bailment: *Austin v. Seligman*, 21 Blatchf. 503. So if A leaves money for safe-keeping with B, with the understanding, not that the identical money shall be returned, but only that a like sum shall be repaid him by B, this is not a bailment or special deposit, but a general deposit, in the nature of a loan: *Shoemaker v. Hinze*, 53 Wis. 116; compare *Wright v. Paine*, 62 Ala. 340. But where A delivered personal property to B, under a contract that the latter should safely keep and sell it, if possible, for the former, he fixing a minimum price, before a certain date, and if not, to return it in good condition, the transaction was held not to be a sale, but a bailment: *Middleton v. Stone*, 111 Pa. St. 589. So an agreement by which one transfers certain movables to another, conditioned that the latter is to sell them, pay himself what the former owes him, and distribute the residue to certain persons named, is at most but a contract of bailment, and not a sale: *Bourg v. Lopez*, 36 La. Ann. 439. So of a written contract entered into by one with a sewing-machine company for a sewing-machine, in which it was agreed that the contract was one of renting only, and not a sale, conditional or otherwise, and that no payment of money except that of the purchase-money, as provided, should vest in the party any title, or prevent the company from claiming possession of the machine: *Wheeler and Wilson Mfg. Co. v. Heil*, 115 Pa. St. 487; *ante*, p. 575; and see *Dando v. Foulds*, 105 Pa. St. 74; *Forrest v. Nelson*, 108 Id. 481; compare *Wire Book-sewing Machine Co. v. Crowell*, 8 Atl. Rep. 22 (Penn.). The general rule is stated to be, that if from the contract it appears that the party who receives possession of the goods receives them under an agreement that he is to retain them for a definite period, and if, at or before the expiration of that period, he pays for them, he is to become the owner, otherwise to pay for their use, this is but a bailment, and the title to the property, even as against creditors, remains in the bailor: *Echeards's Appeal*, 105 Pa. St. 103; *Dando v. Foulds*, 105 Id. 74; *Enlow v. Klein*, 79 Id. 488; *Rose v. Story*, 1 Id. 190.

COUNTY OF CHESTER v. BROWER.

[117 PENNSYLVANIA STATE, 647.]

COUNTY IS CORPORATION WITHIN MEANING OF CONSTITUTION OF PENNSYLVANIA, ARTICLE 16, SECTION 8, providing that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements"; and as such corporation, it may be held liable, in an action on the case, for consequential damages to private property injured by the erection of a county bridge.

WHEN RIGHT EXISTS, AND NO ADEQUATE REMEDY IS PROVIDED, it may be enforced by an action on the case.

ACTION on the case brought by one Brower against the county of Chester. The facts appear in the opinion. Verdict and judgment for the plaintiff, and the defendant assigned error.

H. H. Gilkyson and William B. Waddell, for the plaintiff in error.

R. E. Monaghan and Alfred P. Reid, for the defendant in error.

By Court, PAXSON, J. There was no taking of the property of the plaintiff below by the county of Chester, for the purpose of constructing the bridge on Gay Street over the French Creek, in the borough of Phoenixville. The claim was for consequential damages caused by the erection of the abutments of the bridge some fourteen feet above the grade of the street in front of the plaintiff's house. It follows that under the law as it stood at and prior to the adoption of the constitution he would have been without remedy: *Struthers v. Dunkirk R. R. Co.*, 87 Pa. St. 282, and cases there cited. The constitution of 1874 made a radical change in the law as regards consequential injuries. Section 8 of article 16 of that instrument declares that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction."

The jury have found that the construction of the approaches to the bridge was an injury to the plaintiff's property; hence if the county of Chester is a corporation within the meaning of said section of the constitution, the liability for such injury necessarily follows. It is true, a county is not in a strict technical sense a municipal corporation. It is a public corporation erected by the state for political purposes. One of its chief objects is the furtherance of the general policy of the state at large, especially in the due administration of justice, the preservation of the public peace, etc. It lacks powers of legislation, which in some form, and to some extent, are always possessed by municipal corporations. A county is a public, as distinguished from a private, corporation, and while it aids in the enforcement of the policy of the state, it regu-

lates to some extent the local affairs of the people within its borders. It is sometimes called a *quasi* municipal corporation. In any event, it is a corporation; it has its common or corporate seal; it acts through its duly constituted officers, and it may sue and be sued. The clause in the constitution above recited is very broad in its terms. The framers of that instrument were seeking to redress what this court has repeatedly declared to be a great hardship, and which was regarded by many persons as a great wrong; viz., the exemption of corporations from consequential damages where they injured private property without an actual taking thereof in the erection and construction of their works. The convention had before it the case of *O'Connor v. City of Pittsburgh*, 18 Pa. St. 187, in which a valuable property in the city of Pittsburgh was seriously injured by the change of grade of a street. This court held that as the law then stood no relief could be afforded. How reluctantly we did so may be gathered from the language of Chief Justice Gibson in delivering the opinion of the court. He said: "We have had this cause reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but I grieve to say we have discovered none." When, therefore, the convention took in hand the redress of this grievance, they did it thoroughly. They said practically that hereafter neither corporations nor individuals in Pennsylvania clothed with the power of eminent domain should injure private property without making compensation therefor, by "the construction or enlargement of their works, highways, or improvements," whether any portion of such private property was actually taken or not. The language of the constitution is to be construed liberally so as to carry out and not defeat the purpose for which it was adopted: *Leonard v. Commonwealth*, 112 Pa. St. 607. The section referred to was intended to embrace, and the language thereof is broad enough to embrace, every corporation and individual in the state clothed with the power of taking private property for public use. It is true, counties do not possess this power in its general or enlarged sense; yet it is equally clear that they do possess it to a limited extent in the matter of opening roads and constructing bridges. We need not elaborate so plain a proposition.

We see no difficulty as to the form of action. The legislature has not provided any remedy to enforce the constitutional provision, so far as counties are concerned. But the constitu-

tion confers a right upon the citizen to recover consequential damages in certain cases, and he cannot be deprived of that right by the neglect or omission of the legislature. When a right exists, and no adequate remedy is provided, it may be enforced by an action on the case: *Pennsylvania R. R. Co. v. Duncan*, 111 Pa. St. 352.

Judgment affirmed.

COUNTIES, TO WHAT EXTENT CLOTHED WITH CORPORATE POWERS and attributes: *Louisville etc. R. R. Co. v. County Court*, 62 Am. Dec. 424.

COUNTIES, LIABILITY OF, MODE OF ITS ENFORCEMENT, and power of legislature to modify or impair: *Gilman v. County of Contra Costa*, 68 Am. Dec. 293, and extended note 291-300.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

DRAKE v. HARRISON.

[69 WISCONSIN, 99.]

WHEN PARTY HAS RESERVED TO HIMSELF BY CONTRACT the right to discharge the obligation in two or more different ways he may elect, at any time before the date of payment has passed, in which way he will discharge it, and when he has a peculiar interest in discharging the obligation in a certain manner, he cannot be deprived of his right to do so, either by the act of his creditor without his consent, or by garnishment in a suit against the creditor.

IN GARNISHMENT PROCEEDING, EVIDENCE IS ADMISSIBLE to prove that the garnishee has a right and an interest in paying the money in a particular way, which, under his contract with his creditor, he has a right to do.

EXECUTION ISSUED UPON JUDGMENT obtained against two, but docketed only against one, is not absolutely void so long as it is outstanding, and is sufficient basis for garnishee process. Even if it were necessary to have the judgment docketed against the other defendant in order to validate the execution, the court has power to order it so docketed *nunc pro tunc*.

WHETHER GARNISHEE PROCESS UNDER THE STATUTE is a purely legal or an equitable action, and if purely equitable it was error to direct all the issues to be tried by a jury, *quære*.

F. B. Van Valkenburgh, for the appellants.

Gregory, Bird, and Gregory, for the respondent.

By Court, TAYLOR, J. The material facts in this case are the following: On the twenty-seventh day of September, 1881, the respondent recovered a judgment against the above-named defendants, J. M. Leighton and A. D. McDonald, in the circuit court of Jefferson County, for the sum of \$2,105.50,

damages and costs. This judgment was docketed on the same day by the clerk of said court under the letter "L" against "Leighton, J. M., and A. D. McDonald," and the judgment was never docketed against the said McDonald under the letter "M." An execution was issued out of said court, in due form of law, upon said judgment, on the 28th of November, 1885, directed to the sheriff of said county of Jefferson. After issuing said execution, and before the return thereof, an affidavit was made on behalf of the plaintiff in said judgment, in the form prescribed in section 2735 of the Revised Statutes. A garnishee summons was issued upon such affidavit against the appellants as garnishees, which was served on said appellants on the same day. Afterwards, and within twenty days, the garnishee defendants made and served the answer required by section 2759, Revised Statutes, denying all indebtedness or liability to the defendants Leighton and McDonald, or to either of them; and denying that they had in their possession, or under their control, any property, real or personal, effects or credits of any description, belonging to the said defendants, or either of them; and thereupon the plaintiff served notice that he chose to take issue on the answer of the garnishees, and that he would maintain them to be liable as garnishees.

This case was afterwards brought to trial upon the issue so made; and against the objection of the garnishees, the issues in the case were tried by a jury.

Upon the trial, the following facts appeared: 1. A written contract, made between the garnishees and the defendant A. D. McDonald, was offered in evidence. This contract was dated on the twenty-fourth day of August, 1885. The contract was for doing all the work on the line of the Chicago, Wisconsin, and Minnesota Railroad, from station zero, at the outskirts of Chicago, for the distance of twenty-eight miles west. The only matters in such contract which have any material bearing upon the questions involved in this case are the following: There are the following stipulations in said contract in regard to the manner in which the garnishees should pay the money which should become due said McDonald for his work under the same:—

"It is further agreed by the party of the first part that during the progress of the work an estimate shall be made on or about the first of each month of the materials furnished and the labor performed under this contract, and that pay-

ments shall be made by said first parties upon the estimate and certificate of the engineer on the work, on or about the fifteenth day of each month, for the amount and value of the work done and materials furnished in structures during the previous month; but fifteen per cent of the amount of each estimate shall be deducted and retained by the said first parties until the completion of the work embraced in and covered by this contract; provided, that within thirty days after the engineer shall certify that the said work is fully performed, and after the final estimate and certificate of completion by the engineer shall have been determined and delivered to the first parties, all sums due the parties of the second part shall be fully paid, and this contract shall thereafter be, and be considered to be, determined. It is mutually agreed and understood by the parties hereto that said parties of the first part [meaning the garnishees] shall have the right to pay the money, or any portion thereof, due under this contract for labor performed or materials furnished to the persons actually performing the labor or furnishing the materials respectively, whenever after the same are payable; and said payments are hereby expressly authorized by the second parties to be made, and shall be considered as payments hereunder, as fully as though made to said second parties directly; and said parties of the second part also agree, whenever so required, to furnish to the parties of the first part a full and complete statement of all liabilities incurred on account of work herein contracted for, which are outstanding and unpaid."

The words "second parties," used in said contract, must be taken to mean A. D. McDonald alone, as he was the only person who signed the contract as second party. There is also a provision in the contract that if the second party fails to perform the contract according to its terms, he shall forfeit all right to the fifteen per cent reserved as provided above.

The evidence in the case shows that the work was commenced under the contract immediately after its date, and was not completed until about the 1st of January, 1886. It also shows that the garnishee summons was served on the appellants on the twenty-eighth day of November. It further shows that all the work done and materials furnished under the contract previous to the first day of November had been paid for by the garnishees previous to the said twenty-eighth day of November; that when the summons was served, no estimate of the work done and materials furnished by McDon-

aid during November had been made, but it was admitted on the trial that the value of the work done and materials furnished by McDonald under the contract, previous to the 28th of November, and which had not been paid for, exceeded the sum of four thousand dollars.

Before the trial, the plaintiff took the depositions of Green, one of the garnishee defendants, and to the one hundred and sixteenth interrogatory, which reads as follows: "Now, it appears by this account, Mr. Green, that you have paid nearly eleven thousand dollars on the contract since the garnishee process was served. Answer. We had paid nothing to A. D. McDonald & Co. [Our contract with the railroad company compels us to pay the laborers for all the work done on the road which we have done.]" The part inclosed in the brackets was stricken out on motion of the plaintiff, and the defendants duly excepted. Answers of a similar character to the one hundred and thirty-second and one hundred and thirty-fifth interrogatories were also stricken out on motion of the plaintiff, and exceptions taken. The defendants offered in evidence a contract they had made with Colby and Pinney for the building of the road, which McDonald had contracted with them to construct under his contract given in evidence. This was objected to by the plaintiff, and ruled out by the court. The defendants, at the time of offering the contract, stated the object was to show what contract Harrison and Green were working under at the time they employed McDonald; and they proposed to show, in connection with that, the fact that McDonald was familiar with that contract, and understood the conditions of it, and his was made similar to it, with the understanding that he was responsible as they were. Exception was taken to this ruling by the defendants.

The garnishee Green testified on the trial as follows: "After the garnishee notice was served on us, we paid the money directly to the laborers who did the work, in currency, by our paymaster. We paid the workmen as their work became due. Q. But the amount which appears to have been earned and unpaid on the 28th of November,—when was that paid? A. In December. It was paid out on the pay-rolls made out by McDonald or his book-keeper; I don't know which it was. They were furnished us by McDonald. These payments were made on the line, mostly to the men who were then working there. The payments were made with the assent or request of McDonald." Considerable evidence was given upon the

subject of paying the men who did the work, after the garnishee notice was served; but under the instructions given by the court to the jury, these payments were held to be no defense to the claim of the plaintiff against the garnishees, unless it was further shown that the garnishees had personally employed the men who did the work for McDonald under his contract, and became personally bound to each laborer to pay the amount of his wages.

The learned judge instructed the jury as follows: "If you find that there was no agreement made by Harrison and Green with the workmen, or any of them, on and prior to November 28, 1885, and prior to the time of the service of the garnishee summons upon them, to pay them their wages, then you must answer the second and third questions, 'No.' If Harrison and Green paid the four thousand dollars to workmen with whom they had not, on or before November 28, 1885, made an agreement to pay them, or some of them, their wages, then you must answer the second and third questions negatively. You must answer the second and third questions negatively, unless you find that Harrison and Green not only made an agreement with the workmen before November 28, 1885, to pay them their wages, but that they also paid the four thousand dollars to the men with whom they had made that agreement. If they paid it to other men with whom they had no such arrangement, then you must answer the second and third questions negatively. The burden of proof is upon the garnishee defendants to establish, by a preponderance of the evidence, that they did make such agreement with the workmen on or before November 28, 1885, when the garnishee summons was served on them; and if the garnishee defendants have failed to establish the making of such an agreement by the preponderance of the evidence, then you must answer the second and third questions negatively."

It is very clear, from the whole charge of the learned judge, that he was of the opinion, and so repeatedly instructed the jury, that the garnishees had no authority under their contract with McDonald to pay any of the laborers under the agreement in the contract after the garnishee process was served on them; that, in fact, the option which the garnishees reserved to themselves to pay the laborers who did the work under the contract, instead of paying McDonald for such work, was taken away by the service of the garnishee process. The learned judge, after quoting the provisions from

the contract, says: "That was a right that Harrison and Green had under this contract, as between them and McDonald and the men, to pay the men who were actually doing the work; but when the garnishee summons is served upon Harrison and Green, then their right to pay under this contract would be interfered with somewhat. The men who did the work under this contract could not sue Harrison and Green, if that was all there was existing between them and Harrison and Green. They could not sue Harrison and Green until the knowledge of this provision was brought to them, and they assented to it, and Harrison and Green agreed to pay it to them. So that, if this was all there was in the case, it would have been my duty to have directed a verdict for the plaintiff against the garnishees in this case."

To the instructions above given by the learned circuit judge, exceptions were duly taken by the garnishees.

It will be seen by the offers of evidence made by the garnishees, and which were excluded by the court, the garnishees endeavored to show that they were interested in having the laborers, who performed the work for McDonald under his contract with them, paid in full. Their offer was, in substance, to show that they were bound by the railroad company, who were constructing the road, and which they had agreed with the company to construct, to discharge the claims of all laborers and material-men who performed labor or furnished materials in the construction of such road. This evidence, if admitted, would have very clearly established the fact that the right reserved in the contract with McDonald to the garnishees to pay the laborers, instead of paying McDonald, the amount due for their wages, was a matter in which they had an interest, and that the option to pay could not be arbitrarily withdrawn by McDonald; and if it could not be withdrawn by McDonald, then it could not be withdrawn by a creditor of McDonald garnishing them before the time had passed within which the garnishees were, under the contract, authorized to exercise the option reserved to them in their contract. The interest of the garnishees, as contractors with the railroad company for the construction of the road, in the payment of the wages of the laborers, would more clearly appear had the learned counsel for the garnishees introduced in evidence the statutes of Illinois upon the subject of the lien of laborers upon railroads for their unpaid wages, showing the right of such laborers to compel the payment of their wages

by the company, notwithstanding the fact that they were working for the contractors with the company, and not for the company: See Hurd's R. S. Ill. 1883, p. 723.

The rule of law is very clear that when a party has reserved to himself by contract the right to discharge his obligation under such contract in two or more different ways, he may elect, at any time before the day of payment has passed, in which way he will discharge the same: 2 Parsons on Contracts, 657, 658; Story on Contracts, sec. 1323; *Smith v. Sanborn*, 11 Johns. 59; *McNitt v. Clark*, 7 Id. 465; *Choice v. Moseley*, 1 Bail. 136; 19 Am. Dec. 661; *Small v. Quincy*, 4 Me. 497; *Appleton v. Chase*, 19 Id. 79; *Layton v. Pearce*, 1 Doug. 15, 16; *Chippendale v. Thurston*, 4 Car. & P. 98.

It is urged that it does not appear upon the face of the contract that the garnishees had any interest in the payment of the laborers, and so the reservation in the contract is a mere option in which they have no interest, and the right to exercise such option may be withdrawn by the other party at any time, either before or after the money is payable on the contract. If such were the case, and the evidence in the case failed to show that the garnishees had any interest in making such payments, there are authorities which hold that the option cannot be insisted upon by the party to whom it is reserved: See *Shannon v. Mayor etc. of Hoboken*, 37 N. J. Eq. 123, and other cases referred to in the brief of the learned counsel for the respondent in this case. My view of this contract is, that it must be presumed, in absence of any proofs showing the contrary, that the garnishees had an interest in having the laborers of McDonald paid, and, in the absence of such proofs, the provision must be held to bind all the parties to the contract. But we do not place our decision in this case upon that construction of the contract. The record discloses the fact that the garnishees offered affirmative evidence on their part tending to show that they had an interest in the payment of the wages due the laborers, which evidence was rejected by the court, and exceptions duly taken by the garnishees. And the court held substantially that, as a question of law, the garnishees had no interest of any kind in making payments to the laborers instead of to McDonald, and so rejected the evidence offered to show such interest.

It seems to us that there can be no ground for holding that the garnishees could not, if they had any interest in doing so, have discharged their debt for the amount which would have

been due to McDonald for the work done by him under his contract in the month of November, at any time before the 15th of December, by paying the amount then due in discharge of the wages of the laborers then also due and unpaid by McDonald; and if they had the right under their contract to discharge the debt so to become due for the work done in November, it is evident that McDonald could not defeat such right by an assignment of the amount so to become due to him, before or after the estimate had been made by the engineer as provided by the contract, and before the fifteenth day of December, when the same was payable; and if he could not defeat the right by an assignment of his claim, then the plaintiff cannot hold it under his garnishee process: *Murphy v. Bowery National Bank*, 30 Hun, 40, 45; *Greene v. Warnick*, 64 N. Y. 226; *Mechanics' & T. National Bank v. Mayor of New York*, 58 How. Pr. 207.

It seems very evident that the learned circuit judge was of the opinion that such right of the garnishees under their contract could be defeated at the will of McDonald. Under any other view of the case, it is impossible to uphold his instructions to the jury and his rulings on the trial. Upon the undisputed evidence in the case, and offered on the trial, and upon the findings of fact by the jury, it seems to us a verdict in favor of the respondent cannot be sustained.

The only facts found or questions answered by the jury were the following: "1. What was earned and unpaid on the contract between Harrison and Green of the first part, and A. D. McDonald of the second part, bearing date August 24, 1885, being the contract introduced in evidence on the trial on the 28th of November, 1885, at the time of the service of the garnishee summons in this action?" It was admitted, and the jury so found four thousand dollars. "2 Had Harrison and Green, at the time when said garnishee summons was served, or prior thereto, entered into an agreement with the men actually performing the labor under said contract, with knowledge and consent of A. D. McDonald, by which agreement with said laborers they bound themselves to pay said laborers the money earned by them under said contract, instead of paying the same to McDonald?" This question was answered in the negative by the jury. "3. What sum of money, if any, did Harrison and Green pay to the men actually working on the road, to whom they had agreed to pay it, with the knowledge and consent of McDon-

ald, prior to the time of being served with the garnishee summons?" To this question the jury answered, "Not any."

These findings of fact do not, under the contract in evidence, make out a case in favor of the respondent, if it was made to appear that the garnishees had any interest in making payment to the laborers.

This is not at all like the cases in this court where it has been held that a servant or bailee, who receives money from A, with directions to pay it to B, or when A's debtor, without any further consideration for his promise, agrees to pay the amount of the debt due to A to one of his creditors, in which the rule laid down by the learned circuit judge might apply. In these cases it is held that, until the money is actually paid over as directed, the party placing the money in the hands of his servant or bailee may revoke the authority, and in the case of the debtor, he may revoke the direction to pay the debt to his creditor at any time before such creditor has knowledge of the agreement, and has accepted the debtor's promise to pay his debt for the amount of his claim against A. Under the offer of evidence made by the garnishees, the case is like the case of A selling his farm to B by warranty deed, there being an outstanding mortgage upon the farm, which by his covenants he is bound to pay. B pays the whole purchase price, except the amount to become due upon the mortgage, and agrees to pay that amount to A when the mortgage becomes due, but reserves the right to pay the amount to become due to the mortgagee instead of to A, if A fails to pay the mortgage when due. In such case, it is too clear for discussion that B has an interest in the payment of the mortgage which A cannot take away without his consent: *Kelly v. Roberts*, 40 N. Y. 432. The right reserved in the contract between the parties giving the garnishees the option to discharge any debts which might become due to McDonald under the contract by a performance on his part, by paying the amounts due to the laborers instead of to McDonald personally, is a substantial part of such contract, and if the garnishees have an interest in making such payment, its effect cannot be avoided by any act of McDonald's without their assent.

The evidence shows conclusively that there was nothing due and payable under the contract when the garnishee summons was served, and that nothing became due until the 15th of December thereafter. It is also clear that if on the 15th of December there was enough money due to the laborers at that

date unpaid by McDonald, the garnishees, if they had any interest in making such payment, would have a right under their contract to pay the money due to such laborers in discharge of their liability to McDonald, and no objection made by him to such payment could prevent such payment, and discharge of their liability under the contract. If McDonald could not prevent the discharge of their debt in that way, it is certain the creditor of McDonald cannot by virtue of his garnishee process. If the garnishees were interested in making payments to the laborers, and they can be held at all for the money which had been earned when the garnishee summons was served, the amount of which had not then been ascertained, as provided in the contract, and the payment of which was not due until the 15th of December then next, they can only be held if, on or before the 15th of December, they had not paid the amount so earned in discharge of the claims of laborers then due to such laborers who had performed the work for McDonald under their contract with him. If they had paid said sum to said laborers on or before said 15th of December, then the plaintiff was not entitled to a judgment against the garnishees; and it was wholly immaterial whether such sum was paid with the knowledge or consent of McDonald, or whether the garnishees had before that time employed the laborers personally, or whether the laborers had notice that they would make such payment. If they were paid, and the money was then due them, the garnishees had discharged their promise to pay for the work so done in the manner provided by the contract, and their right to so discharge it cannot be taken away without their consent. Had the money been due and payable at the time the garnishee process was served, and the garnishees had not at that time paid either the laborers or McDonald, then the rule laid down by the learned judge in his charge to the jury, and in the questions submitted to them, would have been applicable, and the same question would have been presented as in *Balliet v. Scott*, 32 Wis. 174.

The case was tried upon an erroneous view of the rights of the garnishees under their contract with McDonald. The court erred in excluding the evidence offered by the garnishees, and in the instructions to the jury; and the findings of fact by the jury are not sufficient to authorize a judgment for the plaintiff.

There were several other objections made by the learned counsel for the appellants against the right of the responder.

to maintain this proceeding, and as there will probably be a new trial of the case, it may not be improper to consider the objection "that the respondent could not maintain his action of garnishment, for the reason that the court had no right to issue an execution on the judgment, because the judgment had never been docketed as a judgment against McDonald." Admitting that the judgment had never been properly docketed against McDonald, so as to make it a lien upon real estate, we are of the opinion that an execution issued upon such judgment to the sheriff of the county in which the judgment was rendered is not void. Whether it be voidable or not, need not be determined. If it was not absolutely void, then, so long as it was outstanding, it was a sufficient basis for the garnishee process. In the case of *Kentzler v. Chicago etc. R'y Co.*, 47 Wis. 641, this court said: "By the law governing courts generally, every court has inherent power to issue writs of execution on its own judgments, but not beyond its territorial jurisdiction. At the common law, all process of courts is limited to the territory over which their jurisdiction extends, and the power of any court to issue extraterritorial process is not inherent in it, but comes only by express statutory grant. . . . The issuing of the execution within the territorial jurisdiction was within the general power of all courts, independently of statutory authority; and section 8 [requiring the execution to recite the time of docketing the judgment] went only to the form of the execution, and not to the authority to issue it." In this case, it was held that an execution issued and directed to a sheriff of a county other than that in which the judgment was rendered, and in which county a transcript of the judgment had not been filed and docketed, was absolutely void. But the argument of the late learned chief justice clearly shows that, had the execution issued to the sheriff of the county in which the judgment was rendered, the decision would have been in favor of the validity of the execution. The statute on the subject of executions was not intended to take away the common-law power of the courts to issue executions to enforce their judgments. There are no negative words in the statute. We think the execution was not void, and was sufficient, therefore, to sustain the proceedings of garnishment. But if it were necessary to have the judgment formally docketed against the defendant, McDonald, in order to validate the execution, the court would have ample power to order it so docketed *nunc pro tunc*: See *Hunt v. Grant*, 19 Wend. 90; *Blos-*

som v. Barry, 1 Lans. 190; *Corwith v. State Bank of Illinois*, 18 Wis. 587; 86 Am. Dec. 793; *Sabin v. Austin*, 19 Wis. 421; *Kennedy v. Knight*, 21 Id. 340; 94 Am. Dec. 543; *Wait v. Sherman*, 61 Wis. 119; *Northrup v. Shephard*, 23 Id. 513.

The question whether the garnishees were indebted to McDonald alone, or to McDonald & Co., was, under the evidence, a question of fact with which we would not be disposed to interfere were that a material question in determining this appeal. Whether a garnishee action under the statute is purely a legal action or a purely equitable action,—and if purely equitable, it was error for the court to direct all the issues in the case to be tried by a jury,—we do not feel called upon to decide on this appeal: See R. S., sec. 2843; *Soenk- sen v. Weyhausen*, 32 Wis. 521.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

GARNISHEE'S LIABILITY AS AFFECTED BY HIS CONTRACT RELATIONS WITH DEFENDANT.—The rule being that such relations cannot be interfered with by garnishment: 2 Wade on Attachment, secs. 473 et seq.; Drake on Attachment, secs. 517-520, 593.

ERRONEOUS JUDGMENT AFFORDS PROTECTION for all acts done under it: *Allen v. Huntington*, 16 Am. Dec. 702. As to judgments on which execution may issue, see Freeman on Executions, secs. 16-20, and notes.

STATE v. HOOKS.

[69 WISCONSIN, 182.]

WHERE RAPE IS CHARGED, PROSECUTING WITNESS MAY TESTIFY as to her marriage, and such testimony will warrant the jury in finding the fact of marriage, and that such witness is not the wife of defendant.

DEFENDANT ON TRIAL UPON INFORMATION FOR RAPE cannot be convicted and sentenced for adultery.

INFORMATION FOR RAPE IS SUFFICIENT WITHOUT ALLEGING that the female upon whom the offense was committed was a married woman. But if alleged and proved, still a conviction of adultery cannot be sustained upon the charge of rape.

PARTY CHARGED WITH ONE CRIME CANNOT BE CONVICTED OF ANOTHER and different, unless the allegations necessary to constitute the greater crime charged in the indictment or information are also sufficient to constitute the lesser crime.

Charles E. Estabrook, attorney-general, for the state.

Bushnell and Watkins, for the defendant.

By Court, TAYLOR, J. The defendant was informed against for rape. The following is a copy of the information:—

"I, J. W. Murphy, district attorney for said county, hereby inform the court that on the sixteenth day of July, in the year A. D. 1886, at said county, Frank Hooks did then and there unlawfully and feloniously, with force and against the will of one Dorcas Cushman, a married female more than ten years of age, said Dorcas Cushman not being then and there the wife of said Frank Hooks, unlawfully ravish and carnally know her, the said Dorcas Cushman, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Wisconsin."

On the trial, the circuit judge being of the opinion that the evidence was not sufficient to justify the jury in finding the defendant guilty of the crime of rape, the jury, under the direction of the court, found the following verdict: "We, the jury, find that the defendant had carnal knowledge of the body of Dorcas Cushman, she being a married female, and not the wife of the defendant, as charged in the information, but without force, and not against her will." Upon this verdict the court suspended sentence, and certified to this court two questions: 1. "Was the evidence sufficient to warrant the jury in finding that Dorcas Cushman, at the time of the alleged offense, was a married woman, and not the wife of the defendant?" 2. "Can the court sentence the defendant for the crime of adultery upon the information and verdict?"

Upon the question of the marriage of Dorcas Cushman, Dorcas Cushman, as a witness for the state, without any objection on the part of the defendant, testified that she was the wife of Silas Cushman, and was married to him in the month of April, 1885. Other witnesses on the trial referred to Dorcas Cushman as being the wife of Silas Cushman at the time the offense was charged to have been committed. We think this evidence was sufficient to warrant the jury in finding that Dorcas Cushman was a married woman, and not the wife of the defendant. In the case of *Mills v. United States*, 1 Pinn. 73, it was held that persons present at the marriage were competent witnesses to prove a marriage in fact. In *State v. Dudley*, 7 Wis. 664, it was held that the husband was a competent witness to prove the marriage between himself and wife. See also *West v. State*, 1 Id. 228, and the cases cited by the attorney-general in his brief.

Under the decisions of this court, we are of the opinion that the defendant cannot be sentenced for the crime of adultery

upon his trial upon an information for rape. It is very clear that the information for rape would have been sufficient without alleging that the female upon whom the offense was committed was a married woman. The statute defines the crime of rape in the following language: "Any person who shall ravish and carnally know any female of the age of ten years or more, by force and against her will, shall be punished in the state's prison not more than thirty years, nor less than ten years." Under this act, the fact that the female is a married woman is wholly immaterial, and the words in the information alleging that she was a married woman are mere surplusage, and the defendant might have been convicted of the rape charged, if the evidence was sufficient, without proof of the fact of the marriage of the female upon whom the rape was committed.

In an information charging the defendant with rape, there is no necessity for alleging that the female upon whom the offense was committed was married, and consequently there is no necessity for proving that fact on the trial. An information for rape does not necessarily charge facts showing that the defendant had committed adultery. It would not be urged that the defendant could have been convicted of adultery had the information omitted to state that the female was a married woman, or that the defendant was a married man, and yet, in that case, the information would be good as an information for rape.

May the state, by alleging matters wholly immaterial to the description of the crime charged against the defendant, compel him to come to trial prepared to contest any issue which the state is not bound to prove in order to convict him of the offense charged? We think not. It is true, the supreme court of Massachusetts seems to have held otherwise in the case of *Commonwealth v. Squires*, 97 Mass. 59-61. In that case the court say: "If the less offense is duly charged in the indictment, the case is within this provision, even if one of the elements alleged is not a necessary element of the greater offense. This is clearly shown by the decision of this court that a man charged with a rape on his daughter might be convicted of incest, although it was not necessary or material in charging him with rape to allege that she was his daughter; citing *Commonwealth v. Goodhue*, 2 Met. 193." In looking at the case in 2 Metcalf, it appears that the court held, without comment, that the indictment for rape in that case contained

all the allegations necessary to show that the defendant committed incest, if not guilty of committing the rape as charged, upon his daughter; and it was impliedly, but not expressly, held that the allegations in the indictment, which were wholly immaterial in charging the crime of rape, might still be used for the purpose of charging the defendant with incest. No argument appears to have been made upon this point. With all proper respect for the opinion of the learned court which made the above decisions, we think the rule adopted by this court in *Kilkelly v. State*, 43 Wis. 604, *State v. Shear*, 51 Id. 460, and *State v. Erickson*, 45 Id. 86, 92, is the better rule, and that a defendant charged with one crime cannot be convicted of another and different crime, unless the allegations necessary to constitute the greater crime charged in the indictment or information are also sufficient to constitute the lesser crime.

The rule which allows a conviction for another and different crime than the main crime charged in the indictment or information is a violation of the rule at common law which prohibited the charging of two different crimes in the same count in an indictment. The power to convict of any other crime than that which constitutes the main charge in the indictment is founded upon the statute, and the decisions above referred to in the supreme court of Massachusetts were based upon the statute of that state, which is in all respects like section 4695 of the Revised Statutes of 1878. This section reads as follows: "Whenever any person indicted or informed against for felony shall, on trial, be acquitted by verdict of a part of the offenses charged in the indictment or information, and convicted of the residue thereof, such verdict may be received and recorded by the court, and thereupon the person charged shall be adjudged guilty of the offense, if any, which shall appear to the court to be substantially charged by the residue of such indictment or information, and shall be sentenced and punished accordingly."

Under this law, the Massachusetts court has held, in *Commonwealth v. Murphy*, 2 Allen, 163, and *Commonwealth v. Squires*, 97 Mass. 59, that on the trial upon an indictment for rape, the defendant cannot be convicted either of adultery or fornication, unless there be allegations in the indictment which, if proved, and the state fails to prove the carnal intercourse was with force, and against the will of the female, would constitute the crime of adultery or fornication. The same court held that to constitute the crime of rape, it is wholly unneces-

sary to allege or prove the facts which are necessary to constitute the crime of adultery or fornication; and they also hold if, in the indictment for rape, immaterial allegations are inserted, which, if proved, would constitute either the crime of adultery, fornication, or incest, and on the trial the state fails to prove the crime of rape, and proves the illicit intercourse, the defendant may be convicted of either of the crimes of adultery, incest, or fornication, according as the material matters alleged in the indictment, and proved on the trial, constitute one or the other of said crimes. On the other hand, this court has held, in the cases above cited, that the insertion of immaterial allegations in the information cannot be used to convict of a different offense than that charged in the indictment, and that neither adultery nor fornication is a part of the offense charged in an indictment for rape, within the meaning of the section above quoted. Substantially the same rule was adopted by the supreme court of Iowa: See *State v. Thomas*, 53 Iowa, 214.

The first question presented to the court by the learned circuit judge is answered in the affirmative, and the second question in the negative.

VERDICT FOR ONE OFFENSE under indictment for another, when jury may find: *Whilden v. State*, 71 Am. Dec. 181, and note; *Dukes v. State*, 71 Id. 371, note 381; *Commonwealth v. Campbell*, 83 Id. 705; *Commonwealth v. Berry*, 96 Id. 767.

INDICTMENT FOR RAPE, what allegations sufficient: *Commonwealth v. Fogarty*, 69 Am. Dec. 264; note to *Smith v. State*, 80 Id. 272.

CLARK v. STATE.

[69 WISCONSIN, 208.]

BURGLARY.—BREAKING AND ENTERING BUILDING IN PROCESS OF CONSTRUCTION, and not yet fit for the purpose for which it is being constructed, if with intent to commit a felony, is burglary by the statute of Wisconsin.

BUILDING IS A STRUCTURE which has capacity to contain, and is designed for the habitation of, man or animals, or the sheltering of property. It need not be completed, if it is in condition to hold tools or other articles of personal property.

BURGLARY.—THE WORD "STABLE," as commonly used and understood, is equivalent to the word "building."

INDICTMENT and conviction for burglary.

Bradley G. Schley, for the plaintiff in error.

L. K. Iuse, assistant attorney-general, for the defendant in error.

By Court, COLE, C. J. The plaintiff in error was prosecuted and convicted of the crime of burglary. A motion in arrest of judgment was made, principally upon the ground that burglary, neither at common law nor as defined by statute, was properly charged in the information. The information charges, in effect, that the plaintiff in error, on the twenty-seventh day of August, 1886, at Milwaukee County, "the unfinished dwelling-house of one Fred Frady, then and there in the custody and possession of said Fred Frady, and there situate, in the night of said day, then and there unlawfully, feloniously, and burglariously, did break and enter, with intent then and there the tools, goods, chattels, and property of one Peter Oman and one Charles Gesch, then and there in said dwelling-house being found, then and there feloniously and burglariously to steal," etc. The information is under section 4409 Revised Statutes, which makes it burglary to break "and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling-house, or any ship, steamboat, vessel, railroad freight-car, or passenger-car, with intent to commit the crime of larceny or other felony." Our statute defines or describes several grades of burglary, and makes that offense burglary which was not so at common law: *State v Kane*, 63 Wis. 260.

It appears that the building broken into in this case was erected upon a stone foundation, was intended for a dwelling-house, and was in process of construction. The walls or sides were up, and the roof was on. The windows and doors had not been put in, though some of the windows were boarded up. A temporary room had been partitioned off in the basement; the basement walls forming two sides, the other sides being closed up with boards, with a door which was locked with a padlock. This room was intended for storing the tools of the workmen while at work on the building. The outside window of the basement was covered with boards. A temporary floor had been laid, from which the basement was reached by means of a ladder. There was a chest of tools on this temporary floor, and also tools in the small room below. The evidence showed that the boards on the basement window were torn off, and the door on the small room in the basement, which was

left locked, was broken open, and carpenters' tools were taken from this room, and from the chest which was on the floor above. It also appeared that Frady was a contractor who had entered into a contract to erect and complete the building for a specified sum, and was in possession and control of the same.

Now, the contention of the learned counsel for the plaintiff in error is, that breaking and entering a structure in the process of construction, as the building in question was described to be, is not included within the statute. It will be observed the provision quoted makes the breaking and entry in the night-time of "any office, shop, warehouse, or other building not adjoining or occupied with any dwelling-house," with intent, etc., one grade of burglary. But it is said a structure which is unfinished, unfit for occupation for the purpose for which it was designed, is not a building within the meaning of the statute. But, on considering the objects of the statute, we are fully satisfied that the word "building," as used therein, does not necessarily mean a structure so far completed as to be in all respects fit for the purpose for which it was intended. It doubtless does mean an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. Webster defines the word "building" as "a fabric or edifice constructed; a thing built"; Worcester defines it, "a structure or edifice"; the Imperial Dictionary, "a fabric or edifice constructed for use or convenience, as a house, church, shop." In *La Crosse etc. R. R. Co. v. Vanderpool*, 11 Wis. 121, 78 Am. Dec. 691, Mr. Justice Paine says: "The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of, man or animals, or the sheltering of property." In this case the structure was intended for use and occupation as a residence when completed. Now, to hold that it was not a building — does not satisfy the definition of the statute, because it is unfinished, not perfect for the purpose for which it was designed eventually to be used — would be giving the statute a stricter construction than we are disposed to place upon it. We are rather inclined to hold that the legislature intended to include in the term "building" a dwelling-house not completed, but in the condition in which the one in question was and in which tools or other articles of personal prop-

erty were or might be temporarily stored or left for safe-keeping. The language is broad enough to include such an edifice, and we think does include it.

But counsel refers, in support of his construction of the statute, to the cases of *Elmore v. St. Briavells*, 8 Barn. & C. 461; *State v. McGowan*, 20 Conn. 245; 53 Am. Dec. 336; *McGary v. People*, 45 N. Y. 153. *Elmore v. St. Briavells*, *supra*, was an action against the hundred to recover satisfaction for damages sustained for setting fire to a building intended for and constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements. The act gave the action against the hundred where the fire consumed a house, barn or outhouse. It was held the building in that case was not a dwelling-house, though it was intended for one; nor was it an outhouse or barn, within the meaning of the statute, so as to entitle the owner to maintain the action against the hundred. Bayley, J., says: "The hundred are liable to make satisfaction to the party injured by the burning of a house, outhouse, or barn, provided a capital offense be committed against that statute by such burning. This building was not a barn, within the meaning of that word as used in the statute; though the house had been applied to the purposes which a barn might be used for." *State v. McGowan*, *supra*, was an information charging the defendant with burning a dwelling-house, and it appeared that the building burned was designed and built for a dwelling-house, but was not completed, ready for the habitation of man. The court held the crime of arson meant the common-law offense, which was defined to be the willful and malicious burning of a dwelling-house which was completed and inhabited, or at least ready for occupation in the condition in which it was. *McGary v. People*, *supra*, was an indictment under the statute for setting fire to an unfinished building. The indictment was under a statute making it a felony to set fire to or burn any building erected for the manufacture of cotton or woolen goods, or both. The court held that the statute applied to a completed building, and not one in process of construction or erection.

These cases furnish but little aid in the construction of our own statutes, for it is obvious, as Mr. Bishop remarks, that the word "building," in a statute, will almost always depend for its meaning, in some degree, on the particular subject, and its connection with other words: Statutory Crimes, sec. 292. And

while, as the assistant attorney-general suggests, it may be difficult to say at what time a structure in process of construction presents such a degree or state of completion as that it may be described as a building in the sense of the statute, still we think the edifice in question may be properly denominated a building within the meaning of section 4409. In the connection in which the word is used, it cannot import a finished structure ready for use, as a residence, for the words are, "any other building not adjoining or occupied with a dwelling-house." The other building was a structure different from a dwelling-house, as those words were used in this and the two preceding sections. We think the provision was intended to include any building not within the curtilage, in which property might be stored, or men or animals sheltered. There are cases which show that the word is often used in statutes in that sense. In *Rex v. Worrall*, 7 Car. & P. 516, an unfinished building intended as a cart-shed, which was boarded up on all its sides, had a door with a lock to it, and the frame of a roof, with loose gorse thrown upon it, but not thatched, was held a building. In *Queen v. Manning*, L. R. 1 C. C. 338, an unfinished house of which the walls were built and finished, and the roof on and finished, considerable part of the flooring laid, and the internal walls and ceilings prepared ready for plastering, was held to be a building. This shows that a building, as the word is often used, does not necessarily imply a completed structure.

In *Barnett v. State*, 38 Ohio St. 7, a defendant was indicted for the burglary of a barn. The proof showed that the building which had been broken and entered was erected by the owner on his farm for a dwelling-house, but had never been occupied or used as such; that the owner had for several years, and ever since its erection, used it to store wheat after it was thrashed, and corn after it was husked, such grain being the products of the farm on which the building was erected; and the court held the building a barn within the meaning of the statute. In *People v. Stickman*, 34 Cal. 242, the defendant was indicted for burglary for breaking and entering a chicken-house in the night-time, with the intent to steal the domestic fowls there being. An objection was taken, that to constitute burglary there must be a breaking and entering into a house, room, or tenement where some person dwells or lives. But the court decided that the language, "any dwelling-house, or any other house whatever, or tent, or vessel, or other water-

craft," was broad enough to include buildings of any kind, and used for any purpose, and sustained the conviction.

In *Orrell v. People*, 94 Ill. 456, 34 Am. Rep. 241, in an indictment for breaking and entering a stable, the objection was taken that it should have been averred that the defendant broke and entered a building. But the court said that the word "stable," as the word was commonly used and understood, was equivalent to "building." In *Commonwealth v. Squire*, 1 Met. 258, the defendant was indicted for feloniously setting fire to a building erected for a dwelling-house, but not completed or inhabited. It was objected that the indictment was bad, and did not charge a crime, because the building described was not completed. The court say, in answer to the objection: "The ground of the objection is, that a structure cannot be considered a building while it is yet incomplete and unfinished in any respect. Looking at the objects of the statute, and its provisions, we are fully satisfied that the term 'building,' as used in the statute, does not necessarily import a structure so far advanced as to be in every respect finished and perfect for the purpose for which it is designed eventually to be used. If this were so, then the burning of a structure designed for a dwelling-house, at any period before the last door was hung, would not be punishable. We cannot adopt a construction of the statute which would leave open so wide a door to escape from its penalties."

It is further claimed that if the structure was a building, it did not belong to the class covered or intended to be covered by section 4409. We have already said that the section embraced an unfinished dwelling-house in the state the one in question was,—a structure which could or might be used for the habitation of man or animals, or in which personal property might be temporarily stored. This sufficiently disposes of this point. We cannot see that the maxim, *Noscitur a sociis*, has any application to the case, for the language is broad enough to include any building of any kind which is not adjoining to or occupied with a dwelling-house, for whatever purpose it may be used, and in the condition this was.

There is abundant evidence to sustain the verdict. This disposes of all the material questions in the case.

The judgment of the municipal court is affirmed.

STYLOW v. WISCONSIN ODD FELLOWS M. L. INS. CO

[69 WISCONSIN, 224.]

WHERE INSURANCE COMPANY RECEIVES PAYMENTS ON ASSESSMENTS ON a policy when they are overdue, and when it might refuse payment and declare the policy forfeited under its by-laws, it cannot accept and keep the money, and still insist upon a forfeiture. Nor does the fact that where the money is so received the receipts therefor have a conditional clause of the by-laws appended, to the effect that a physician's certificate of good health may be required in all cases of reinstatement, alter the case, in the absence of fraud in the insured as to his state of health at the time the payments were made.

INSURANCE COMPANY, BY MAKING AN ASSESSMENT AGAINST AN ASSURED after he has failed to pay a previous assessment within the time declared by the by-laws to work a forfeiture, waives the forfeiture of the policy for such failure to pay, and admits him to be a member of the company notwithstanding such failure.

INSURANCE COMPANY, HAVING RECEIVED ASSESSMENTS after they were overdue, and when the policy might have been forfeited under the by-laws for non-payment, can only insist upon a forfeiture after having given the assured personal notice that thereafter punctual payment of assessments would be required.

ACTION to recover one thousand dollars upon an insurance policy in favor of Stylow. Among the by-laws of the company were the following: "Sec. 4. If any member fails to pay the secretary any assessment made upon him within sixty days from date of notice issued by the secretary, his membership shall cease, and he can be reinstated only upon the terms fixed by the by-laws." "Sec. 21. Any member of this company who is not more than one year in arrears may, if he is in good health, be reinstated on paying all assessments due and if more than one year in arrears, and not over sixty years of age, can only be reinstated by furnishing a physician's certificate of good health, and paying the sum of fifteen dollars. A physician's certificate may be required in all cases of reinstatement." It was in evidence that many assessments had been paid by Stylow long after they were overdue, without any complaint on the part of the company, nor did the latter ever require any physician's certificate as to the health of the assured. It also appeared that the company made assessment 19 against the assured two days after he was delinquent for assessment 17, for the non-payment of which the company claims a forfeiture of his policy. Verdict for Stylow. The company appeals.

Gregory, Bird, and Gregory, for the appellant.

Harlow Pease, for the respondent.

By Court, TAYLOR, J. Notwithstanding the very able argument of the learned counsel for the appellant, we are of the opinion that the company had waived the right to declare the policy forfeited for the non-payment of assessments Nos. 17 and 18, which were unpaid and past due at the time of his death. The assured had every reason to believe that the company would accept the payment of these assessments, as it had accepted the payment of all others within a reasonable time after they became due, without making any question as to his state of health. And it is equally plain that had payment been tendered the day before the death of the insured, such payment would have been accepted. The forfeiture, if any, arose upon the non-payment on or before the day fixed for payment; and it is clear, from the evidence, that the company did not consider it forfeited on that day; and it cannot afterwards declare it forfeited because of the happening of an event which has nothing to do with the payment of the sum due. That the company did not consider the policy forfeited on account of the non-payment of assessment No. 17 is very clear from the fact that they made assessment No. 19 against the deceased after No. 17 was past due. We think the case is ruled by the decisions of this court in *Erdmann v. Mutual Ins. Co.*, 44 Wis. 376; *Woodruff v. Town of Depere*, 60 Id. 128; and *Alexander v. Continental Ins. Co.*, 67 Id. 422; 58 Am. Rep. 869; and cases cited in the opinions in those cases. Upon the evidence, we think the present case a much stronger one in favor of the plaintiff than either of the cases above cited.

It is urged by the learned counsel that the fact that the company appended to the receipts given for the assessments paid after the time for payment had passed the conditional clause above quoted, changes the rule as laid down in the cases cited. We do not think this appendage to the receipts given can alter the case. When no fraud has been practiced by the insured in concealing his state of health at the time the payments are made, and the company receives such payments out of time, when it might refuse payment and declare the insurance forfeited, it cannot accept the money and keep it, and still insist upon a forfeiture. Every time the company makes an assessment against the assured after he has failed to pay a previous assessment within the time prescribed by the rules, it waives the forfeiture of the policy for such failure to pay, and admits him to be a member of the company, notwithstanding such failure.

We are of the opinion that after the constant course of conduct of the company with the assured, as shown by the evidence in this case, the only way the company could insist upon a forfeiture for non-payment within the time fixed by the by-laws would be by giving the assured personal notice that thereafter punctual payment would be required. It cannot, with any plausibility, be argued that in this case the company did not consider the deceased a member of the company up to the very time of his death, as the evidence shows that the assured was in his usual health up to the minute of his death. We think that good faith on the part of the company, as well as the law, requires that it should pay the respondent the amount of the insurance.

The judgment of the circuit court is affirmed.

INSURANCE COMPANY, BY RECEIVING PAYMENT of a premium when it is overdue, and when the policy might be forfeited, thereby waives the right to insist upon a forfeiture for the non-payment of a premium when due: *Cotton etc. Life Ins. Co. v. Lester*, 35 Am. Rep. 122, and note 125; *Appleton v. Phoenix etc. Life Ins. Co.*, 47 Id. 220; *Conigland v. N. C. Mut. Life Ins. Co.*, 98 Am. Dec. 89; *Mutual etc. Life Ins. Co. v. Robertson*, 14 Am. Rep. 8.

SCHWALLBACK v. CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY.

[99 WISCONSIN, 292.]

CONTINUED USE AND OCCUPATION BY GRANTOR OF LAND is not evidence that his possession is adverse to his grantee; on the other hand, his possession is presumed to be under and in subordination to the legal title held by his grantee, for he is estopped by his deed from claiming that his holding is adverse. This rule applies to all subsequent grantees of such grantor.

COVENANT IN DEED FOR QUIET AND PEACEABLE POSSESSION runs with the land, and is binding upon the grantor and all of his subsequent grantees to the same land.

EACH OF SUBSEQUENT GRANTEES ARE PRESUMED to have entered under their respective deeds with knowledge of the contents of a prior deed to the same land by their grantor.

WHEN BOTH PARTIES CLAIM TITLE under the same person, neither of them can deny his right, and as between them the elder is the better title, and must prevail; hence the estoppel of the grantor to deny his grantee's title, arising from his deed, extends to all persons claiming from or under the grantor by title acquired subsequent, whether by deed or otherwise. Any of such subsequent grantees desiring to destroy the presumption that they hold in subordination to the legal title, and take and hold the land by adverse possession to which they have no title by virtue of their

deed, though described in it, are bound first to actually and notoriously disseise the rightful owner before they can set the statute running in their favor.

ADVERSE POSSESSION IS TAKEN STRICTLY; every presumption is in favor of possession in subordination to the rightful owner. Adverse possession is not to be made out by inference, but by clear and positive proof.

J. W. Cary, for the appellant.

P. and T. O'Meara, for the respondent.

By Court, *CASSIDAY, J.* It appears that the strip of land in question, lying along the southwesterly side of the defendant's right of way, was used and cultivated by the plaintiff's several grantors until the fall of 1885. It was then fenced off by the defendant. That was after the plaintiff obtained from his father a warranty deed of the thirty-five and fifty-six hundredths acres, and before he obtained from him his quitclaim deed. The two strips of land mentioned, claimed by the defendant, and being in that forty, together contained a little over three acres. During the eighteen or twenty years that the plaintiff's father owned the portion of the forty not belonging to the railway company, only thirty-seven acres appear to have been assessed. Upon the facts stated, the plaintiff claims the right to recover on the ground of adverse possession in him and his several grantors. The question presented is, whether such facts warrant the court in holding such adverse possession. The title to the strip of land in question undoubtedly became vested in the railroad company by the deed to it from Witlin and wife, October 3, 1855, subject only to re-entry in case of breach of condition subsequent: *Horner v. Chicago etc. R. R. Co.*, 38 Wis. 165; *Cleveland etc. R. R. Co. v. Coburn*, 91 Ind. 557; 17 Am. & Eng. R. R. Cas. 41; *Vail v. M. & E. R. Co.*, 21 N. J. L. 190.

The mere fact that Witlin continued to use and occupy that strip in connection with his other lands, until he conveyed to the Schindlers in 1864, is no evidence that his possession was adverse to the railroad company, his own grantee. On the contrary, such occupancy by him for nine years, in the language of the statute, must "be deemed to have been under and in subordination to the legal title," which he had so conveyed to the railroad company; for he certainly was estopped by his own deed from claiming that his possession was adverse to his own grantee: R. S., sec. 4210; *McCormick v. Herndon*, 67 Wis. 650. The deed to the railroad company was recorded in 1855. This being so, we must hold that the Schindlers took

title with constructive notice of the existence and contents of that deed. For the same reason, we must hold that the father of the plaintiff, and also the plaintiff, took title with like notice. So that the plaintiff, his father, and each of the Schindlers, must be conclusively presumed to know that Witlin not only had no title to the strip of land in question when he deeded to the Schindlers, but that he and his wife had, for themselves, their heirs and assigns, covenanted and agreed with the railroad company [grantee] and its assigns that they would, at their own costs and charges, build and maintain good and sufficient fences on both sides of said strip of land therein conveyed, and also that said railroad company and its assigns should remain in the quiet and peaceable possession of said strip of land.

In several of the states it has been held that a covenant to erect and maintain a partition fence, where there is a privity of estate existing between the covenantor and covenantee, or is created at the time of making the covenant, runs with the land, and is binding upon a subsequent grantee: *Bronson v. Coffin*, 108 Mass. 175; 11 Am. Rep. 335; 118 Mass. 156; *Hazlett v. Sinclair*, 76 Ind. 488; 40 Am. Rep. 254; *Easter v. L. M. R. R. Co.*, 14 Ohio St. 48; *St. Louis etc. R. R. Co. v. Mitchell*, 47 Ill. 165; *Duffy v. New York etc. R. R. Co.*, 2 Hilt. 496; *Blain v. Taylor*, 19 Abb. Pr. 228; *Kellogg v. Robinson*, 6 Vt. 276; 27 Am. Dec. 550; *Morse v. Garner*, 47 Id. 575, and note. Those cases are distinguishable from *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611, where no privity of estate existed or was so created; and perhaps from *Hartung v. Witte*, 59 Wis. 285, where the agreement to maintain the fence was by the grantee in the deed, who conveyed to the defendant. For a discussion of such distinction, see *Norcross v. James*, 140 Mass. 188; 25 Am. Law Reg. 64; 3 Washburn on Real Property, 493, 494 (*659). But however this may be, there can be no doubt but what the covenant, that the railroad company and its assigns should remain in the quiet and peaceable possession of the strip of land in question, did run with the land, and hence was binding upon the subsequent grantees of Witlin, including the plaintiff and his father. Since such subsequent grantees each entered into possession subject to said deed to the railroad company containing such covenants, such possession must, upon the principle already stated, and under section 4210, Revised Statutes, "be deemed to have been under and in subordination to the legal title" in the railroad company or its

assigns, "unless it appears that such premises have been held and possessed adversely to such legal title for ten years" under section 4211, Revised Statutes, or twenty years under section 4213, Revised Statutes, before the commencement of this action. Each of such subsequent grantees must be presumed to have entered under their respective deeds, with knowledge that Witlin had previously parted with the title by deed containing at least one covenant running with the land, and binding upon him as such grantee, to the effect that he would "forever warrant and defend" the "premises in the quiet and peaceable possession" of the railroad company and its assigns. With such presumption resting upon each of said grantees, can we affirm from his mere occupancy or possession, the same as Witlin had enjoyed it for nine years, that his entry was "under claim of title" to said strip, within the meaning of the statutes cited, merely because it was described in his deed? It must be remembered that mere occupancy or possession for twenty years is not sufficient to set the statutes of limitation running. To do that, it must be held adversely: *Hacker v. Horlemus*, 69 Wis. 280; *Sartain v. Hamilton*, 62 Am. Dec. 524.

It has been held that whenever both parties claim title under the same person, neither of them can deny his right, and as between them, the elder is the better title, and must prevail; and hence, that the estoppel of the grantor to deny his grantee's title, arising from his deed, extends to all persons who claim from or under the grantor by title acquired subsequent to the grant, whether by deed or otherwise: *Gilliam v. Bird*, 8 Ired. 280; 49 Am. Dec. 379, and cases cited in the note. This must at least be so presumptively. Any of such subsequent grantees desiring to destroy such presumption, and take and hold that strip of land by adverse possession, to which he had no title by virtue of his deed, though described in it, was bound first to disseise the rightful owner before he could set the statute running in his favor. As to what constitutes such disseisin is well stated by Parsons, C. J., in the leading case of *Proprietor of Kennebeck Purchase v. Springer*, 4 Mass. 416, 3 Am. Dec. 227, where he said: "When a man is once seised of land, his seisin is presumed to continue until a disseisin is proved. . . . When a man not claiming any right or title to the land shall enter on it, he acquires no seisin but by the ouster of him who was seised, and he is himself a disseisor. To constitute an ouster of him who was seised, the

disseisor must have the actual, exclusive occupation of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession. . . . To constitute a disseisin of the owner of uncultivated lands by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety that the owner may be presumed to know that there is a possession of the land adverse to his title; otherwise a man may be disseised without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his seisin has been interrupted." That opinion has been regarded as high authority on the doctrine of adverse possession, not only by the courts of that state, but by others: See note to last report cited, and 3 Washburn on Real Property, 160 (*494). "The doctrine of adverse possession is to be taken strictly. Such a possession is not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner": *Huntington v. Whaley*, 29 Conn. 391. Here the testimony fails to disclose anything more than a mere occupancy or possession by any of such subsequent grantees. It is nothing more than the occupancy of Witlin before any of such subsequent conveyances. That was subordinate to the title of the real owner. We must hold that there is an absence in the record of any evidence of disseisin.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

ADVERSE POSSESSION IN NEVER PRESUMED: *Pownal v. Taylor*, 34 Am. Dec. 725; but must be shown by clear proof: *Irvine v. McRee*, 42 Id. 468; and not from inference, as the presumption is in favor of possession in subordination to the true owner's title: *Rung v. Shoenberger*, 26 Id. 95; *Jackson v. Sharp*, 6 Id. 627.

POSSESSION OF GRANTOR IS NOT ADVERSE to the possession of his grantee: *Rouce v. Beckett*, 95 Am. Dec. 676, note 684; and see *Schaferman v. O'Brien*, 92 Id. 708.

COVENANT FOR QUIET ENJOYMENT runs with the land: *Hunt v. Amidon*, 40 Am. Dec. 283, note 288.

GRANTOR AND ALL CLAIMING UNDER HIM, by title acquired subsequent to the grant, are estopped from denying the grantee's title: *Gilliam v. Bird*, 49 Am. Dec. 379, and extended note 383; *Carbrey v. Willis*, 83 Id. 688.

FOSTER v. SINGER.

[69 WISCONSIN, 332.]

GARNISHMENT OF SALARY. — Where the hiring is by the month for a salary to be paid at the end of the month, such salary is not subject to garnishment before the end of the month in which it is to be earned, as it is not then money due or to become due, within the meaning of section 3719 of the Revised Statutes of Wisconsin.

Charles M. Bice, for the appellants.

Adolf Herdegen, for the respondent.

By Court, TAYLOR, J. Foster and others commenced an action in justice's court against M. Phillips, on the twenty-seventh day of August, 1885. A garnishee summons was served in said action upon the respondent Singer on the 28th of August, 1885. The action between the appellants and the garnishee was tried in the justice's court, and judgment rendered against the garnishee for forty-seven dollars. From this judgment the garnishee took an appeal to the county court, and on the trial there the court ordered the plaintiff nonsuited, and the garnishee discharged, with costs. From the judgment entered in favor of the garnishee for costs, the plaintiffs appeal to this court.

The evidence on the trial in the court below showed that the garnishee employed Phillips, the defendant in the main action, as a traveling salesman at a salary of \$125 per month, to be paid at the end of each month. The appellant introduced in evidence on the trial in the county court an account taken from the books of the garnishee, showing, among other payments to the said Phillips, that he had paid him on the thirty-first day of August the sum of \$125. This account also shows that Phillips was credited with his salary, \$125, on the last day of each month, and that payments were made on the last day of each month for the salary of each month, except that in the month of July there were credits of \$5 on the 6th, \$2 on the 26th, \$5 on the 27th, and \$113 on the 31st of July. The evidence of the plaintiffs also showed that the garnishee Singer testified in the justice's court that Phillips was employed by him as a salesman at a salary of \$125 per month, due at the end of each month.

The learned county judge nonsuited the plaintiff, because it appeared from all the evidence in the case that there was nothing due or owing by the garnishee to Phillips on the day the garnishee summons was served on him, viz., on the 28th

of August, 1885. We think the nonsuit was properly granted. The statute fixes the liability of the garnishee upon the *status* of his relation to the principal defendant at the time the garnishee process is served: See R. S. 1878, sec. 3719. The test of the liability of the garnishee to the creditor of the defendant is generally this: Could the defendant have maintained an action against the garnishee, at the time the garnishee process was served, to recover the debt or liability sought to be garnished? It seems to us evident that under the testimony given in this case, had Phillips brought his action for his salary for August, 1885, on the day the garnishee summons was served, viz., 28th of August, his action would have been prematurely brought, and he must have failed in his action. There certainly was nothing due to Phillips on the 28th of August, 1885: See *St. Louis v. Regenfuss*, 28 Wis. 144, 147; *Allen v. Meguire*, 15 Mass. 490.

But it is urged that the statute extends the liability of the garnishee to cases in which he would not be liable to an action by his creditor. This claim is well founded. The statute provides that the garnishee shall stand liable to the plaintiff to the amount of the personal property, money, credits, and effects in his hands belonging to the defendant, and the amount of his own indebtedness to the defendant then due or to become due, and not by law exempt from sale on execution: See R. S., sec. 3719. And the provision for judgment against the garnishee contains a similar provision: See R. S., sec. 3725.

The only other question in the case, therefore, is, whether there was anything "to become due" from the garnishee to Phillips on the 28th of August, when he was served with the garnishee summons, within the meaning of the statute above quoted. We think this question has been answered by this court against the claim of the appellant. In *Bishop v. Young*, 17 Wis. 47, 53, the present chief justice, in speaking of the construction to be given to the language of the statute above quoted, says: "And the 'debts due or to become due' evidently relates to such as the garnishee owes absolutely, though payable in the future. We have no idea the statute intended to include in the language 'to become due' a debt which might possibly become due upon a performance of a contract by the defendant in attachment. . . . There was nothing absolutely due him at the time of service of garnishee process upon the respondent. And whether anything would become due depended upon a contingency." See also

Smith v. Davis, 1 Wis. 447; 60 Am. Dec. 390; *Huntley v. Stone*, 4 Wis. 91. Under the evidence in the case at bar, there was nothing due absolutely from the garnishee to Phillips when he was served with the garnishee summons. The evidence clearly shows a hiring by the month for a salary, to be paid at the end of the month, and according to the decisions of this court, the contract is an entirety. Phillips could not recover any part of his wages unless he worked the whole month. If Phillips had quit work on the 29th, he could not have recovered any part of his wages for the month. The debt, therefore, would only become due upon the contingency that Phillips continued to work for the garnishee for the entire month: See *Gordon v. Brewster*, 7 Wis. 355; *Lee v. Merrick*, 8 Id. 229; *Jennings v. Lyons*, 39 Id. 553; 20 Am. Rep. 57; *Diefenback v. Stark*, 56 Wis. 462; 43 Am. Rep. 719; *Koplitz v. Powell*, 56 Wis. 671.

It can make no difference as to his liability whether the summons was served on the twenty-eighth day of the month or on the second. In either case, whether anything would become due depended upon Phillips working the entire month; and if the garnishee is liable when served on the 28th, he would be equally liable if he had been served on the 2d, if it appeared on the trial that Phillips had worked the entire month: See also, upon this subject, *Hancock v. Colyer*, 90 Mass. 187; 96 Am. Dec. 730; *Knight v. Bowley*, 117 Mass. 551; *Wood v. Partridge*, 11 Id. 488; *Wyman v. Hichborn*, 6 Cush. 264. There is nothing in the case of *Jones v. St. Onge*, 67 Wis. 520, which in any way changes the rule laid down in the cases above cited in this court.

The judgment of the county court is affirmed.

MONEY TO BECOME DUE under a contract for labor may be attached: *Peterson v. Williams*, 39 Am. Dec. 485. A debt not yet due is subject to garnishment: *Mims v. West*, 95 Id. 379; *Drake on Attachment*, 6th ed., sec. 557-559; 2 Id., sec. 484.

BRUNSWICK-BALKE-COLLENDER COMPANY v. REES.
SAME v. LINDEMANN.

[69 WISCONSIN, 442.]

LANDLORD AND TENANT OF UPPER FLOORS of building are joint wrongdoers, and jointly or severally liable for an injury received by the tenant of the lower floors from overloading the upper floors and causing them to fall, when the landlord, knowing that the tenant of the upper floors desired to use them for heavy storage, and knowing that such floors were not of sufficient strength for such use, leased them to such tenant, assuring him that he could safely use them for the purpose desired, and that such floors were sufficiently strong to sustain such load, and even a much greater one, whereby such tenant was induced to overload the floors on the declaration and assurance of the landlord. In such case it is no objection to a recovery against the tenant that a recovery for the same wrong may be had against the landlord; and a complaint which alleges the facts above set forth is sufficient as against the tenant.

Frank M. Hoyt, for the plaintiff.

Jenkins, Winkler, Fish, and Smith, for the defendants Rees.

Roehr, for the defendants Lindemann.

By Court, TAYLOR, J. We will first consider the appeal from the order sustaining the demurrer of the defendants Rees. As to them, the facts are these: They owned the whole building No. 144. They let the two lower floors of the building to the plaintiff, and had previously let the upper floors to the defendants Lindemann for the purposes set out in the complaint. Having let the lower floors to the plaintiff, the law imposed a duty upon the lessors that they should not so use the upper part of the building as to endanger the lives of the plaintiffs, or their property, while in the lower part of said building as their tenants. This would seem an almost self-evident proposition, had the landlords themselves been in the actual occupation of said upper floors. But it is said that they were not in such actual possession, and the plaintiffs knew the fact that such floors were in possession of the tenants of said landlords when they took their lease, and consequently the landlords owed no duty to the plaintiffs during the tenancy of the upper tenants to protect them against the acts of such tenants, which might endanger the safety of the lives or property of the plaintiffs as tenants of the lower floors. This contention is sound to a certain extent, but only to a certain extent. I am, however, of the opinion that when the landlords let the lower rooms to the plaintiffs they impliedly

agreed that they had not authorized the tenants occupying the upper floors to use them in such a way as to endanger their lives or property in the lower floors; but if there be no such implied agreement, the general rules of law render them liable for injuries resulting to third parties when they knowingly let the premises to tenants to be used for purposes which they are unfitted for.

In *Edwards v. New York etc. R. R. Co.*, 98 N. Y. 245, 249, 50 Am. Rep. 659, a case which goes as far as any case to be found in the books in relieving the landlord from injuries resulting from the improper use of tenements in the possession of his tenants, still in that case the court lays down the rule that "if the landlord be guilty of negligence, or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him. If he lets a building or warehouse knowing that it is so weak and imperfectly constructed that the floors will break down from the weight necessarily to be placed upon them, his negligence imposes liability upon him for injury to the person or property of any one who may lawfully be upon the premises using them for the purposes for which they are demised." "If one builds a house for public amusements or entertainments, and lets it for those purposes, knowing that it is so imperfectly and carelessly built that it is liable to go to pieces in the ordinary use for which it was designed, he is liable to the person injured through his carelessness. . . . It is but a just and reasonable application of the maxim, *Sic utere tuo ut alienum non lædas.*"

In *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159, the court say: "We think it may be held as well settled in this state that where the owner of a wharf leases or rents it out, and at the time of such renting the wharf was in an unsafe condition for the use the lessor knew it was to be put to, and the owner knew, or by the exercise of reasonable diligence could have known, of its condition, and that one who was lawfully on the wharf, and was injured in consequence of its condition, that the owner is liable."

In *House v. Metcalf*, 27 Conn. 631, 640, the court use this language: "The defendant contends that the mill being at the time of the accident in the exclusive occupation of his tenant, and he having no rightful control over it during the continuance of the tenancy, he was for that reason exonerated from all liability for injuries occasioned by its use. But every one

who aids, abets, instigates, authorizes, or commands, as well as every one who actively participates in the commission of a tort, is himself a principal tort-feasor, and liable as such. And the facts claimed by the defendant, and found by the jury, that at the time of the accident the wheel was in the same condition as when the lease was made, that it was used in the same manner contemplated and intended by the parties to the lease, and that for such use the defendant was to be paid compensation by way of rent, so far from exonerating him from, establish his legal liability for, the plaintiff's injury."

In a case lately decided in the supreme court of Rhode Island (*Joyce v. Martin*, 15 R. I. 558), the learned court after citing and commenting upon the cases bearing upon the question, say "that some of the cases cited are cases in which the lessors were held liable to respond in damages, because the premises from which the injuries were received were in such a state as to be nuisances, public or private, when let; but others are cases in which the lessors who were held to respond because the premises let by them for rent or profit were let to be used for purposes for which they were not fit or safe to be used, and because the lessors knew when they let them the purposes for which they were to be used, and also knew, or ought to have known, that they were not fit or safe to be so used"; and the court cited *Godley v. Hagerty*, 20 Pa. St. 387, 59 Am. Dec. 731, which case was reaffirmed in *Carson v. Godley*, 26 Pa. St. 111, 67 Am. Dec. 404. These were well-considered cases, and the argument of the learned court seems to us conclusive. The defendant was the landlord; he had himself built the warehouses, and let them to the United States for the storage of heavy goods. They proved of insufficient strength to sustain the weight placed in them by the tenant, the United States, and while occupied and used by the tenant, they fell and injured the plaintiff, who brought the action. After a very able review of the cases bearing upon the question involved in the case, the court say: "Had it [the building] fallen before it was used at all,—had the superstructure been so defective as to be unable to sustain itself,—it would have been indictable as a common nuisance, and nobody doubts that the owner, at whose instance it was erected, would have been answerable to individuals for the damage occasioned; but the wrong consisted not in erecting walls incapable of standing alone, but in building and renting the store for a specific purpose for which it was unfit

and unsafe. In itself it may not have been a common nuisance, but the maxim, *Sic utere*, etc., is not limited to common nuisances. . . . Be it, then, that the store was a lawful structure, the defendant so used it as to hurt the plaintiff in his property, and this was to violate a fundamental maxim of the law. With his eyes wide open to the fact that the government would use his storehouse for heavy storage, he let them have it, knowing that it was unfit for such use, and he inserted no word of caution or restraint in the lease. . . . Tempted by a large rent, he permitted his building to be subjected to burdens too heavy for it to bear, though lighter than the tenant had the right to impose, and herein is the ground of his liability."

The cases above cited, we think, state the law correctly. No one, we think, would question the right of the plaintiff against the landlord in this case, if he had been himself in the actual occupation of the premises, and caused it to break down by overloading it, especially if it were shown that he knew that he was placing a greater load upon it than it could be reasonably expected to bear. Can it make any difference with his liability to third persons that he has not overloaded it himself, but has let it to another, and at the same time authorized him to overload it, and so caused the injury? We think not. Under the allegations of the complaint in the case at bar, the landlord is more culpable than the tenants. If the allegations of the complaint are true,—and for the purposes of this case they are admitted to be true,—the tenants were clearly induced to overload the upper floors of the building in question, by reason of the declaration and assurance of the landlords, at the time they took their lease, that they could safely so load them; and that the building was sufficiently strong to sustain such load, and even a much greater one. It is alleged in the complaint that the landlords knew when they leased these upper floors that the tenants desired to use such floors for heavy storage; that they also knew that such floors were not of sufficient strength for such use. Under these allegations, the landlords are joint wrong-doers with the tenants in overloading the floors, and causing them to fall, and so inflicting an injury upon the plaintiffs. Their culpability under the facts alleged in the complaint is greater, in fact, than that of the tenants, who acted upon their representations, and probably relying upon the superior knowledge of the landlords as to the strength of such floors. We are very

clear that the allegations of the complaint state a good cause of action against the defendants Rees, and that the court erred in sustaining their demurrer to the complaint.

That the learned county court rightly held that the complaint stated a good cause of action against the defendants Lindemann, the tenants, hardly admits of a doubt. The law compels every man to so use his own as to cause no unnecessary injury to his neighbor. They did so use these rooms as to destroy the plaintiffs' property. The charge in the complaint is, that the floor fell because overloaded by the Lindemanns. They had no right to load the floors beyond their capacity, and doing so is a wrong, and if the damage occurs by reason of such wrong, they are responsible. If it were necessary to allege the negligence of the tenants in overloading the upper floor, it is sufficiently alleged in the complaint: See *Young v. Lynch*, 66 Wis. 514.

It is no objection to a recovery against the tenant that a recovery may be had for the same wrong against the landlord. This is fully sustained by the authorities above cited. The facts stated in the complaint, independently of the general allegation of negligence, are sufficient to constitute a cause of action against the tenants. If the plaintiff proves the facts alleged in its complaint, it seems to us that it will have made a *prima facie* case, at least, against the tenants, and they will be put to proof, if they have any, showing that it was an inevitable accident, or that the floor fell from some other cause than from their overloading it: *Wood on Landlord and Tenant*, 928; *Killion v. Power*, 51 Pa. St. 429; 91 Am. Dec. 127; *Moore v. Goedel*, 34 N. Y. 527; *Wharton on Negligence*, 2d ed., sec. 791; *Edwards v. Halinder*, Poph. 46.

The order sustaining the demurrer of the respondents Rees is reversed; and the order overruling the demurrer of the appellants Lindemann is affirmed; and the cause is remanded for further proceedings according to law.

LYON and ORTON, JJ., dissented.

WARRANTY THAT PREMISES ARE FIT FOR PURPOSES for which they are leased, and liability of landlord: *Carson v. Godley*, 67 Am. Dec. 404, note 412; see also *City of Lowell v. Spaulding*, 50 Id. 776. As to his liability when one floor is leased and another occupied by himself or another tenant: *Marshall v. Cohen*, 9 Am. Rep. 170; *Glickauf v. Maurer*, 20 Id. 238, and note 240; *Toole v. Beckett*, 24 Id. 54.

STATE EX REL. ANDERTON v. KEMPF.

[69 WISCONSIN, 470.]

IT WILL BE PRESUMED WITHOUT AVERMENT that the proper officers performed their duty under a statute requiring ballots to be preserved and disposed of in a particular manner.

JURISDICTION — ELECTION. — UNLESS STATUTE CONFERRING JURISDICTION upon the common council to judge of an election and qualification of its members unequivocally excludes, by express provision or necessary implication, the jurisdiction of the courts in that behalf, such jurisdiction remains in the courts, and that conferred upon the council is only concurrent or temporary.

JURISDICTION — ELECTION. — WHETHER LEGISLATURE HAS POWER to confer the exclusive authority upon a non-judicial tribunal, to determine finally the right to any office, and thus oust the courts of their common-law and statutory jurisdiction, *quære*.

QUO WARRANTO, to try the right of the relator, Anderton, to an office in Milwaukee, which office it is alleged Kempf has intruded into and usurped, and unlawfully holds and exercises the same, and the privileges thereof, to the exclusion of the relator. The complaint was demurred to upon the ground that the court had no jurisdiction of the subject-matter of the action, and that it did not state facts sufficient to constitute a cause of action. Demurrer sustained on the first ground. Other facts are stated in the opinion.

J. C. McKenney, for the appellant.

Johnson, Rietbrock, and Halsey, for the respondent.

By Court, LYON, J. Conceding the jurisdiction of the court, we think the complaint states a cause of action. It contains all the averments required by section 3468 of the Revised Statutes in such a case. But it is objected that it contains no allegation that the steps required by chapter 464 of the Laws of 1885, to preserve the ballots, were taken. The statute required the ballots to be preserved and disposed of in a particular manner by the proper officers, and it must be presumed, even without averment, that those officers performed their duty. Hence the second ground of demurrer is not well taken.

The controlling question in the case relates to the jurisdiction of the court over the subject of the action. Section 6, chapter 324, of the Laws of 1882, amendatory of the charter of the city of Milwaukee (chapter 184, Laws of 1874), provides that "the common council shall be the judge of the election and qualification of its own members." The argument is, that this provision excludes the jurisdiction of the courts to adju-

dicate between contesting claimants for the office of alderman, and vests that power solely in the common council. It must be conceded that there are some decisions of courts of high authority which seem to approve this doctrine. Among these are the cases of *Commonwealth ex rel. McCurdy v. Leech*, 44 Pa. St. 332; *Lamb v. Lynd*, 44 Id. 336; *Commonwealth ex rel. Yard v. Meesser*, 44 Id. 341; *Peabody v. School Committee*, 115 Mass. 383; *People v. Metzker*, 47 Cal. 524.

But the great weight of authority, and we think the better reason, is opposed to such doctrine. We think the rule is satisfactorily established, that unless the statute conferring the jurisdiction upon the common council to judge of the election and qualification of its members unequivocally excludes, by express provision or necessary implication, the jurisdiction of the courts in that behalf, such jurisdiction remains in the courts, and that conferred upon the council is only concurrent or temporary. This is the doctrine laid down by Judge Dillon in his treatise on municipal corporations, vol. 1, 3d ed., secs. 202, 203, and notes; also in McCrary on American Law of Elections, sec. 295, and cases cited. A few of those cases are the following: *Ex parte Heath*, 3 Hill, 42; *People ex rel. Hatzel v. Hall*, 80 N. Y. 117; *McVeany v. Mayor of New York*, 80 Id. 185; 36 Am. Rep. 600; *Commonwealth v. Allen*, 70 Pa. St. 465; *Commonwealth v. McCloskey*, 2 Rawle, 369; *State v. McKinnon*, 8 Or. 493; *Kendell v. Camden*, 47 N. J. L. 64; 54 Am. Rep. 117; *Kane v. People ex rel. Snyder*, 4 Neb. 509; *State ex rel. Turner v. Fitzgerald*, 44 Mo. 425; *State v. Wilmington*, 3 Harr. (Del.) 294.

In many of the above cases, the language of the charters under consideration is substantially the same as that of the charter of Milwaukee. The case of *Commonwealth v. Allen*, above cited, in effect overrules the cases cited from 44 Pa. St. as sustaining the opposite doctrine. Some of the cases of that class hold that language like that contained in the charter of Milwaukee excludes the jurisdiction of the courts, because it is substantially the same as that employed in most of the state constitutions, and found in article 4, section 7, of the constitution of this state, as follows: "Each house shall be the judge of the elections, returns, and qualifications of its own members." No one denies that this provision excludes the jurisdiction of the courts in that behalf, and so it has been held, notably in the case of *People ex rel. Vejar v. Metzker*, 47 Cal. 524, that this language must receive the same construction

when employed in a statute that it receives when employed in the constitution. We cannot give our assent to this proposition. We think that the same terms when used in different statutes, or in a statute and constitution, may properly receive different constructions, if that be indicated by the object and scope of the several statutes in which the same is employed. However, we do not care to discuss this question here; but for a full and satisfactory discussion thereof, we refer to the above cases of *People ex rel. Hatzel v. Hall*, 80 N. Y. 117 (opinion by Judge Folger); *Commonwealth v. Allen*, 70 Pa. St. 465 (opinion by Judge Agnew); *Kendell v. Camden*, 47 N. J. L. 64; 54 Am. Rep. 117 (opinion by Judge Scudder).

We adopt the doctrine of judges Dillon and McCrary, in their treatises above cited, that the jurisdiction of the courts remains in such cases, "unless it appears, with unequivocal certainty, that the legislature intended to take it away." And we hold, upon principle and authority, that the provision of the charter of Milwaukee, under consideration, does not interfere with the common-law jurisdiction of the proper courts to determine the right to the office in controversy. Whether the legislature has the power to confer the exclusive authority upon a non-judicial tribunal to determine finally the right to any office (which is judicial power), and thus oust the courts of their common-law and statutory jurisdiction over such controversies, is a question of great importance; but the same is not presented by this record, and will not be here determined.

The order of the circuit court sustaining the demurrer to the complaint is reversed, and the cause is remanded, with directions to that court to overrule the demurrer.

IT IS PRESUMED THAT EVERY PUBLIC OFFICER performs his duties properly: *Dubes v. Voss*, 92 Am. Dec. 526, and note 529.

JURISDICTION TO TRY CONTESTED ELECTION CASES: See Paine on Elections, sec. 860, 861, where it is stated that if the common council of a city is made the final judge of the election of its members, the supreme court will not review its determination on the facts; but where a statutory proceeding is provided for the trial of contested elections, which does not by express or implied provision exclude the remedy by *quo warranto*, the courts are not ousted of their jurisdiction.

STEELE v. MOSS.

[60 WISCONSIN, 432.]

STIPULATION GIVING ADDITIONAL TIME "to serve and file an answer" gives the right to demur within the time specified, for within the meaning of the statute a demurrer is an answer.

Maxon, and Shepard and Shepard, for the appellant.

John M. Connolly, for the respondent.

By Court, **COLE, C. J.** In this case the first motion to set aside the judgment should have been granted, because it was irregularly entered. Before the time for answering had expired, a demurrer to the complaint was served and filed. This issue of law had not been disposed of when judgment was entered. Consequently judgment could not be entered as in case of default, as was attempted. But the learned counsel for the plaintiff contends that the stipulation giving the defendant ten days' additional time "to serve and file an answer" did not give the right to demur, and that it was in violation of the stipulation to do so. We cannot concur in that view of the matter. More than twenty-five years ago it was held by this court that, within the meaning of the statute, a demurrer was an answer: *Howell v. Howell*, 15 Wis. 55; and this, too, under a provision which enacted that the objection that an action was not commenced within the time limited could "only be taken by answer." That decision defining or construing the word "answer" has been followed since in several cases: See *Orton v. Noonan*, 25 Id. 675; *Tarbox v. Supervisors Adams Co.*, 34 Id. 560; *Hyle v. Supervisors Kenosha Co.*, 43 Id. 138; *George v. Chicago etc. R. R. Co.*, 51 Id. 605. Presumably counsel were familiar with these decisions, and made the stipulation with a view to the meaning which had been given to the word "answer" in them. We cannot therefore construe the stipulation as allowing the defendant to answer only, and not demur.

The first order refusing to vacate the judgment is reversed, and this disposes of the second order, which was to the same effect. The order of the circuit court is reversed.

THE RULE OF THE PRINCIPAL CASE, that an order or stipulation allowing defendant time in which to answer will authorize him to demur, because to demur is to answer, meets with general acquiescence.

HENSCHEL v. MAURER.

[60 WISCONSIN, 536.]

PERSON OF SOUND MIND, EVEN IN EXTREMIS, may make a partial will or gift; and the fact that he attempts at the same time, and as part of the same transaction, to dispose of the whole of his property, but for some cause the disposition is ineffectual as to part of it, will not prevent its being effectual as to the other part.

GIFT OF PERSONAL PROPERTY, made with intent to take effect immediately and irrevocably, and is fully executed by complete and unconditional delivery, is binding upon the donor as a gift *inter vivos*, even if he is at the time in *extremis*, and dies soon after.

WHERE MORTGAGES IN EXTREMIS delivered a mortgage note and satisfaction to the mortgagor personally as a gift, but afterwards directed the mortgagor to deliver them to a relative, that the latter might ascertain the value of the land conveyed, and thus determine the difference in value between two gifts, and then divide the personal property so as to make the gifts equal, the transaction is an absolute gift *in presenti*. Even if there was no intent to make a then present, unconditional gift, yet, as the delivery was complete, and as the donor was at the time in his last sickness, and died soon after without revoking the gift, it was binding as a valid gift *causa mortis*.

Krez and Krez, for the appellant.

Seaman and Williams, for the respondents.

By Court, CASSODAY, J. The evidence is to the effect that September 22, 1884, the plaintiff's intestate at first requested one Charles Heins to draw his will, and to give all his property, except twenty-five dollars mentioned, to his brother Conrad, and his sister, Mrs. Adolph Henschel; that when informed that it would probably cost sixty or seventy dollars in the probate court, he declined to make a will; that he then asked if such distribution could not be made in some other way, and was told by Heins that it could, and accordingly the satisfaction piece was drawn and executed, and then, with the note and mortgage, delivered, first to Conrad, then to the uncle, and subsequently to Conrad, as found; that at the same time he executed a deed of 160 acres of land in Marathon County to his sister, Mrs. Adolph Henschel, and delivered that to her; that he thereupon directed her to deliver the deed to his uncle, and she did so; that at the same time he gave to his uncle an order for the personal property, with directions to keep all the papers until he ascertained the value of the Marathon County lands, and then divide the personal property, so that his said brother and sister should each have one half of all his property, except that he should give Mrs. Herman Henschel

twenty-five dollars; that in executing the papers, he wrote his own name, and was at the time physically weak, but of sound mind, with no hope of recovery, but perhaps with an expectation of reclaiming the property if he did recover; and he died five days thereafter. Upon these facts, it is urged by counsel that the whole transaction, when taken together, was simply an attempt by the intestate to dispose of all his property by will, or to delegate to his uncle the power to do so upon his death, or both together.

There can be no question but what a person of sound mind, even in *extremis*, may make a partial as well as a total disposition of his property by will. The same is true in case of a gift as to any property which is the subject of gift. The mere fact that he attempts, at the same time, and as a part of the same transaction, to dispose of the whole of his property, but for some cause the disposition is ineffectual as to a part of it, will not prevent its being effectual as to the other part. Here, the matters of conveying the land to the sister, and the directions for disposing of the personal property, are not within the issues, and hence not before us for determination. No question of creditors or other claimants is involved. The only question presented is, whether what was said and done by the intestate constituted a complete satisfaction and extinguishment of the note and mortgage. A mortgagee may undoubtedly, by way of gift to the mortgagor, completely satisfy the debt, and discharge the mortgage: *Moore v. Darton*, 4 De Gex & S. 517; *Lee's Ex'r v. Boak*, 11 Gratt. 182; *Darland v. Taylor*, 52 Iowa, 503; 35 Am. Rep. 285; *Carpenter v. Soule*, 88 N. Y. 251; 42 Am. Rep. 248.

Where a gift of personal property is made with intent to take effect immediately and irrevocably, and is fully executed by complete and unconditional delivery, it is certainly binding upon the donor as a gift *inter vivos*, even if the donor at the time is in *extremis*, and dies soon after: *Tate v. Leithead*, Kay, 658; *McCarty v. Kearnan*, 86 Ill. 292. But where such intent is not manifest, and the gift is otherwise made, under such circumstances it will ordinarily be regarded as a gift *causa mortis*: *Rhodes v. Childs*, 64 Pa. St. 23, 24; *Grymes v. Hone*, 49 N. Y. 17; 10 Am. Rep. 313. But even such a gift is not complete without delivery: *Id.*; *Wilcox v. Matteson*, 53 Wis. 23; 40 Am. Rep. 754; *Brunn v. Schuett*, 59 Wis. 260; 48 Am. Rep. 499.

Such a gift may be defined as one made by the delivery of personal property by the donor in his last sickness, and in

expectation of death then imminent, and upon condition that it shall belong to the donee if the donor dies, as anticipated, without revoking the gift, leaving the donee him surviving, and not otherwise: *Rhodes v. Childs*, *supra*; *Grymes v. Hone*, *supra*; *Ogilvie v. Ogilvie*, 1 Bradf. 356; 2 Quar. Law Rev. 446; 21 Am. Law Rev. 784, and cases there cited. But even such a gift is defeated if the donor survive such sickness: *Staniland v. Willott*, 3 Macn. & G. 664. Here the intestate, as mortgagee, actually delivered the note, mortgage, and satisfaction to the mortgagor personally as a present. True, the intestate subsequently directed the mortgagor to deliver them to the uncle, as he directed Mrs. Adolph Henschel to deliver the deed she had received from him to the uncle. But this was apparently done in order that the uncle might the better ascertain the value of the land conveyed, and thus ascertain the difference in the value of the two gifts thus made, and then divide the personal property so as to make the gifts equal. Under such circumstances, and in view of the apparent absence of any hope of recovery, it would seem that the note, mortgage, and satisfaction may be regarded as so delivered to the mortgagor as an absolute gift *in præsenti*. But even if there was an absence of such intent to make a then present and unconditional gift, yet as the delivery by the donor was complete, and he was at the time in his last sickness, and died soon thereafter, without revoking the gift, we must regard it as a valid and binding gift *causa mortis*.

The judgment of the circuit court is affirmed.

BONDS AND NOTES SECURED BY MORTGAGE are proper subject of gift *causa mortis* without indorsement, and the mortgage will be carried without formal delivery: *Kiff v. Weaver*, 55 Am. Rep. 601; see also *Borneman v. Sidlinger*, 23 Am. Dec. 626, and note.

ESSENTIALS OF VALID GIFT *inter vivos* or *causa mortis*: *Priester v. Priester*, 23 Am. Dec. 191; *Bradley v. Hunt*, 23 Id. 597, and extended note; *Holley v. Adams*, 42 Id. 508, and note; *Grymes v. Hone*, 10 Am. Rep. 313; *Hall v. Howard*, 43 Am. Dec. 115.

CLEMENT v. CLEMENT.

[69 WISCONSIN, 599.]

ALL PARTNERS ARE BOUND ON FIRM NOTE, if a promise to pay, a partial payment, or an acknowledgment of the note is made by one of them, after the dissolution of the firm, but within the period of the statute of limitations, and the holder of the note at the time of its execution has no notice of the dissolution of the firm. This, whether section 4244, Revised Statutes of Wisconsin, is applicable to partnerships, or to partners as joint contractors, or not.

NEW NOTE OR CONTRACT MADE BY ONE PARTNER in the name of the firm, and within the scope of the partnership business, and after dissolution, binds the firm until the payee of such note or contract has notice of the dissolution.

PART PAYMENT OF FIRM NOTE by one of the partners, before the statute of limitations has attached, though after dissolution of the firm, of which the payee has no notice, forms a new point, from which the statute begins to run as to all the partners.

Kate H. Pier and C. K. Pier, for the appellant.

Rose and Blair, for the respondent.

By Court, ORTON, J. This action was brought upon two promissory notes, given to the plaintiff by the firm of Clement Brothers, composed of the defendants, the first dated December 1, 1874, for \$125, payable ninety days after date, and the other dated April 13, 1875, for \$633.80, payable one year after date. The defendant Charles Clement, in his answer, admits the signing of both notes, and the receipt of the money, and alleges that he made all the payments thereon up to 1884, and counterclaims for board of plaintiff. The defendant Stephen, while admitting the partnership up to January 1, 1875, denies its continuance after that date, and alleges a dissolution thereof on that day, with the knowledge of the plaintiff, before the last note was given, and pleads the statute of limitations upon both of said notes.

The payments proved were sufficient to cancel the first note, and to reduce largely the other note, and these payments running along from July, 1875, until and including September 1, 1884, were all made by the defendant Charles. In short, the pleadings are such that the following material issues were made: 1. Whether there was a dissolution of the firm January 1, 1875, or before the last note was given; 2. Whether, if there was, the plaintiff had notice thereof, before receiving said note and the payments thereon. The referee found that the defendants had failed to show by a preponderance of proof that the partnership was dissolved "January 1, 1875," and

that they failed to show by a preponderance of proof that the partnership was dissolved "at any particular or specified date." This last finding is extremely awkward, but it may be substantially sufficient, if we can construe it to mean that there was no preponderating evidence that the partnership was dissolved before the last note was given. If the evidence did not show the date of the dissolution, it did not show that its date was before the last note was given, as an affirmative fact to be proved by the defendants. Having thus found, the referee very properly did not find whether the plaintiff had any notice of such dissolution. The referee held both defendants, as the partnership of "Clement Brothers," liable for the balance of the notes.

On the counter-motions to confirm, or set aside, or modify the report of the referee, the county court confirmed the report as to the defendant Charles, and rendered judgment against him accordingly, but set aside the report of the referee as to Stephen Clement, and dismissed the complaint as to him with costs. Whether the county court found that there was preponderating evidence of the dissolution before the note was given, and discharged the defendant Stephen Clement on that ground alone, or found, besides this, that the plaintiff had notice of such dissolution before the note was given, as we understand the law, the finding of the first fact made the other necessary in order to exonerate the defendant Stephen. On reading the evidence, we are inclined to hold that the referee was right in his finding, and the court was wrong. Although there was some evidence of a dissolution at some time, the date of that occurrence was left by the evidence very uncertain. The finding of the second fact by the county court, if such fact was found at all, that the plaintiff had notice of the dissolution before the note was given, or the payments made upon it within the period of limitation, we cannot but think was entirely without proof. If the county court was wrong as to the fact that a dissolution took place January 1, 1875, or before the last note was given, that ends the case. But we will not rest the decision of the cause upon that finding, but upon the finding (or what should have been the finding) that the plaintiff had no notice of such dissolution before the note was given or the payments made. And this raises the only real question of law in the case.

It does not seem to be controverted by the learned counsel

of the respondent that the defendant Stephen Clement, or the partnership, was bound by the second note, unless the plaintiff had notice of the dissolution before it was given. The plaintiff had dealings with the firm, and took the first note so recently that there can be no question but that he had a right to assume the continuance of the partnership to the time of giving the second note, unless he had notice of the dissolution. This is elementary: Parsons on Partnership, secs. 411 et seq. But the question whether, if the partnership had been previously dissolved in fact, notice of it to the plaintiff is necessary to make the payments or promise made by one partner have the effect to remove the bar of the statute of limitations, is seriously and plausibly controverted by the learned counsel of the respondent. The statute, section 4244 of the Revised Statutes, is invoked to show that the payment or acknowledgment made by one joint contractor shall not have such effect. There may be some question whether this statute is applicable to partnerships, or to partners as joint contractors. But it has been held by some courts, in states where this statute exists, that it has application *sub modo*, but not to dispense with the necessity of notice to the creditor of the dissolution, as in *Peirce v. Tobey*, 5 Met. 168, and *Faulkner v. Bailey*, 123 Mass. 588.

In the case specially cited and relied upon in the brief of the respondent, of *Gates v. Fisk*, 45 Mich. 522, it was held "that a partnership note is a joint contract, within the meaning [of the statute], so that a payment thereon by one partner, within the period of the statute of limitations, will not bind the other, if the firm had previously dissolved, to the payee's knowledge." There are incidents, rights, and liabilities of a partnership which make the members of the firm in such case something more than mere joint contractors, and it is only after notice of dissolution to the creditor, which places the partners upon the same footing of other joint contractors in respect to a promise by one not removing the bar of the statute as to another partner, that the statute has any application. "Until the payee knows of the dissolution, any contract made by one partner within the scope of the partnership business binds the other partner also": *Pratt v. Page*, 32 Vt. 15. And "payment by the liquidating partner would take the case out of the statute of limitations": *Reppert v. Colvin*, 48 Pa. St. 248. A partnership debt remains the same after

dissolution, and the partners are all responsible *in solido*, any arrangements between the parties to the contrary notwithstanding, and they are still agents for each other in making payments, or doing anything else material to the contract: Parsons on Partnership, 3d ed., 388, 395, 398, 421, 457; Collyer on Partnership, sec. 106; *Whiting v. Farrand*, 1 Conn. 60; *Gay v. Bowen*, 8 Met. 100; Story on Partnership, sec. 334. Dissolution does not revoke the authority of one partner, as agent for the others, to arrange, liquidate, settle, and pay the debts before created: Parsons on Partnership, sec. 390. Part payment by one partner before the statute of limitations has attached, as in this case, forms a new point from which the statute begins to run as to all the partners: *Pennoyer v. David*, 8 Mich. 407; *Palmer v. Dodge*, 4 Ohio St. 21; 62 Am. Dec. 271; *Turner v. Ross*, 1 R. I. 88; *Joslyn v. Smith*, 13 Vt. 353; *Mix v. Shattuck*, 50 Id. 421; 28 Am. Rep. 511; *Coleman v. Fobes*, 22 Pa. St. 156; 60 Am. Dec. 75. Many authorities hold that until notice of the dissolution, the firm is bound even by a new contract that any of the partners make with a creditor: *Pecker v. Hall*, 14 Allen, 532; *Dickinson v. Dickinson*, 25 Gratt. 321; *Page v. Brant*, 18 Ill. 37; Parsons on Partnership, sec. 397; *Lovejoy v. Spafford*, 93 U. S. 430.

It is perfectly clear, then, that these payments, scattered along almost every year since the giving of the note until 1884, by Charles Clement, removed the bar of the statute as to Stephen also, the plaintiff having had no notice of the dissolution. This disposes of this case, whether there was a dissolution or not, as there was no evidence of the plaintiff's knowledge of it. Both Charles and Stephen Clement were alike bound, and as to neither had the statute of limitations run upon either note. The county court should have so found, and rendered judgment against both of the defendants as an existing copartnership.

The judgment of the county court appealed from is reversed, and the cause is remanded, with directions to render judgment in said action also against Stephen Clement for the amount unpaid of said note, and interest, the same as against said Charles Clement.

RENEWAL OF NOTE BY ONE PARTNER AFTER DISSOLUTION OF THE FIRM — STATUTE OF LIMITATIONS: *Beardsley v. Hall*, 4 Am. Rep. 74; *Merritt v. Day*, 20 Id. 362; *McIntire v. Oliver*, 11 Am. Dec. 760; but see *Muss v. Donelson*, 36 Id. 309, and note 311; *Van Keuren v. Parmelee*, 51 Id. 322, and extended note 330-332.

NOTE MADE AFTER DISSOLUTION, BY ONE of the partners in the firm name to payees who have no notice of the dissolution, is binding on all the partners: *Graves v. Merry*, 16 Am. Dec. 471.

POWER OF PARTNER TO BIND FIRM, after dissolution, by new note or contract: *Hurst v. Hill*, 63 Am. Dec. 705, and note; *White v. Tudor*, 76 Id. 121, and note.

WHALEY v. JARRETT.

[69 WISCONSIN, 612.]

GATES MAY BE LAWFULLY MAINTAINED ACROSS RIGHT OF WAY by the party who granted such right, when the grant declares that the property granted is a "mere easement of travel and private road privilege, but no other or greater or further estate whatever, or title or interest of any kind whatever."

GRANT OF RIGHT OF WAY ACROSS GRANTOR'S LANDS DOES NOT IMPLY that it is to be open or free from gates or bars.

TRESPASS. The wrong complained of was the leaving open of a gate placed across a right of way by the plaintiff. The defendants claimed that the plaintiff had no right to maintain such gate. Judgment for the plaintiff.

M. M. Cothren and H. S. Magoon, for the appellants.

Orton and Osborn, for the respondent.

By Court, COLE, C. J. The rights of the defendants in the strip of land used for a private way must rest upon the clause in the deed to Alderson, made by Stephens June 7, 1865. That deed conveyed to Alderson certain lands in section 6, which are west of the strip in question, and contains this clause: "Also the following described strip of land, to be used by said second party as a private road, and for private road purposes, to wit: Commencing at the N. W. corner of the S. W. $\frac{1}{4}$ of section 5, T. 1, R. 1, east of the 4th P. M., running thence E. 27 and 33-100 chains, to the present highway running from Benton to Elk Grove and Platteville; then south on the line of the said public highway 24 feet; thence west 27 and 33-100 chains; and thence north 24 feet, to the place of beginning, — containing one and 6-100 acres of land; in and to which said last-described strip of land there is hereby granted to said second party a mere easement of travel and private road privilege, but no other or greater or further estate whatever, or title or interest of any kind whatever."

Now, the question is, Can a party possessing the rights thus granted in the deed over a strip of agricultural land, forming

a part of a farm, insist that this may be kept open at each end? or may the owner of the land, which is subject to the easement, lawfully maintain gates at the end of the strip, which do not unreasonably interfere with the right to travel over the way by those in whose favor the easement exists, and impose upon such persons using the way the duty of closing and fastening the gates after passing through them? This question seems to be very clearly settled by the authorities to which we were referred by the respondent's counsel: *Maxwell v. McAttee*, 9 B. Mon. 20; 48 Am. Dec. 409; *Bakeman v. Talbot*, 31 N. Y. 366; 88 Am. Dec. 275; *Garland v. Furber*, 47 N. H. 301; *Houpes v. Alderson*, 22 Iowa, 160; *Amondson v. Severson*, 37 Id. 602; *Baker v. Frick*, 45 Md. 337; 24 Am. Rep. 506; Washburn on Easements, 3d ed., 230, 231, 264. The learned author last cited, on page 264, uses this language: "It seems to be now settled that, if the land-owner is not restrained by the terms of the grant of a right of way across his lands for agricultural purposes, he may maintain fences across such way, if provided with suitable bars or gates for the convenience of the owner of the way. He is not obliged to leave it as an open way, nor to provide swing gates, if a reasonably convenient mode of passage is furnished." Indeed, there is no room for doubt, upon the authorities, that a grant of way across one's land does not imply that it is to be open and free from gates, unless the nature of the use to which it is to be applied indicates thereby that it should be open and unobstructed. It is a principle of law that nothing passes as an incident to the grant of an easement but what is requisite to the fair enjoyment of the privilege: 3 Kent's Com., 13th ed., 427.

In this case, the easement is a mere right of travel and private road privilege, without defining the manner of its enjoyment, whether with or without gates. There must be a reasonable use of such a privilege. If the defendants are entitled to an open, unobstructed passage to the public highway, the lands of the plaintiff must be either thrown open and exposed to cattle running at large on the highway, or he must be to the expense of building and maintaining a fence on each side of the strip to protect his crops. To hold that the grant imposes upon him any such loss or burden, would be giving it an unreasonable construction. The owner of the land, for the purpose of cultivating it, may use gates of sufficient width to accommodate passage with teams over the way, so fastened

and hung that they can be conveniently opened and closed by those passing through them. This will secure to the defendants a fair and reasonable enjoyment of the way, and of all rights of passage granted. The learned counsel for the defendants says that the words descriptive of the grant, especially the language "to the public highway running from Benton to Elk Grove," etc., necessarily implies an open way, and precludes the plaintiff from the right of closing the open terminus. But the right granted was to pass into the highway, which surely does not imply the right to pass over every inch of the twenty-four feet in width. As we have said, the defendants are entitled to a reasonable use and enjoyment of the way, and this is quite consistent with the right of the plaintiff to maintain proper gates at the ends of the lane for the protection of his land. A reasonable construction should be placed upon the grant, and not a forced and unnatural one.

We do not think there is any ground for claiming that the defendants showed a right by prescription to have the way left open without gates. The right of way is really founded on express grant, and is not based on prescription. This is all the evidence shows. There is no proof of adverse user. True, Mrs. Alderson testified that she and her husband occupied a small piece of land on section 6, west of this strip, under the deed from Mr. Edwards, dated June 5, 1858, and that they had used the strip more or less since as a private road, and had done some work upon it; but there is nothing warranting the assumption that this use was adverse; on the contrary, the presumption is that it was permissive.

So in every view which we have been able to take of the case, we are forced to the conclusion that the judgment of the circuit court is correct, and must be affirmed.

Judgment affirmed.

PRIVATE WAYS, NOTE ON USE OF: *Bakeman v. Talbot*, 88 Am. Rep. 279-282. The cases there cited all sustain the view of the principal case, that the grantor of a right of way may maintain gates or bars across it, or a covering over it, or make any use of the property not conflicting with a reasonable enjoyment of the way by his grantees.

POWERS v. LARGE.

[69 WISCONSIN, 621.]

IN CONTEST BETWEEN CREDITOR OF INDIVIDUAL PARTNER and a creditor of the insolvent partnership, the partnership creditor is to be preferred, and his debt first paid, if he shows that he has in any way obtained a lien upon the partnership property before the same has been appropriated to the payment of the debt of the creditor of the individual partner; and it is immaterial that the creditor of the individual partner obtained a lien first, so long as the property has not been sold before the lien of the creditor of the firm attaches.

IN CONTEST BETWEEN CREDITORS OF INDIVIDUAL PARTNERS and the firm creditors as to the distribution of a fund in court, and it appears that no parties are interested except those mentioned and made parties, the fund may be distributed upon petition, without resort to equity, or allegation and proof of fraud.

John D. Wilson, for the appellant.

Clark and Mills, for the respondent.

By Court, TAYLOR, J. The petition of the respondent shows that the appellant obtained a judgment against Frank L. Powers for the sum of \$3,463.25 damages, and \$23 costs, on the 8th of February, 1886. On the same date execution was issued on such judgment, and placed in the hands of the sheriff of the proper county. On the same day, by virtue of said execution, said sheriff seized upon all the goods and chattels of Frank L. Powers and S. Stone, as partners, and that all the goods and chattels seized upon said execution were the goods and chattels of the said firm of Powers and Stone.

The petition further sets forth that the respondents were creditors of the firm of Powers and Stone, for goods theretofore sold to said firm, and that on the eleventh day of February, 1886, they commenced an action against said Powers and Stone to recover the amount due them; that in said action a writ of attachment was issued against the property of said Powers and Stone, and by virtue of such attachment the goods and chattels in the hands of said sheriff, by virtue of his levy and seizure upon the execution above mentioned, were duly attached and duly appraised at the value of \$2,548.34. The petition further alleges that at the time of the levy of said attachment, the only property owned by Powers and Stone, or by either of them, liable to execution, were the goods and chattels seized by them on such attachment. The petition further alleges that Powers and Stone are both insolvent, and

that the execution issued upon their judgment obtained in the attachment action was, on the second day of April, 1887, returned unsatisfied.

The petition further sets forth that the sheriff proceeded to sell the property of said Powers and Stone upon the execution issued upon the judgment in favor of the appellant, and upon such sale he realized a large sum of money, more than sufficient to satisfy the judgment of the petitioners, and that such money is still in the hands of said sheriff, who holds the same under the order of the court, to be paid over to such party or person as may be entitled thereto. The petition asks for an order of the court, directing the sheriff, or other officer or person having such money, to pay over to the petitioners the amount of their said judgment, etc. They also ask the court to make an order requiring the said Lyman A. Powers, the appellant, to answer their petition.

The circuit court thereupon made an order requiring said Lyman A. Powers to answer said petition within twenty days after service of a copy of the order and a copy of the petition upon him.

After the service of such order and petition, the said Lyman A. Powers appeared in court and filed a demurrer to said petition, stating the following grounds of demurrer: "1. That the court has no jurisdiction of the person of the plaintiff, or defendant, or of the subject-matter set forth in the petition, or of the above-entitled action; 2. That the petitioners have not legal capacity to sue or intervene herein; 3. That there is another action pending between the parties hereto for the same cause; 4. That there is a defect of parties, both plaintiff and defendant, for the reason that Samuel Stone and Ora Richards, sheriff, should be made a party to this proceeding; 5. That several causes of action and grounds for relief have been improperly united; 6. That the petition does not state facts sufficient to constitute a cause of action, or entitle the petitioners to the relief prayed for; 7. That the action was not commenced, or petition filed for leave to intervene, within the time limited by law." The circuit court overruled the demurrer, and from the order overruling such demurrer the plaintiff, Lyman A. Powers, appeals to this court.

The case presents the following facts in brief: A creditor of one of the partners of an insolvent partnership obtains a judgment against such partner upon his individual indebtedness, and levies upon all the partnership property. A creditor

of the partnership commences an action upon a demand due to him from the partnership, before the sale under the execution levy, and attaches the same partnership property for his partnership debt, and afterwards obtains judgment against the partnership. In the mean time, and after his attachment, the sheriff sells the property of the partnership, upon the execution, in favor of the individual creditor, and retains the proceeds of the sale in his hands to be paid over by order of the court, to the party entitled thereto. The parties having the attachment and judgment against the partnership ask the court to direct the money in the hands of the sheriff to be appropriated, in the first place, to the payment of their judgment. That the petitioners are entitled to have the money so applied by some process of law, cannot well be denied.

All the cases hold that in a contest between a creditor of one of two or more partners and a creditor of the partnership, the creditor of the partnership is to be preferred, if he shows that he has in any way obtained a lien upon the partnership property before the same has been appropriated to the payment of the debt of the creditor of the individual partner. The petition clearly shows that the petitioners, the creditors of the partnership, had attached the partnership assets before the same had been sold on the execution in favor of the creditor of the individual partner. In such case, it is wholly immaterial that the creditor of the individual obtained a lien first, so long as the property has not been sold before the lien of the creditor of the firm attaches: *Conroy v. Woods*, 13 Cal. 626; 73 Am. Dec. 605, 606; *Greenwood v. Brodhead*, 8 Barb. 594; *Wilder v. Keeler*, 3 Paige, 167; 23 Am. Dec. 781; *Jackson v. Cornell*, 1 Sand. Ch. 348; *Coover's Appeal*, 29 Pa. St. 9; 70 Am. Dec. 149. In this case the court say: "But when the joint creditors acquire a lien on the joint assets, either by assignment or by levy, no subsequent disposition of the property by the several partners, or by their separate execution creditors, can defeat such lien. It differs from a lien against a single member of the firm in this important particular: that the former is a lien on the chattels themselves, while the latter is a lien on the surplus only, after payment of partnership debts. The lien of the partnership creditors is in time if acquired before the sale. The moment the equity of the partnership creditors is thus secured, their rights become paramount, and no arrangement of the order of sale can give the separate creditors a preference over them." This case, it appears to us, cor-

rectly states the law as to the relative rights of an individual creditor, and the rights of a creditor of the partnership, when both have acquired a lien upon the partnership assets before a sale of the same has been made by the individual creditor.

The cases cited by the learned counsel for the appellant, which seem to hold a different rule, will be found upon examination to be cases in which the individual creditor of one of the members of the firm had been allowed to proceed and sell the property of the firm to pay his individual debt, before any steps were taken by the creditors of the firm to attach the property of the firm for their debts, or in any other way obtain a lien thereon. In such case, the courts hold that the equitable lien of such creditors over the creditor of the individual is a lien to be worked out in the name of the partners, and not in their own names.

It is objected by the learned counsel for the appellant that if the petitioners have any right as against the claim of the appellant, it can only be enforced in an equitable action, and not by petition. We see no reason why the court cannot do justice in this matter upon the petition to distribute the fund in the hands of the court as well as by an independent action. No persons appear to be interested in the fund except the appellant and the petitioners. The sheriff has no interest hostile to either, and there are no other creditors who would seem to have any interest. It is urged that the right to distribute the fund depends upon the good faith of the appellant in proceeding to sell, and as no fraud is charged, the petition should not be sustained. In the cases in which this court has held that the rights of contesting creditors to a fund arising from the sale of the property of the common debtor may be determined upon the petition of one of the claimants, it may have appeared that the rights of the petitioner in such cases did depend upon the fraud of the claimant; but we are not aware that it was decided that, in order to give the court jurisdiction to make an order distributing such fund, it was necessary to charge and prove fraud on the part of the other claimant. If the court has jurisdiction to determine a question of fraud in order to base an order for the distribution, it would seem the court might, with much greater propriety, make an order of distribution when no fraud was involved, and only a question of law upon an admitted state of facts: See *Breslauer v. Geilfuss*, 65 Wis. 388; *Nassauer v. Techner*, 65 Id. 388.

The right of a court to distribute a fund brought into court

by the sale of property upon its order or writ has always been recognized, and is the well-known method of proceeding whenever there is a surplus arising upon the sale of real estate in the foreclosure of a mortgage, or other judicial sale. But if it were necessary that the element of fraud should exist to give the court the right to proceed by way of petition, that element would exist in this case. The petition shows that the firm, and the individuals comprising the firm, are insolvent, and unable to pay their debts; and if the creditor of the individual partner is permitted to apply the assets of the firm to the payment of his debt, it would be a fraud upon the creditors of the firm: See *Keith v. Armstrong*, 65 Wis. 225, 228, and cases there cited. This petitioner having acquired a lien upon the partnership assets out of which the fund in court was raised, he is in a position to intervene without the assent or co-operation of the partners.

The order of the circuit court is affirmed, and the cause is remanded for further proceedings.

FIRM CREDITORS ARE ENTITLED TO PREFERENCE over the creditors of individual partners in the payment of their debts out of the firm property, without regard to the priority of attachment or judgment liens: *Bullock v. Hubbard*, 83 Am. Dec. 130; *Coover's Appeal*, 70 Id. 149; *Cumming's Appeal*, 64 Id. 695; *Conway v. Woods*, 73 Id. 605. As to liens and priorities of firm over individual partnership creditors generally, see the notes to the cases cited *supra*, and *Willis v. Freeman*, 82 Id. 619; *Midnight v. Smith*, 88 Id. 233; *Hagood v. Cornwell*, 95 Id. 516; *Manhattan Ins. Co. v. Webster*, 98 Id. 332, and notes to these cases; *Farley v. Moog*, 58 Am. Rep. 535.

SUBSEQUENT ATTACHMENT BY FIRM CREDITOR takes precedence over a prior attachment by creditor of individual partner: *Jarvis v. Brooks*, 59 Am. Dec. 359.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

LUCO v. BROWN.

[73 CALIFORNIA, 2.]

INJUNCTION WILL NOT LIE TO RESTRAIN the sale of goods on execution issued on a justice's judgment rendered by default, but void because the court never acquired jurisdiction of the person of defendant. The remedy is by motion to set the execution aside.

Thomas J. Arnold, for the appellant.

Leach and Parker, and F. D. Nicol, for the respondents.

By Court, BELCHER, C. C. This action was commenced in the superior court of San Diego County, to obtain an injunction restraining the defendants "from levying upon or attaching plaintiff's property, or any part thereof," under an execution issued upon a judgment rendered against plaintiff in a justice's court in Tuolumne County.

The facts set up in the complaint may be briefly stated as follows:—

On the fourteenth day of August, 1885, the defendant Brown filed a complaint in a justice's court, in the county of Tuolumne, against the plaintiff here and two other persons, in which he alleged that the defendants were indebted to him in a certain sum of money for labor and services done and performed by plaintiff for defendants at their special instance and request.

On the 26th of September following, Brown caused a summons to be issued by the justice upon his complaint, which

was served upon plaintiff in the city and county of San Francisco, where he then and has ever since resided, and was never served upon him in the county of Tuolumne. The summons so served was defective and void, because there was not attached to it a certificate under seal by the county clerk of the county of Tuolumne, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons, as required by section 849 of the Code of Civil Procedure. On the — day of November, 1885, Brown caused the default of plaintiff for not answering to be entered in the cause, and thereupon judgment was made and entered against him for the sum of \$252.74. Thereafter Brown caused an abstract of the judgment to be filed in the office of the county clerk of the county, and an execution thereon, under the seal of the superior court, to be issued to the sheriff of San Diego County. The defendant Bushyhead is the sheriff of San Diego County, and the execution so issued has been placed in his hands, and under it he is about to levy upon, advertise, and sell the plaintiff's property, situate in his county.

It is then alleged that all the allegations in the complaint filed in the justice's court, so far as the plaintiff here is concerned, are untrue; that Brown never at any time performed any work or labor for plaintiff, at his instance or request, or otherwise, and that plaintiff is not, and was not, either individually or in connection with his co-defendants, indebted to Brown in the sum named in his complaint, or in any sum of money whatever, and that he never agreed to pay him the sum alleged in his complaint, or any other sum whatever; that plaintiff never had any notice or knowledge of the commencement of the action in the justice's court (except from the service of said void summons upon him), or of the default taken, or of the judgment rendered therein, or of the issuance of the execution, until demand was made upon him by defendant Bushyhead, for payment and satisfaction of the same; and that the levy upon and sale of the plaintiff's property, under the execution, will cloud his title and do him irreparable injury.

This action was commenced on the ninth day of February, 1886, and on the same day a temporary injunction was granted. The defendants demurred to the complaint; and on coming on to be heard, their demurrer was sustained, and the injunction dissolved. The plaintiff excepted to the rulings of the court, and now prosecutes this appeal therefrom.

Assuming, as claimed by the appellant, that the judgment rendered against him in the justices' court was void, for the reason that the court never acquired any jurisdiction of his person, still it does not follow that he can maintain this action. The same question was involved in *Comstock v. Clemens*, 19 Cal. 78, in which the court, by Field, C. J., said: "The plaintiff seeks to enjoin the sale of certain personal property under an execution issued upon a judgment recovered against him in a justice's court, and bases his claim for relief upon the ground that the court never acquired any jurisdiction of his person. He avers that the summons issued in the action in which the judgment was entered was never served upon him. If this averment be true, he has an effectual remedy by motion to the court to set the execution aside. The justice possesses the power at all times to arrest process issued upon judgments entered in his docket which are void." And in that case, the judgment in favor of the defendants was affirmed.

The same question was again presented in *Gates v. Lane*, 49 Cal. 266. There the plaintiffs sought to enjoin the enforcement of an execution issued on a judgment rendered against them in a justice's court, upon the ground that the summons had never been properly served upon them. The defendants demurred to the complaint, and this court said: "The demurrer was properly sustained. If the judgment obtained against the plaintiffs was void on the face of the proceedings in the justice's court for want of jurisdiction, as the complaint avers it to have been, these plaintiffs had an adequate remedy, by motion in that court, to arrest the execution, and stay further process on the judgment. [Citing cases.] Nor did the fact that the execution was issued by the county clerk, on a transcript of the justice's docket filed in his office, obstruct the remedy by motion in the justice's court. Though issued by the clerk, the execution was subject to be recalled by the justice who rendered the judgment."

In *Ede v. Hazen*, 61 Cal. 360, it is said: "As appears upon the face of their complaint, the plaintiffs discovered within forty days after the entry of the judgment, and within six months after the entry of their default, all the facts upon which they now base their right to have it set aside; and if it be conceded that upon those facts they are entitled to the relief they now claim, it is clear that they had a speedy, complete, adequate, ussmmary remedy in the same proceeding, and that

the complaint shows no circumstances which entitle them to maintain a separate and distinct equitable action."

Upon the authority of the foregoing cases, we think the demurrer was properly sustained, and that the order dissolving the injunction should be affirmed.

FOOTE, C., and HAYNE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the order is affirmed.

COLLECTION OF VOID JUSTICE'S JUDGMENT cannot be restrained by injunction where there is an adequate remedy at law by appeal or *certiorari*: *Crandall v. Bacon*, 91 Am. Dec. 451, and note 452.

THE PRINCIPAL CASE is in harmony with prior cases in California upon the same topic. In other states, the remedy by injunction is more fully accorded; and the weight of authority is in favor of the proposition that the fact that redress against a void judgment might probably be obtained by motion in the original action constitutes no insuperable obstacle to a suit in equity for relief by injunction: *Freeman on Judgments*, sec. 497.

[IN BANK.]

LAMB v. RECLAMATION DISTRICT No. 108.

[78 CALIFORNIA, 125.]

RECLAMATION DISTRICT ORGANIZED AND EXISTING under the laws of California for the purpose of reclaiming swamp and overflowed lands has the right to maintain a levee along the banks of a navigable river to protect such lands from overflow, and is not liable in damages to one who owns land on the opposite side of the river two miles away, which land is overflowed in time of high water by reason of the erection of such levee; and when such overflow occurs seven years after the erection of the levee, the damage is too indirect, remote, and consequential in point of time and distance to constitute a "taking" of the property for public use, so as to entitle the owner to compensation, within the meaning of the constitution.

RECLAMATION DISTRICT FORMED AND EXISTING under the laws of California for the purpose of reclaiming swamp and overflowed lands has the right to maintain a levee along a navigable river, and in so doing to dam the mouth of a slough which in time of flood acts as an escape for part of the waters of such river upon adjoining lands, but which carries no water except in time of flood, and the district does not thereby render itself liable in damages for the overflow of lands caused thereby, when such lands are on the opposite side of the river, and two miles below the mouth of such slough.

SLOUGH WHICH ORIGINALLY CARRIES NO WATER of its own, but simply acts as a conduit by which occasionally some of the flood water of a navigable river escapes into the lower lands adjoining, does not come within the legal definition of a "watercourse," so as to apply the doctrine that one land-owner on a watercourse cannot dam it so as to flood the land of the owner below.

J. C. Ball and A. L. Hart, for the appellant.

A. C. Adams, Jackson Hatch, and W. B. Treadwell, for the respondent.

By Court, MCFARLAND, J. This is an action to abate and remove as a public nuisance a levee erected by defendant along the west bank of the Sacramento River, and across a place on said bank called Wilkins Slough, and to recover damages for the overflowing of plaintiff's land on the other side of the river, about two miles below, alleged to have been caused by said levee. The case was submitted on certain parts of the pleadings taken as true. The court below gave judgment for defendant, and plaintiff appeals from the judgment.

The Sacramento River is a large navigable stream, having its sources near the boundary line between the states of Oregon and California, and running for several hundred miles through the northern and central parts of the latter state to the bay of San Francisco. In times of high water it frequently overflows its banks. A great deal of the adjoining land is lower than the banks of the stream; and at times of overflow the surplus water runs down to and over such land, where it remains until it evaporates, or, later in the season when the river is at a lower stage, runs back into the stream. The water at some places pours over the entire bank in continuous sheets for considerable distances, but more commonly finds its way out through the lower parts, or depressions, of the banks, which of course have gradually been worn down deeper and wider by the action of the water. These short depressions by which the water gets through the banks into the lower lands beyond are called sloughs; and Wilkins Slough, mentioned in the complaint, is quite a large depression of that character, and affords means of escape during overflows for a considerable quantity of water. The lands thus overflowed, and for the protection of which respondent claims the right to maintain said levee, are a part of that large body of swamp and overflowed land acquired by California from the United States by virtue of the act of Congress of September 28, 1850, generally known as the Arkansas act.

The respondent, Reclamation District No. 108, is a public corporation, organized and existing under the laws of this state relating to swamp and overflowed lands. The district includes over forty thousand acres in the county of Yolo and about thirty-three thousand acres in the adjoining county of

Colusa, all lying west of the Sacramento River. The district having been regularly and legally organized, and engineers employed by its trustees having performed their duties as required by law, the plan of its proposed work, with estimates of costs, expenses, etc., was duly adopted and reported to the boards of supervisors of said two counties on the twenty-eighth day of September, 1870. The plan was, in substance, by a continuous levee, wherever necessary, along and upon the west bank of the river from "the Upper Sycamore Slough to Knight's Landing," a distance of over forty miles,—and which, of course, included the filling of all depressions or sloughs,—to prevent the water of the river from flowing over its banks and flooding the lands of the district. It mentioned by name the place called Wilkins Slough. The respondent thereafter commenced to construct its works in accordance with the said plan, and completed the same on the first day of December, 1872. And from that date it has continuously maintained its levee, except that in 1879 that portion of it which was across said Wilkins Slough was partly washed away, but was immediately—that is, in the next month—rebuilt to its original height. It is admitted that this levee, including that part of it constructed across Wilkins Slough, is necessary and indispensable to the protection of the lands of said district from overflow; and that without such protection the overflow would render said lands unfit for cultivation and uninhabitable.

The complaint, taken as true, avers in substance that on December 22, 1879, plaintiff was the owner and in possession of a tract of land fronting on the opposite or east side of said Sacramento River; that on the 23d of said month he resided on said land with his family; that it was a safe and suitable dwelling-place, and valuable for agricultural purposes; and that on or about the 26th of said month he had prepared, cultivated, and seeded with wheat about two hundred acres of said land, and that the remainder was used for alfalfa and grass. It then describes the said Wilkins Slough as situate about two miles above said land, and on the west side of the river, and avers that when unobstructed it divides the water in times of flood, and carries large quantities of it to the southwestward away from the land of plaintiff to a natural basin. Further averments are, that on or about January 15, 1880, defendant completely obstructed said Wilkins Slough by placing a dam and levee across its head, and thus prevented

any water from passing into or through the same, and that by reason of said obstruction, on or about the sixth day of April, 1880, the water did so accumulate in said Sacramento River as to overflow, and did overflow, the easterly bank thereof, and did flood and inundate plaintiff's said land on said easterly bank, and did destroy his said growing wheat, grass, fences, etc., to his damage in the sum of five thousand dollars. It is further averred that defendant continues and intends to maintain said levee, and that in times of flood it will cause the easterly bank to be overflowed, and plaintiff's land to be damaged as aforesaid.

It does not appear when or from what source plaintiff got title to or possession of his land. It only appears that he was there in December, 1879, and that the alleged damage occurred in April, 1880, which was between seven and eight years after the erection of the levee.

The questions to be determined in the case are, Did respondent have the right to construct the levee which it completed in 1872, notwithstanding the damage which was caused thereby several years afterward to appellant's land? and has it the right to maintain said levee, notwithstanding any damage which it may possibly or probably cause to said land hereafter, as apprehended by appellant and described in his complaint?

It may be remarked that the conclusion that respondent had or has no such right does not follow from the mere fact of damage to appellant's land. The phrase *damnum absque injuria* is just as well recognized, as a statement of a legal condition, as the maxim, *Sic utere*, etc., is, as the statement of a limitation of rights to property. And the words *damnum absque injuria* include a direct declaration, in terms, of the proposition that there may be damage without legal injury. Therefore, the reiteration of one or the other of these Latin phrases affords but little aid in the solution of any question. This is well expressed in the text of Wood's Law of Nuisances, page 21, as follows:—

"But when no right has been violated, it cannot, by any process of reasoning, be established that there is a legal injury or damage. The instances of *damnum absque injuria* are very numerous, and are always injuries that result from a lawful act, for the law never recognizes an injury arising from a lawful act as imputing damages. . . . In giving force to the maxim, *Sic utere*, etc., the courts are always met by the right

of parties to use their own property in every reasonable way, and neither justice nor public policy would tolerate the idea that a person should be made liable for damages resulting from a reasonable use of his property. Therefore, in determining whether or not an injury has been done amounting to a nuisance, it is necessary to balance the rights of the parties, in view of all the circumstances, and say whether or not the use of the property in the manner complained of is reasonable, and in accordance with the relative rights of the parties."

The real question in such cases is, Had the party sued the right to do the thing complained of?

Respondent has at least as much right to maintain the levee as a natural person owning lands, of a character similar to those of respondent's district, would have; and its counsel bases its defense,—1. Upon the right of a natural person to protect his lands from overflow, upon the principle of self-defense, as held in *Rex v. Commissioners*, 8 Barn. & C. 355; and 2. Upon its right as a public municipal corporation organized under the laws of the state, exercising the police powers of the state, and acting as a public instrumentality of the state in providing for the public welfare, and in complying with the conditions upon which the grant of swamp and overflowed lands was made to the state by the general government.

In *Rex v. Commissioners*, *supra*, the facts were these: The commissioners of the levels, for the purpose of protecting the property intrusted to their care against the inroads of the sea, erected certain groynes and other works, which caused the water to flow with greater force against the lands of one Cosens, and to injure them, and to gradually wash a portion of them away. The lands of Cosens fronted on the seashore, and were adjoining and to the eastward of the levels on which the works of the commissioners were erected. The question was, whether or not the commissioners could be compelled to pay for the damages done to the lands of Cosens, or to erect other works to prevent further injury to said lands. The court decided that the commissioners were not liable, and that Cosens would have to protect his own lands by works similar to those of the commissioners. Lord Tenterden, C. J., in delivering the opinion of the court, said, among other things, as follows: "But the sea is a common enemy to all proprietors on that part of the coast, and I cannot see that the commissioners, acting for the common interest of several land-owners, are, as to this question, in a different situation from any individual proprie-

tor. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea may not endeavor to protect himself by erecting a groyne or other reasonable defense, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing. . . . I am therefore of opinion that the only safe rule to lay down is this: that each land-owner, for himself, or the commissioners acting for several land-owners, may direct such defenses for the land under their care as the necessity of the case requires, leaving the others, in like manner, to protect themselves against the common enemy." And Bayley, J., says: "I am entirely of the same opinion. It seems to me that every land-owner exposed to the inroads of the sea has the right to protect himself, and is justified in making and erecting such works as are necessary for that purpose. . . . If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title, two things must occur,—damage to himself, and a wrong committed by the other. That he has sustained damage, is not of itself sufficient. Now here, Mr. Cosens may have sustained damage, but the commissioners have done no wrong. The *dictum* of Justice Wilmot was cited to show that when there is a right, this court ought to find a remedy. But the right that Mr. Cosens and each land-owner has is to protect himself,—not to be protected by his neighbors. To that right no injury has been done, nor can any wrongful act be charged against the commissioners."

Logically, this principle would seem to be applicable to the waters of large navigable American rivers subject to extensive overflows. And it has been thus made applicable in a number of adjudicated cases: *Hoard v. City of Des Moines*, 62 Iowa, 326; *S. & B. Turnpike Co. v. Green*, 99 Ind. 205; *C. & V. R. R. Co. v. Stevens*, 73 Id. 283; *Dubose v. Levee Commissioners*, 11 La. Ann. 165; *Bass v. State*, 34 Id. 494. But inquiry on this branch of the subject need not here be further prosecuted, because counsel for appellant have argued the case almost entirely upon the theory that respondent is a municipal corporation acting under the authority of the state; and that, therefore, although exercising the power of the state, it is bound, like the state, by the constitutional limitation that private property cannot be taken for public use without compensation. This view of the case rests upon the assumption that

building the levee, and thereby subsequently causing the damage complained of, was done under the power of eminent domain; and that, therefore, appellant was entitled to compensation for the "taking" of his land. But assuming the theory to be correct, the position is clearly untenable. In the first place, when respondent built the levee, it could not possibly have condemned appellant's land under the power of eminent domain. It could not have shown that it had any use for said land, or intended to use it, or even to damage it, or to interfere with it in any way. And then the subsequent damage which happened years afterward was not a "taking" within the meaning of the most extreme cases on that subject. It was, in the extreme sense, indirect, remote, and consequential. There was no physical directness between the act and the damage. It cannot be claimed that the water which the levee prevented from going over and through the west bank of the river was the very water which afterwards flowed onto appellant's land. It was remote and indirect in point of place and distance; it took place two miles away, and on the opposite side of a large, navigable river. It was indirect, remote, and consequential in point of time; it took place more than seven years after the act complained of. And there was nothing in the nature of a permanent use or occupation of the land; it was a mere temporary overflow, which occurred once in seven years, and it is impossible to know when, if ever, it will occur again, or with how small an effort appellant could make its recurrence improbable or impossible. It is therefore one of the plainest cases for the application of the well-established rule that the state is not liable for remote and consequential damages caused by the erection of public works. That rule has been held to go much further than it is necessary to extend it here in the cases of *Green v. Swift*, 47 Cal. 536, and *Green v. State*, 73 Id. 29, which two cases are, we think, determinative of the case at bar in favor of respondent.

Under these views, it is unnecessary to discuss the distinction made by counsel for respondent between "eminent domain" and the "police powers" of a state. The right and duty of the state,—acting for the public benefit and the general welfare, and by means of municipal corporations like respondent,—to reclaim the swamps and overflowed land granted to it by the Arkansas act, we do not understand to be disputed: *Kimball v. Reclamation Fund Com'rs*, 45 Cal. 344; *Hagar v. Yolo County*, 47 Id. 222; *People v. Reclamation*

Dist. 108, 53 Id. 346; *Dean v. Davis*, 51 Id. 406. And counsel for respondent argues that this right is exercised under the police powers of the state, and that therefore appellant would not have been entitled to compensation even if his property had been "taken." But as the land of appellant was not taken, we need not follow the point here made by respondent. Under either view, respondent is not liable for the remote and indirect damage.

With respect to the matters involved in this case, it may be remarked that the Sacramento very closely resembles the Mississippi River, the difference being in magnitude, not in character. And it has been held in states bordering on that river that the state may not only control and levee its banks for the purpose of preventing the adjoining country from overflow, but may compel riparian owners to maintain such levees at their own expense: *New Orleans Drainage Co.'s Case*, 11 La. Ann. 370; *Bass v. State*, 34 Id. 494; *Dubose v. Levee Com'rs*, 11 Id. 165. And it is a matter of common knowledge, that since the settlement of California by Americans, it has been the custom of cities, towns, and private riparian owners along the Sacramento River to protect their lands from overflow by building levees on its banks. If the works of respondent can be declared a nuisance, then the levees in front of the cities of Colusa and Sacramento, which preserve millions' worth of property, including the capitol buildings and grounds of the state, can be removed at the suit of any owner who will not protect himself, and who can show that the swell of the river is increased in times of flood by levees either above or below him, and the whole system of reclamation can be defeated.

Counsel for appellant contends that Wilkins Slough is within the legal definition of a "watercourse," and argues for the application here of the doctrine that one land-owner on a watercourse cannot dam it so as to flood the land of his neighbor above. But in the first place, appellant is not a riparian owner upon Wilkins Slough. His land is two miles away, and divided from it by a large navigable river. He has no interest in whatever rights land-owners on Wilkins Slough, if there were any, might have as between themselves. In the second place, we do not think that Wilkins Slough, as between appellant and respondent at least, is to be treated as a watercourse within the legal meaning of that word. It occasionally happens that a river, in its course from its source to its mouth, divides into two main, permanent channels, each carrying con-

tinuously a large part, if not a moiety, of its waters at all stages, and either uniting with the other at a lower point, or continuing to the sea, leaving a delta between the two. But there is nothing here resembling that condition. Wilkins Slough is not a channel or fork, continuously carrying a large part, or any part, of the waters of the Sacramento River. It carries no water at all except "in times of flood," and then the amount which it carries, when compared with the volume of water in the river, is insignificant. In fact, it has no original water of its own at all, but is simply a conduit by which occasionally some of the flood-water of the river escapes into the lower lands adjoining. This same office is performed by every other low place along the bank; and every other part of the levee could be removed as a nuisance if that part of it which is at Wilkins Slough can be so removed. Upon this point we cannot distinguish the case at bar from the case of *S. & B. Turnpike Co. v. Green*, 99 Ind. 205, where it was held that plaintiff could protect his land from overflow of the Big Blue River by erecting a levee on its bank at a place where there was "a depression washed out across the lands of plaintiff," and where, "when there was a rise in said river, the water passed out over said lands of plaintiff," although it caused a greater overflow on the premises of defendant, to its damage.

Considering, therefore, all the facts and circumstances of this case, and confining our opinion to the case here made, we think that the works of respondent complained of by appellant do not constitute a nuisance, and that respondent is not legally liable for the incidental damage caused thereby, as above described.

Judgment affirmed.

SEARLS, C. J., concurred.

TEMPLE, J. (concurring). I concur in the judgment and in the opinion, but I do not agree to the construction apparently placed upon the case of *Green v. Swift*, 47 Cal. 536, and upon the case of *Green v. State*, 73 Id. 29.

PATTERSON, J. (concurring). I concur in the judgment on the ground that the character, size, and operation of the slough which was obstructed cannot be satisfactorily determined from the pleadings upon which the cause was submitted and decided. Before a court of equity would be authorize in declaring the levees and dams of a reclamation district to be nuisances, and ordering them abated as such, something mor

should be shown than that the slough obstructed does at all times, when unobstructed, "divide the waters of the river in times of flood, and carry and conduct large volumes thereof to the southwestward, away from the lands of plaintiff, to a natural basin."

It is true, the complaint alleges that said slough was a natural watercourse, but other allegations of the complaint and answer (which must be taken as true) leave that matter very doubtful and unsatisfactory.

The state and its grantees are charged with a great trust with respect to swamp and overflowed lands under the laws by which they are granted, and it is by no means clear that that trust can be executed if we apply strictly the common-law rules applicable to nuisances caused by the obstruction of natural watercourses. It may be necessary, under our peculiar conditions as to seasons, watersheds, river systems, and swamp-lands, to find a new definition for the term "natural watercourse," if we are to apply old principles to the innumerable sloughs which are found in our overflowed districts, and which have well-defined banks and beds. There are channels in this state not well defined in bank and bed, without water in them during certain months of the year, yet so important in operation during high water that to dam them would be disastrous to life and property; and there are sloughs running out from the rivers in the low-lands with well-defined banks and beds, and with water running bank-full every month in the year, yet so unimportant in their operation that to close them would have no appreciable effect upon the river or its tributaries, except to improve the same for navigation, but so numerous in the overflowed districts that to restrain the obstruction of them, simply because they are within the accepted definition of a natural watercourse, would in many instances prevent the reclamation of large and valuable tracts of land which the state and its grantees have undertaken, and are in duty bound, to reclaim. The dam and levee complained of were constructed in 1872, and have ever since been maintained. This action was commenced January 20, 1883, to procure an abatement of the levee and dam, and recover the sum of five thousand dollars damages alleged to have been caused by the destruction of plaintiff's growing crops, fences, and other improvements, and it does not appear that any complaint was made prior to the last-named date.

If the slough is one which, considering the end to be accom-

plished by defendant, and with due regard to the property rights of others, could not lawfully be obstructed, it may be fairly inferred that plaintiff would have discovered the fact, and proceeded to have the obstruction abated long before the commencement of this action. The delay in bringing the suit adds to the uncertainty arising from the complaint and answer concerning the equity of plaintiff's prayer for the abatement of the levee and dam as a nuisance.

RIPARIAN OWNER'S RIGHT TO MAINTAIN DIKE so as to flood the land of an owner on the opposite side of the stream in time of freshet: *Burwell v. Hobson*, 65 Am. Dec. 247, and note 254.

WATERCOURSE, WHAT CONSTITUTES: *Hart v. De Hart*, 72 Am. Dec. 395, and note 402.

THE RIGHT OF LAND-OWNER to protect his lands from overflow from rivers, by means of dams and levees, is considered in the note to *Gerriat v. Clough*, 97 Am. Dec. 565-569.

CONNEAU v. GEIS.

[78 CALIFORNIA, 178.]

RULE OF COURT REQUIRING PARTY DEMANDING JURY TRIAL to deposit a certain sum with the clerk of court as jury fees before the commencement of the trial is a reasonable regulation of the mode of enjoyment of the right of jury trial, and is not a denial or impairment of the right.

WHERE DEED IS EXECUTED IN CONSIDERATION OF PRIOR INDEBTEDNESS, and left with one in escrow to be delivered to the creditor in thirty days if such debt is not liquidated within that time, and the debt is not paid, the grantor cannot make a second deed to one who has notice of the escrow.

ACTION to recover possession of land. All the parties claim under Manning and Steffin.

S. W. Geis, in pro. per., and Frank H. Farrar, for the appellant.

Wright and Hazen, for the respondent.

By Court, HAYNE, C. The defendant demanded a trial by jury, but failed to deposit the sum of twenty-four dollars, which, according to its rules, the court required to be deposited with the clerk as jury fees before the commencement of the trial. The case was thereupon tried without a jury, and judgment rendered for the plaintiff. The first question is, whether the court could rightfully require the advance of this sum. We think that the advance of the fees was a reasonable regu-

lation of the mode of enjoyment of the right of a jury trial, and that the making of such a regulation cannot be said to be a denial or impairment of the right.

The expense of a jury demanded by a party is expense incurred on his behalf, and at his instance. It is reasonable and just that he should bear this expense; and it always has been the law and the practice to collect it from one or the other of the litigants. The point is not and could not be that the court had no right to make the parties pay it, but that it could not be collected in advance. But if the court has the right to make the parties pay, it does not seem that the time of its collection is of such importance as to change the character of the requirement. A rule requiring the fee to be paid in advance is a reasonable precaution to prevent the jurors from being defrauded by unscrupulous parties, and to prevent the demand of a jury being used as a pretext to obtain continuances, and thus trifle with justice. The right to bring suit, and the right to appeal to a higher court, are as fully secured by the constitution as the right to a trial by jury; yet it has always been the practice to collect the fees therefor before the suit is commenced, or the record on appeal is filed. And we do not see how such a proceeding impairs the right in the one case any more than in the other. If the court has a right to require the payment of a jury fee in advance, the refusal to pay it is the refusal to have a jury trial; and since this is the party's own act, he cannot be said to be deprived of anything. Upon analogous principles, it was held, even in a criminal case, that where, after a demurrer, a defendant refused to plead, such refusal was a refusal of a jury trial, or any trial, and that judgment should be entered against him without further ceremony, the court, per Sanderson, C. J., saying: 'The intent of the constitution is to secure every person charged with crime a fair and impartial trial by jury, but not to place it in his power to evade a trial altogether': *People v. King*, 28 Cal. 266.

The authorities in other states bear out the proposition that the making of a reasonable regulation of the mode of enjoyment of the right of trial by jury is not a denial or impairment of the right. Thus in *Biddle v. Commonwealth*, 13 Serg. & R. 410, the provision was for a trial, in the first instance, before a magistrate without a jury; but upon complying with the requisite conditions, the party could appeal to a higher court, where the case was to be tried by a jury. The condition of

the appeal was, that the party should make affidavit that "he verily believed injustice had been done him, and that the appeal was not made for the purpose of delay." The court held that there was no impairment of the right of trial by jury; and Tilghman, C. J., delivering the opinion, said: "Laws such as these promote justice, and leave the substance of the trial by jury unimpaired; and that is all that is required by these expressions in the constitution." A similar ruling was made in *Keddie v. Moore*, 2 Murph. 45, 5 Am. Dec. 518, in which case the condition was, that the party should give a bond, the court, per Locke, J., saying: "The party wishing to appeal may be subjected to some inconvenience in getting security, but this inconvenience does not, in this nor in any other case where security is required, amount to a denial of the right." A similar ruling was made in *Beers v. Beers*, 4 Conn. 539, 10 Am. Dec. 186, the court, per Hosmer, C. J., saying: "A law containing arbitrary and unreasonable provisions, made with the intention of annihilating or impairing the trial by jury, would be subject to the same considerations as if the object had been openly and directly pursued. But on the other hand, every reasonable regulation made by those who value this palladium of our rights, and directed to the attainment of the public good, must not be deemed inhibited, because it increases the burden or expense of the litigating parties. Such a degree of morbid sensibility may be excited on this subject as to generate an opinion that the legal requisition of the bond, the increase of jurors' fees, and other trivial changes, although imperiously demanded to promote justice and the general convenience, if they only operate to subject the trial by jury to a burden not unreasonable, are a violation of the constitution. . . . As the interests of a state, however, do not essentially depend on the existence of one right only, but on many, it is proper to preserve them generally, and not to sacrifice one important consideration to another equally important." And similar decisions have been made in other cases: See *Jones v. Robbins*, 8 Gray, 341; *Flint River etc. Co. v. Foster*, 5 Ga. 195; 48 Am. Dec. 248; *Morford v. Barnes*, 8 Yerg. 458.

The foregoing cases seem to us to proceed upon the principle above stated, viz., that a reasonable regulation of the mode of enjoyment is not a denial or impairment of the right, although, in the cases referred to, the regulation was not the prepayment of the jury fees. But in *Adams v. Corrison*, 7 Minn. 456, the precise point was decided. The court below refused a jury

trial because the defendant declined to advance a jury fee of three dollars, and tried the case without a jury. On appeal, this was held to be proper, the court, per Emmet, C. J., saying: "The objection to the jury fee we do not think is well taken. It is altogether too broad. It is not that the fee is so unreasonably high as to impede the due administration of justice, but because a fee is charged at all. We can see no valid objection to a reasonable fee of this kind. The constitution does not guarantee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy in the law, or impede the due administration of justice. And that a party who demands a trial by jury should be required to advance a small jury fee, whether it is considered as a tax on litigation or as a part of the expense which is necessarily incurred in his behalf, seems no more liable to a constitutional objection than is the requirement that the fees of the clerk, sheriff, and other officers shall be paid in advance when demanded. If the clause in the constitution means that we shall be permitted to litigate literally 'without price,' there is an end to all fees, from the issuing of summons to the entry of satisfaction of the judgment." And see also *People v. Hoffman*, 3 Mich. 248; *Randall v. Kehlor*, 60 Me. 44, 45; 11 Am. Rep. 169; *Venine v. Archibald*, 3 Col. 165.

If it be objected that a regulation might be made which would amount to a denial of the right, the answer is, that when such shall be the case, the court will doubtless afford the appropriate remedy.

Upon the merits, the case turned upon the delivery of a deed to the plaintiff. The deed, which was in consideration of a prior indebtedness (*Schluter v. Harvey*, 65 Cal. 159), was left with one Perley in escrow. There is a conflict in evidence as to what the condition was. One of the grantors testified on behalf of the defendant as follows: "The contract was, that if in thirty days I made a sale of the property, the deed was to be given to me, and if I did not, it was to be delivered to Conneau." On the other hand, Perley testified as follows: "It was left with me by consent of all parties to be delivered to Conneau in case Manning and Steffin failed to sell the land in thirty days and pay the money; . . . the transaction was a complete and fair understanding; the deed was delivered to me, to remain in my possession for thirty days, and in case

they then failed to pay Conneau his mortgage within that time, it was to be delivered to him." In view of this conflict, it must be taken from the findings in favor of the plaintiff that the payment of plaintiff's indebtedness was part of the condition upon which the deed was to be ineffectual. And since the money was not paid, Manning and Steffin had no right to make a second deed to the defendant, who took with notice of the escrow.

We therefore advise that the judgment and order be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, judgment and order are affirmed.

Hearing in bank denied.

STATUTE REQUIRING PARTY DEMANDING JURY TO PAY the jury fee, and tax the same in his costs, if he prevail, is constitutional: *Randall v. Kehler* 11 Am. Rep. 160.

CROSSMORE v. PAGE.

[78 CALIFORNIA, 213.]

INDORSER DISCHARGED. — OPTION CONTAINED IN NOTE, that the holder thereof may treat the note as due immediately upon default in the payment of an installment of interest when due, must be exercised within a reasonable time. Delay of seven months before attempting to exercise the option is unreasonable, and discharges an indorser. It seems that in such case the holder should wait until the next installment of interest was due and unpaid, and then insist upon his option.

A. Muentzer and J. E. Richardson, for the appellant.

Carter, Smith, and Keniston, for the respondent.

By Court, FOOTE, C. This is an action to foreclose a mortgage given to secure the payment of a promissory note executed by Page to Rhodes, and by the latter indorsed to the plaintiff.

The court, sitting without a jury, rendered judgment as prayed for against both Page and Rhodes, but upon motion duly made granted a new trial as to Rhodes. From that order the plaintiff appeals.

The note to secure the payment of which the mortgage was executed reads as follows: —

"\$8,153.50.

STOCKTON, CAL., June 30, 1884.

"On or before three years after date, without grace, I promise to pay to Alonzo Rhodes, or order, the sum of \$8,153.50, payable only in gold coin of the government of the United States, for value received, with interest thereon in like gold coin, at the rate of eight (8) per cent per annum, from date until paid, interest payable annually, and if not so paid as it becomes due, to be added to the principal, and become a part thereof, and bear interest at the same rate; but if default be made in the payment of the interest, as above provided, then this note shall immediately become due at the option of the holder thereof.

C. A. PAGE."

The contract was, that in case of default in the payment of interest, "this note shall immediately become due at the option of the holder thereof." This is not the same as saying that the note shall become due immediately upon the option of the holder. The meaning is, that the note is to become due immediately upon the default, at the option of the holder. And this is a different thing from saying that it shall become due seven months after default, at the option of the holder. The holder was entitled to a reasonable time to exercise his option; but this time was nothing like what elapsed before the election was made. To allow him to wait seven months before doing anything would be to make the contract read that, in case of default, the holder has the option to make the note become due at an indefinite time after default; whereas what it says is, that it shall become due immediately upon the default, at the option of the holder, which is to be exercised at furthest within a reasonable time. In exercising a right like this, the holder must keep within the terms of his contract. Not having done this, he had to wait until the next installment of interest should fall due and remain unpaid, which had not taken place when this action was brought.

This being so, it may well be presumed that the court below came to the conclusion, after a re-examination of the evidence given upon this point, that it did not sustain the decision, and therefore granted a new trial; and it is our opinion that the order made in the premises was right, and should be affirmed.

BELCHER, C. C., and HAYNE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the order is affirmed.

HOLDER OF NOTE CANNOT RECOVER against indorser, unless he shows due diligence in making demand upon the maker, and notice to the indorser of non-payment: *Tate v. Sullivan*, 96 Am. Dec. 597, and note 612.

BELL v. HUDSON.

[73 CALIFORNIA, 235.]

- IN ACTION FOR PARTNERSHIP ACCOUNTING, equity will refuse to interfere on the ground that the claim is stale, where plaintiff has allowed twenty-five years to elapse before attempting to enforce his rights, during all of which time he had knowledge of all the facts, and there was no impediment to the prosecution of his claim, nor had he made any demand upon defendant, nor in any way asserted his claim.
- IN ACTION FOR PARTNERSHIP ACCOUNTING, objection that the claim is stale may be raised by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action.
- IN ACTION FOR PARTNERSHIP ACCOUNTING between an administrator of one partner and the representatives of the other, if the complaint is insufficient in other respects it is not cured nor made sufficient by an allegation that the real property "has at all times since the same was acquired and still does stand in the names of said partners," for the action cannot be considered as for partition, ejectment, or mesne profits, as the necessary allegations to support either are not made.

Hundley and Gale, and A. F. Jones, for the appellant.

W. C. Belcher and William G. Murphy, for the respondents.

By Court, HAYNE, C. According to the complaint, the material facts are as follows: In 1849 John A. Bell and William M. Bell became partners "in the business of buying and selling stock, and the purchase of real and personal property." The business was carried on until the death of John A. Bell in 1859, at which time there was on hand, belonging to the firm, "a large amount of personal property, consisting of stock cattle, beef cattle, horses, and mares, of the estimated value, as plaintiff is informed and believes to be true, of fifty thousand dollars; real estate situated in the county of Sutter and state of California, and in the county of Westmoreland, state of Pennsylvania, of the estimated value, as plaintiff is informed and believes to be true, of ten thousand dollars; which said real estate has at all times since the same was acquired and still does stand in the names of said partners, John A. and William M. Bell; together with notes and other demands

of the estimated value of over ten thousand dollars, as plaintiff is likewise informed and believes to be true, besides other property to the plaintiff unknown."

No administration was had upon the estate of John A. Bell until June 3, 1885, when the plaintiff was appointed administrator. In the mean time, "and up to the third day of June, A. D. 1885, the said William M. Bell has continued and did continue individually in the possession of the whole of said real and personal property, and to manage and carry on said business, and dispose of said property, and to collect the debts and things in action, and to manage and control all the property in any wise belonging to said partnership, and during the time aforesaid used the said property in any manner he saw fit, and has sold and disposed of said property, and changed it into other property, and realized thereon large sums of money, the amount of which plaintiff does not know and cannot ascertain."

It is not alleged that the heirs of John A. Bell were ignorant of these proceedings on the part of William M. Bell, or that there were any impediments to the prosecution of their claims, or that they made any demand upon him, or in any way asserted their claims, during his lifetime. He died on June 3, 1885, and the defendants were appointed executors of his will. The complaint goes on to allege that "the said plaintiff has requested and demanded of the said defendants a statement and account of said copartnership transactions, which the said defendants have neglected and refused to give; and that he demanded of the said defendants that they deliver over all property due and owing, belonging or coming, to him as administrator of the estate of John A. Bell, deceased; and that they pay over to him as such administrator all sums of money as were due to the estate of John A. Bell, deceased, as his part of said partnership assets and property, which they have likewise failed to do." The prayer is for an accounting, and for general relief.

The court below sustained a demurrer to the complaint, and the plaintiff not amending, final judgment was entered in favor of the defendants. Two grounds are urged in support of the judgment. It is argued, in the first place, that the claim is barred by the statute of limitations; and in the second place, that the claim is so stale that a court of equity will refuse to enforce it.

1. In the view we take of the case, it is unnecessary to pass

upon the first question. Assuming in favor of the plaintiff what we are inclined to think is true,—viz., that the trust is not one of those implied trusts against which the statute runs, —we think that, so far as the claim for relief is founded upon the partnership transaction, it is stale, and that a court of equity will not aid its enforcement.

This is a defense peculiar to courts of equity, and applies, although no statute of limitations governs the case: *Harwood v. Railroad Co.*, 17 Wall. 81; *Sullivan v. Portland etc.*, 94 U. S. 811; *Godden v. Kimmell*, 99 Id. 201; *Sheldon v. Rockwell*, 9 Wis. 181; 76 Am. Dec. 265; *Harrison v. Gibson*, 23 Gratt. 212; *Stout v. Seabrook*, 30 N. J. Eq. 189, 190; *Matter of Neilley*, 95 N. Y. 390; *Groenendyke v. Coffeen*, 109 Ill. 329; 2 Story's Eq. Jur., sec. 1520. It is not the same thing as equitable estoppel, although it has been termed a *quasi* estoppel: 2 Pomeroy's Eq. Jur., secs. 816, 817; and hence the rules governing equitable estoppel (see *Boggs v. Merced Mining Co.*, 14 Cal. 279) do not apply. The ground of the doctrine was stated by Taney, C. J., delivering the opinion of the supreme court of the United States in *McKnight v. Taylor*, 1 How. 168, as follows: "We do not found our judgment upon the presumption of payment; for it is not merely on presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence to call into action the powers of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost."

The principal foundations of the doctrine are acquiescence and lapse of time. But other circumstances will be taken into consideration. Thus it is a material circumstance that the claim was not made until after the death of those who could have explained the transaction: See *Mooers v. White*, 6 Johns. Ch. 360; *Barnes v. Taylor*, 27 N. J. Eq. 259; *German-American Seminary v. Kiefer*, 43 Mich. 111; *Bolton v. Dickens*, 4 Lea, 577; *Hatcher v. Hall*, 77 Va. 578. So it has been held that a change in the value and character of the property may be material: *Bliss v. Prichard*, 67 Mo. 187; *Allen v. Allen*, 47 Mich. 79. But, as stated by Davis, J., in *McQuiddy v. Ware*, 20 Wall. 19, "there is no artificial rule on such a subject, but

each case as it arises must be determined by its own particular circumstances." In other words, the question is addressed to the sound discretion of the chancellor in each case: *Brown v. County of Buena Vista*, 95 U. S. 160; *Rayner v. Pearsall*, 8 Johns. Ch. *586; *Landrum v. Union Bank*, 63 Mo. 56.

The following decisions are instances of the application of the rule to facts similar to the facts of the case under consideration: In *Groenendyke v. Coffeen*, 109 Ill. 339, which was a suit by the heirs of the deceased partner for an accounting, it was held that a delay of sixteen years rendered the claim stale. In *Codman v. Rodgers*, 10 Pick. 119, which was a suit for an accounting brought by the representatives of the deceased partner against the representatives of the surviving partner, it was held that a delay of seventeen years rendered the claim stale. In *Harris v. Hillegas*, 66 Cal. 79, which was a similar case, it was held that a delay of somewhat over twenty years rendered the claim stale. And like decisions were made in *Ray v. Bogart*, 2 Johns. Cas. 432, and *Harlow v. Lake Superior Co.*, 41 Mich. 584. And in *McEwin v. Gillespie*, 3 Lea, 205, which was a similar case, it was held that a delay of twenty-one years rendered the claim stale.

Now, in the present case, the complaint does not allege that the heirs of John A. Bell had not knowledge of the proceedings of William M. Bell, or that there was any impediment to their action, and consequently it must be presumed that they had such knowledge, and that there were no such impediments: *Marsh v. Whitmore*, 21 Wall. 184, 185; *McQuiddy v. Ware*, 20 Id. 19; *Harwood v. Railroad Co.*, 17 Id. 81. Such being the case, we think that the fact that they delayed the assertion of their claim until the death of the surviving partner, a period of twenty-five years, is sufficient to make their claim stale.

It is contended, however, that this question cannot be raised on demurrer. But the preponderance of authority (and we think the better reason) is to the effect that it can: *Landedale v. Smith*, 106 U. S. 392; *Bliss v. Prichard*, 67 Mo. 189, 190; *Shorter v. Smith*, 56 Ala. 210. The defense is, in substance, that the bill does not show equity; or in the language of our statute, that the complaint does not state facts sufficient to constitute a cause of action. This is a ground of demurrer under our system.

We think, therefore, that so far as the claim for relief is founded on the partnership transactions, a court of equity will not enforce it.

2. But the complaint alleges that the real property "has at all times since the same was acquired, and still does stand in the names of said partners, John A. and William M. Bell." Does this, in connection with the other allegations, state a cause of action of any kind? We think not. The action cannot be considered as for partition between co-tenants because the administrator is not a co-tenant, and cannot bring such an action: Freeman on Cotenancy and Partition, sec. 454. It cannot be treated as an action of ejectment between co-tenants, because what is alleged does not amount to an averment of ouster: *Carpentier v. Webster*, 27 Cal. 561; *Carpentier v. Mendenhall*, 28 Id. 487; 87 Am. Dec. 135; and it cannot be treated as an action for mesne profits, because (if for no other reason) there is no averment that the use of the land was of any value.

We see no aspect in which the complaint states a cause of action; and we therefore advise that the judgment be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

STALE CLAIMS. — The general principles which govern courts of equity in permitting a defendant to avail himself of the laches of the plaintiff in prosecuting his claim are exhaustively considered in the note to *Smith v. Thompson*, 54 Am. Dec. 130, so that it becomes unnecessary to discuss here the right which courts of chancery have to act in cases where there has been gross laches or unreasonable delay: See also 1 Pomeroy's Eq. Jur., secs. 418, 419; *Stearns v. Page*, 7 How. 819, 829; *Wagner v. Baird*, 7 Id. 258; *Speidell v. Heinrici*, 15 Fed. Rep. 757. We would add here, however, that "what constitutes a stale equity is a vexed question hardly susceptible of an accurate definition. Length of time alone is not a test of staleness"; the question must be determined by the facts and circumstances of each case, and according to right and justice: *Paschall v. Hinderer*, 20 Ohio St. 568, 580; *Brown v. County of Buena Vista*, 95 U. S. 159; *Jeffery v. Fitch*, 46 Conn. 601, 605; 1 Sugden on Vendors, 8th Am. ed., Perkins's notes, 387, note p¹. The court is not confined to the statutory period of time in determining whether or not the demand is stale, but may refuse relief in cases where the delay is less or greater than that named in the statute: Wood on Limitations of Action, ed. 1883, sec. 60, p. 122; 1 Sugden on Vendors, 8th Am. ed., Perkins's notes, 387, note p¹; 1 Parry on Trusts, 3d ed., sec. 230.

LACHES AND ACQUIESCENCE DISTINGUISHED. — An important distinction is made by some of the authorities between lapse of time or laches and lying by or acquiescence: *Leads v. Amherst*, 2 Phill. C. C. 123; *Fisher v. Boody*, 1 Curt. 206, 219; *Archbold v. Scully*, 9 H. L. Cas. 383; *Clark v. Potter*, 32 Ohio St. 61. So it is said in Wood on Limitations of Actions, ed. 1883, sec. 62, p. 126, that "while the words 'laches' and 'acquiescence' are often used as similar in meaning, the distinction in their import is both great and important. Laches

imports a merely passive, while acquiescence implies active, assent; and while, where there is no statutory limitation applicable to the case, courts of equity would discourage laches and refuse relief after great and unexplained delay, yet where there is such a statutory limitation, they will not anticipate it as they may where acquiescence has existed." It was held, however, in *Life Ass'n of Scotland v. Siddal*, 3 De Gex, F. & J. 72, that the two propositions of a bar from length of time or laches and by acquiescence were not distinct, but constituted only one proposition.

Now, while lying by and acquiescence would in many cases by analogy to the doctrine of estoppel preclude a party from asserting claimed rights in equity to the detriment of others who had relied in good faith upon such acts, yet lying by and acquiescence are of necessity an important factor in determining whether there have been such laches as to constitute a bar to relief in equity. So it was declared by the court in *Life Ass'n of Scotland v. Siddal*, 3 De Gex, F. & J. 72, that length of time, where it does not operate as a statutory or positive bar, operates as evidence of assent or acquiescence, and to the same effect are the words of the court in *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, 239, where it is held that "the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief which otherwise would be just is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy."

DISTINCTION BETWEEN EXECUTORY AND EXECUTED INTERESTS. — A further distinction is also made by the courts between executory and executed interests in passing upon the question whether there have been laches or acquiescence, greater laches being required in the latter than in the former case, since in executed interests mere laches will not alone disentitle a party to relief; something more, such as waiver or abandonment, being required: *Clarke v. Hart*, 6 H. L. Cas. 632, 654.

SPECIFIC PERFORMANCE GENERALLY. — As to when specific performance is barred by staleness of the claim, see note to 54 Am. Dec. 132; Hilliard on Vendors, 2d ed., 181, and note.

In Cases of Partnership Agreements, delay or laches may furnish a ground for the court to refuse to decree specific performance of the contract, especially in cases of mining partnerships or others, which are speculative in their nature: *Bell v. Hudson*, 73 Cal. 285; *Harris v. Hillegan*, 54 Id. 463; *Clegg v. Edmonson*, 8 De Gex, M. & G. 787; *Walker v. Jeffreys*, 1 Hare, 341. There are exceptions, however, to this rule, where the courts have granted the relief sought, although the claim has become stale: *McGuire v. Ramsey*, 9 Ark. 518; *Coleman v. Marble*, 9 La. Ann. 476; *Leadlow v. Cooper*, 4 Ohio St. 1; *Ray v. Bogart*, 2 Johns. Cas. 432.

AGENTS. — In cases where an agent has sought to avail himself of an advantageous transaction by reason of his confidential relation as employee, and such transaction is endeavored to be set aside after a lapse of time, or the transaction has become a stale demand, the rule seems to be that it is very difficult for a confidential agent to set up as an available defense the laches of his employer, since it is his duty, so long as the relation continues, to guard against his employer's negligence in all his transactions, and more particularly those in which he, as agent, is concerned. "Length of time weighs less in this case than any other": Note 4 to *Crows v. Ballard*, 1 Ves. Jr., Sumner's ed., citing *Beaumont v. Boulbee*, 5 Ves. 492, 494; 7 Id. 609; *Hardwicke v. Vernon*, 14 Id. 511; see further, as to fiduciary and confidential relations, *McDonald v. McDonald*, 1 Bligh, 336; *Lewes v. Moryan*, 5 Price, 42; *Berkmeyer v. Kellerman*, 32 Ohio St. 257. But where an attorney sold his client's bonds at a public sale, and bought them himself, giving their full value at the time for them, it was held that it was too late for the client to obtain any relief in equity, he having acquiesced in the purchase for twelve years: *Marsh v. Whitmore*, 21 Wall. 173.

PARENT AND CHILD. — Where a child made a voluntary settlement upon his father while under his influence, but thereafter was emancipated from parental control, and for nine years was in a position to assert his rights, but neglected to do so during that time, and then filed a bill asking that the deed might be set aside, the relief asked was refused, and the court observed that "if it be shown that the influence is gone, the court expects steps to be taken especially in regard to these family matters, in order that persons may know what line of conduct they are to adopt where there is a transaction which may be subject to be impugned. . . . The court requires a person to be prompt in asserting his right in a case of this description, where the whole conduct and life of the father is framed upon the supposition that the property is in the state in which it is until it is disputed": *Turner v. Collins*, 20 Week. Rep. 306; 41 L. J. 553; L. R. 7 Ch. 329. In the following case, a daughter, for a nominal consideration, very soon after attaining her majority, gave to her father, who was also her guardian, a life interest in part of her real estate. Sixteen months thereafter she married, and seven years after the execution of the indenture she died. Three years after her decease, her husband, on whom her rights had devolved, brought a bill in equity, asking to have the father declared a trustee of the life estate, and an account of the rents and profits which accrued prior to the daughter's minority and afterwards. It was held, that if the bill had been filed shortly after the transaction, or even near the time of the marriage, it might have been set aside, since courts look with great jealousy upon all transactions of such a character between parent and child, but that a delay of ten years was such laches that the bill could not be sustained, and it was accordingly dismissed on that ground: *Wright v. Vonderplank*, 2 Kay & J. 1; 1 Perry on Trusts, 3d ed., sec. 201.

MEMBERS OF THE SAME FAMILY. — As a rule, the delay is not so prejudicial where all the parties are members of the same family as in case of strangers: *Paschall v. Hinderer*, 28 Ohio St. 563, 582, citing *Laver v. Fielder*, 9 Jur., N. S., 190.

GUARDIAN AND WARD. — A bill in equity for an accounting, and for setting aside a release given by the ward in ignorance of her rights, will lie against the guardian and against his sureties on his bond, who had notice of the fraudulent character of the release, although the action is brought within eight years after the ward arrives at majority, it appearing that she had no

knowledge of her rights until about a year before bringing suit: *Carter v. Tec.*, 120 Ill. 277.

JUDGMENTS. — A court of equity will open a judgment upon a petition brought within a reasonable time after the fact that such judgment exists comes to the party's knowledge, he having had no notice of the pendency of the suit, and it makes no difference that the time fixed by the statute of limitations has expired: *Jeffery v. Fuch*, 46 Conn. 601, 605. But relief will be refused where it is sought to set aside a judgment obtained by fraud, if it appears that the complainant has not exercised proper diligence, and that the petition was not brought until seven years after the judgment was obtained: *Brown v. County of Buena Vista*, 95 U. S. 167; and a party who seeks the aid of a court of equity for relief against a judgment, on account of a matter which would have been a good defense at law, must show that his failure to make his defense was not owing to his own neglect or want of diligence, since in no case will a court of equity relieve a person against the consequences of his own laches: *Drinkard v. Ingram*, 21 Tex. 650; 73 Am. Dec. 253. Although mere irregularities may be cured by lapse of time, yet such is not the case if the proceedings are void: *Shaefer v. Gates*, 2 B. Mon. 457; 38 Am. Dec. 164; and in favor of a judgment, it is held that facts which are indispensable to its validity may be presumed after a lapse of time, although they are not apparent on the record: *Id.* So in case of a delay of forty-three years everything is presumed in favor of a judicial act not shown to have been unauthorized: *Shackelford v. Miller*, 9 Dana, 278. In *Sullivan v. Andre*, 4 Hughes, 290, 6 Fed. Rep. 641, the facts were these: A bill was filed in 1879 to set aside a distribution of personal estate made in 1869, and it appeared that the complainants were aliens; that they first learned of the intestate's death in 1874, and had instituted a suit in 1876 to set aside the distribution, which suit they were obliged to discontinue; and that they had used every endeavor to ascertain the parties to whom the money had been distributed, and upon finding one of them, had brought this action. It was held, in view of the facts, that lapse of time was not a bar.

A Judicial Sale. — The court refused to set aside a judicial sale where there had been laches in delaying to bring a suit for five years: *Harwood v. Railroad Co.*, 17 Wall. 78.

Execution Sale. — Equity will not interfere to set aside a sale of real estate made under an execution, where the party seeking relief has, without excuse, failed to avail himself of his rights at the proper time, since justice requires that one must suffer for his own laches in such a case, although a large estate be sacrificed for a small sum of money: *Stone v. Gardner*, 20 Ill. 304; 71 Am. Dec. 268.

THAT DEMAND IS STALE CANNOT BE AVAILED OF AGAINST THE GOVERNMENT, nor is laches imputable to it on account of negligence of its public officers or its agents. This doctrine is well settled: *United States v. City of Alexandria*, 4 Hughes, 545; 22 Myer's Fed. Dec., sec. 327. The court said in this case that "the general principle is, that laches are not imputable to the government; the utmost vigilance would not save the public from the most serious losses if the doctrine of laches could be applied to its transactions"; but the exception is made as to third parties, who are strangers to transactions as to which the negligence may occur: *Haskins v. Commonwealth*, 13 Pa. St. 617; 53 Am. Dec. 502, and note 503; *United States v. Williams*, 4 McLean, 567; Sedgwick and Wait's Trial of Title to Land, 2d ed., sec. 753 a; *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Little Miami etc. R. C.*, 1 Fed. Rep. 701; *United States v. Van Zandt*, 11 Wheat. 184; *United*

States v. Barrowcliff, 3 Ben. 519; *McIntyre v. Thompson*, 4 Hughes, 562. But see 7 Opin. Att'y-Gen. 614, where it is said that rights of action in favor of the United States are not barred in the absence of a special provision by act of Congress, and citing *United States v. Knight*, 14 Pet. 311, 315; *United States v. Hoar*, 2 Mason, 311; though laches may be availed of by the government as against the claimant of a grant: *United States v. Moore*, 12 How. 223. As to claims, however, which are presented against the United States, it is said that "the presumption and inference" arising from staleness of a demand "may be rebutted by other evidence accounting for the delay, and explaining that it arose from other causes": 2 Opin. Att'y-Gen. 464.

THE RULE GOVERNING TRUSTS. — Laches does not operate as a bar to purely equitable trusts which are direct, continuing, or express: *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; and see notes 24 Id. 569; 12 Id. 372. Although "time does not bar a direct trust where the relation of trustee and *cestui que trust* is admitted to exist, yet diligence must be used to establish a constructive trust on the ground of fraud. . . . A constructive trust will be barred by long acquiescence, although the fraud was evident, and the relief was originally clear": 1 Perry on Trusts, 3d ed., secs. 228 et seq.; see *Speidel v. Henrici*, 15 Fed. Rep. 753, and note 758; *Godden v. Kimmel*, 99 U. S. 201, 212; 22 Myer's Fed. Dec., sec. 315; *Etting v. Marx*, 4 Hughes, 312; 4 Fed. Rep. 673; 22 Myer's Fed. Dec., sec. 325. A very concise rule and clear statement of the law on this question, of what trusts are and what trusts are not barred, is given by Judge Story. He says: "It is often suggested that lapse of time constitutes no bar in cases of trust. But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and *cestui que trust* is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account, or other proper relief, for the *cestui que trust*. But where this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties, or other circumstances, give rise to presumptions unfavorable to its continuance, — in all such cases a court of equity will refuse relief upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust; and *a fortiori* it will apply with increased strength to cases of implied or constructive trusts": 2 Story's Eq. Jur., 13th ed., sec. 1520 a; Pomeroy's Eq. Jur., secs. 418, 419, 1080; Angell on Limitations, 6th ed., secs. 166–169, 171, 174–178, 468–472; *Prevost v. Gratz*, 6 Wheat. 497. In consideration of this question, the words of the court in *Michoud v. Girod*, 4 How. 503, 561, are important. It is said in that case that the time within which a constructive "trust will be barred must depend upon the circumstances of the case: *Boone v. Chilea*, 10 Pet. 177. There is no rule in equity which excludes the consideration of circumstances; and in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or become known to the party whose rights are affected by it": See also Tiffany and Bullard's Law of Trusts and Trustees, ed. 1862, 718, 719; 1 Perry on Trusts, 3d ed., sec. 229.

Instances of Trusts Barred and not Barred. — A *cestui que trust* cannot be bound by acquiescence, except when he has been fully informed of his rights and all the material facts and circumstances of the case: *Life Ass'n of Scotland v. Siddal*, 3 De Gex, F. & J. 74. A delay of twelve years after the expiration of a trust, or ten years after the death of the trustee, does not

constitute such laches as to bar the representatives of a *cestui que trust* from the right to a trust account: *Dickenson v. Holland*, 2 Beav. 310. Although in regard to express trusts, lapse of time is not as a rule considered, yet where the *cestui que trust* was guilty of gross laches, it was held that the rule did not apply: *De Busche v. Ak*, L. R. 8 Ch. D. 286. But equity will not enforce a trust in behalf of creditors who have slept on their rights for twenty years, such delay being unreasonable: *McKnight v. Taylor*, 1 How. 161. Where there has been a great lapse of time or laches on the part of the *cestui que trust*, a resulting trust will not be enforced, especially not against occupation under a deed or against an adverse holding: 1 Perry on Trusts, 3d ed., sec. 141. In a recent case in Massachusetts the following facts appeared: The plaintiff's testator became a surety on the probate bond of a trustee in 1855. An account was rendered by the trustee in 1856, but no other was rendered, except one occasionally to the *cestuis que trust*. The trustee in 1864 pledged certain stock of the trust estate to a bank as security for indebtedness to it from his firm. The bank had notice that the stock belonged to the trust estate, but thereafter, in 1867, sold the same at the trustee's request, and the amount realized therefrom was applied on the debt. No benefit was received by the trust estate from such disposal of the stock. The surety was secured by the trustee in 1858, but in 1863, upon being released by the court from the bond, gave up his security. The *cestuis que trust* first learned of the breach of trust in August, 1877. A suit was commenced upon the bond in November, 1877. Thereafter, in 1878, the original trustee was removed, and another trustee appointed. A judgment for the penal sum of the bond was rendered, although the full amount due on the execution was not at that time determined. Before filing their bill in equity, the plaintiffs paid the amount due, so far as ascertainable, and subsequently thereto they paid the balance in full on the execution. In 1884 they brought this petition against the bank to recover the sum paid on the judgment and execution. It was held that there was no such laches on the part of the *cestuis que trust* in failing to call for an account as would prevent them from following the funds into the bank, since they had no knowledge of the breach of trust until 1877, and that the pendency of the suit on the bond justified the delay necessary to defend it, that the delay was not unreasonable, and was, therefore, no sufficient ground of defense, and that it would be inequitable to deprive the plaintiffs of their remedy on account of it: *Blake v. Traders National Bank*, 145 Mass. 13.

But a direct trust not cognizable at law, though falling exclusively within the jurisdiction of courts of equity, is not subject to the doctrine of stale demand as a defense, where the bill seeking relief is filed in five years after the liability accrues: *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412. In the last case the remedy was sought against the stockholders of a banking corporation, the legal assets of which were exhausted. So lapse of time is no bar to relief for the enforcement of a resulting trust, when it appears that the trust has been acknowledged, and there have been no laches or adverse possession: *Dow v. Jewell*, 18 N. H. 341, 357; 45 Am. Dec. 371. In *Barrell v. Barrell*, 34 Beav. 371, a trustee bought up a charge on the share of one of the *cestuis que trust* to certain trust property for the benefit of his representatives; they were unable to purchase it at the price paid, and he subsequently sold it to others of the *cestuis que trust*, all the transactions were openly entered into, and there was no concealment of the facts. It was held that such purchase would not be set aside after the lapse of twenty years, although the property had very greatly enhanced in value. Again: the plaintiff's ancestor

conveyed real and personal estate to trustees for the purpose of paying certain debts, and to hold the balance in trust for himself; twenty-two years thereafter he died, and two years after his decease a bill was filed for discovery and account against the survivors of the trustees. At no time during his life had the grantor made any attempt to annul the transaction or obtain a settlement. It was held that the long delay and acquiescence was a proper objection to the bill: *West v. Randall*, 2 Mason, 181. So a presumption that a trust has been satisfied or extinguished may arise after a lapse of forty years: *Prevost v. Gratz*, 6 Wheat. 481. And where there has been a possession under absolute deeds for a long time without question, and evidence relied on to establish a resulting trust, such evidence must be clear and explicit, so as to leave no doubt as to the character of the transaction: *Miller v. Bloce*, 30 Gratt. 744, 751. Although purely equitable trusts which are direct, express, and subsisting are not barred by lapse of time, yet where the suit is brought for redress for an injury caused by a violation of the trust, a different rule prevails, and the suit is barred: *Wickliffe v. City of Lexington*, 11 B. Mon. 161.

FRAUD. — In cases where it is sought to impeach a transaction on the ground of fraud, lapse of time is a question of much importance, owing to the fact that much evidence originally available and necessary to a full knowledge of the equities of the transaction may be lost: *Prevost v. Gratz*, 6 Wheat. 481, 498. And the plaintiff in equitable proceedings in cases of asserted fraud can have no relief if he has been guilty of gross laches: *Gould v. Gould*, 3 Story, 516; *Charter v. Trevelyan*, 11 Clark & F. 714.

In an action on a note based upon the conveyance of certain land as a consideration, the defense of fraud in making the conveyance was set up, and an offer was made to reconvey. The fraud was discovered in 1877; the deed was given in 1873; the action was commenced in 1877; and in 1879 the answer averring fraud was filed. It also appeared that "the delay of the defendant in electing to rescind, after he suspected the fraud, was the natural consequence of, or at least might have been caused by, the acts of the plaintiff"; and it was held, therefore, that he had not, under the peculiar circumstances of the case, "lost his right to rescind by his delay to elect so to do beyond a reasonable time after he had full knowledge of the fraud": *Nealon v. Henry*, 131 Mass. 153. It is said, however, in *James v. Atlantic Delaine Co.*, 3 Cliff. 614, 620, that the rule that staleness of a claim is a good defense "should seldom or never be applied in cases of trust where the means of knowledge are wholly or even chiefly on one side. When the fraud charged and proved consists of misrepresentations and concealments, courts of equity are reluctant to apply the rule at all, unless it appear that the rights of innocent third parties will be injuriously affected if that defense be overruled." But in cases of fraud, the time when the fraud was discovered, or when by the exercise of reasonable diligence it might or ought to have been discovered, is material: 1 Sugden on Vendors, 8th Am. ed., Perkins's notes, 389; and the remedy is not barred by lapse of time, where the party has never with a knowledge of the facts done anything which amounts to acquiescence: *Charter v. Trevelyan*, 11 Clark & F. 714, 740. Relief was granted in the last case, where the fraud was first discovered after a lapse of thirty-seven years: *Id.* So laches will not avail as a defense in cases of secret fraud, if the action is brought within a reasonable time after its discovery: *Meador v. Norton*, 11 Wall. 442; and a suit brought in one year after the discovery of the fraud, the action being to rescind a sale of land, is instituted within a reasonable time: *Smith v. Babcock*, 2 Wood. & M. 246.

KNOWLEDGE IS MATERIAL. — Acquiescence imports full knowledge: *Life Ass'n of Scotland v. Siddal*, 4 De Gex, F. & J. 74. Therefore a party will not be held to acquiesce in acts which he did not know he had any right to dispute: *Cholmondeley v. Clinton*, 2 Mer. 171, 362. Nor is the rule confined to cases of acquiescence merely; for it is said that where one is ignorant of the facts, there can be neither laches nor acquiescence: *Charter v. Travelyan*, 11 Clark & F. 714, 740; *Bennet v. Colley*, 1 Mylne & K. 225, 232; Wood on Limitations of Actions, ed. 1883, sec. 61, p. 125; and where fraud is relied on in cases of trust, there can be no laches by reason of anything done or neglected, where the party seeking relief has, without any fault of his own, remained in ignorance of his rights: *Rosse v. Gregory*, 13 Week. Rep. 355; *Savery v. King*, 5 H. L. Cas. 626, 665. In brief, time does not commence to run, except there is full information and knowledge by a party of his rights and the injury done, and he has such notice thereof as that he ought to have made inquiry, or where there is undue influence, and the disability is removed, or where he himself possesses the means of knowledge: 1 Sugden on Vendors, 8th Am. ed., Perkins's notes, 387, note p¹. So the time when a party first seeks to impeach an agreement which he had hitherto treated as fair is material in determining the question of laches: *Morony v. O'Dea*, 1 Ball & B. 118; and see cases under title "Fraud," *supra*; 2 Pomeroy's Eq. Jur., sec. 917.

Where a party with knowledge of the facts neglects for nineteen years to assert his claim, with no sufficient excuse for delay, his laches will bar relief in equity: *Casner v. Walrod*, 25 Am. Rep. 369; see also *Smith v. Thompson*, 54 Am. Dec. 126, note 130-134; *De Cardova v. Smith*, 58 Id. 136; *Strimpfler v. Roberts*, 57 Id. 606, and notes to these cases.

ACCOUNTS. — Long acquiescence in an account makes it a settled one: *Baker v. Biddle*, 1 Bald. 394, 418; for this reason the court will refuse to order an accounting where several years have elapsed since the transactions in question were had, although the statute of limitations does not apply: *Sherman v. Sherman*, 2 Vern. 276. So where a bill was filed against a son to account to his father's estate for money given him by his father twenty years before, upon the ground that the sum was a debt due the estate, it not being claimed as an advancement. It was held that the equities after such a lapse of time raised the presumption of payment when the same was averred in the answer: *Blackerby v. Holton*, 5 Dana, 525; and where a tenant for life in remainder brought a bill against the representatives of a prior tenant for life twenty years after his death for an account of timber improperly cut, the bill was dismissed: *Harcourt v. White*, 28 Beav. 303.

INJUNCTIONS. — Delay, laches, or acquiescence may prevent a party from obtaining relief where an injunction is sought. So held where it was sought to enjoin making an award: *Dulin v. Caldwell & Co.*, 28 Ga. 117; and laches may be a defense to an application for an injunction, by way of information, equally with that of proceeding by a bill: *Attorney-General v. Sheffield etc. Co.*, 3 De Gex, M. & G. 304. So laches may be set up in defense to a motion for an interlocutory injunction in cases of patents: *Hockholer v. Eager*, 2 Saw. 361; and see *Walker on Patents*, 2d ed., sec. 684; and where one has been guilty of unreasonable delay and laches in prosecuting his rights, equity will not aid such a person by injunction in the collection of purchase-money from a vendor: 1 High on Injunctions, 2d ed., sec. 383. So a delay of three and a half years was held to be sufficient laches to warrant the refusal of an injunction against a claimed nuisance: *Tichenor v. Wilson*, 8 N. J. Eq. 197; and where the plaintiff, after a delay of nineteen years, sought for an injunction to prohibit an injury arising from the setting back of water by reason of a mill-

dam, it was held, in the absence of fraud, misrepresentation, unfair dealing, or mistake, excusing his delay, that it was such laches as not to entitle him to relief: *Sheldon v. Rockwell*, 9 Wis. 167; 76 Am. Dec. 265. Nor need the delay amount to proof of acquiescence in the wrong sought to be remedied: *High on Injunctions*, 2d ed., sec. 7. As to delay and acquiescence affecting the granting of injunctions, see also *Kerr on Injunctions*, ed. 1871, pp. 205, 206, 228, 238, 349, 406, 551.

PATENTS. — In cases of patent rights, it is said that "delay to sue is not always laches, because it may have resulted from the fact that the complainant did not know of the infringement till long after it began, or from the fact that he was litigating a test case under his patent against another infringer during the time of the delay. . . . Where neither of these excuses can be invoked by a complainant, he may perhaps avail himself of some excuse arising out of grievous poverty or protracted sickness": *Walker on Patents*, ed. 1883, sec. 596. As to when laches is fatal to any claim of continuity between withdrawn and rejected applications for the same patent, or as to when it constitutes proof of an abandonment of both application and invention, see *Walker on Patents*, 2d ed., secs. 91, 145. That reasonable diligence is necessary in prosecuting rights under patent claims, see *Goodyear v. Honsinger*, 2 Biss. 1; *Sawyer v. Massey*, 25 Fed. Rep. 144; *Magie Ruffle Co. v. Elm City Co.*, 14 Blatchf. 109; *McLean v. Fleming*, 96 U. S. 245.

STALE DEMANDS IN REGARD TO LAND. — "Long acquiescence and laches by a party out of possession [of land], productive of much hardship and injustice to others, cannot be excused except by showing some actual impediment or hindrance caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor": *Johnson v. Toulmin*, 18 Ala. 50; 52 Am. Dec. 212, 220, citing from *Wagner v. Baird*, 7 How. 234. Nor can the party guilty of such laches "screen his title from the just imputation of staleness merely by the allegation of an imaginary impediment or technical disability": *Wagner v. Baird*, 7 Id. 258. So adverse possession of land, continued for thirty years, is an equitable bar, in the absence of any excusable or explanatory circumstances: *Piatt v. Vattier*, 9 Pet. 405; *Scott v. Evans*, 1 McLean, 486. And if parties setting up a claim of title to land have slept upon their rights for forty-nine years, such fact constitutes a good defense: *Copen v. Fleisher*, 1 Bond, 440. So the court will refuse to enforce a bond for the conveyance of an interest in lands dependent upon certain payments, when twenty years have elapsed since the obligation became due: *Wright v. Fullerton*, 2 Biss. 336. In *Wagner v. Baird*, 7 How. 234, a petition was brought to obtain the possession of certain land. It appeared that the defendants or their immediate grantors had paid a valuable consideration for the land, and had entered upon and occupied it for twenty-seven years, and had, by their industry, and by a large expenditure of money thereon, greatly enhanced its value, and that no bad faith, concealment, or fraud could be imputed to them. It also appeared that the complainants had taken no measures during such occupancy by the defendants, or those under whom they claimed, to secure or protect their rights. The court decided that these facts brought the case within the rule that lapse of time and staleness of a claim were a good defense in equity, and ordered the bill dismissed. But where a charge is created upon land by will, and there is a delay of three years in bringing a suit to enforce such charge, this is not such laches as to constitute a sufficient reason for rejecting the bill, especially where it appears that no change had been made by the defendant in his position by reason of such acquiescence of the plaintiffs, or if it had, that it was not attributable to that

cause: *Mudd v. Powers*, 136 Mass. 273. And lapse of time is no bar to relief in equity against one who holds the legal title to land as trustee under a decree which has been reversed: *Talbot's Ex'rs v. Bell's Heirs*, 5 B. Mon. 320; 43 Am. Dec. 126. In this connection, it may be well to note the proposition that inasmuch as the various improvement statutes are in effect a punishment against the real owner of land for his laches in remaining quiet and failing to assert his title against the adverse possessor, they are for this reason founded upon equitable principles, and are therefore constitutional: *Sedgwick and Wait's Trial of Title to Land*, 2d ed., sec. 712.

DEEDS AND AGREEMENTS. — The court will refuse to rescind a deed or conveyance, when the delay and acquiescence of the plaintiff are such that the parties cannot be restored to their original position: *Fisher v. Boody*, 1 Curt. 200. So thirty years' delay after the execution of a deed, which acknowledges the receipt of the purchase-money, is a bar, if unaccounted for: *Smith v. Kincaid*, 4 J. J. Marsh. 240; and acquiescence for twenty-three years under an agreement will preclude the parties from impeaching it on the ground of claimed illegality: *Westby v. Westby*, 1 Con. & L. 537. So stale and antiquated demands in respect to the purchase of lands are discouraged by courts of equity: *Johnson v. Toulmin*, 18 Ala. 50; 52 Am. Dec. 212, 220; and where there was an unexplained delay of fifteen months in conveying a patent right under a contract of sale providing for a conveyance "as soon as practicable," it was held that the vendor had lost the right to enforce the contract: *Bellas v. Hays*, 5 Serg. & R. 427; 9 Am. Dec. 385.

MISCELLANEOUS CASES. — Where the bonds of a railroad corporation were appropriated by its officers for an illegal and void purpose, and it was not attempted to enforce the payment of such bonds, it was held that the stockholders might interpose by a suit, after a delay of eleven and a half years, to cancel the bonds and the deed of trust given as security for their payment, and that such delay did not constitute such laches or acquiescence as to bar maintenance of the bill: *City of Chicago v. Cameron*, 120 Ill. 447, 462. But a suit for a legacy charged upon land is barred by the lapse of thirty years without any demand for its payment, either by the legatee or her husband: *Perkins v. Cartmell*, 4 Harr. (Del.) 270; 42 Am. Dec. 753; and it was held in *Hunt v. Hamilton*, 9 Dana, 91, that a will could not be established after thirty years' time unaccounted for. So where a mortgagee or his alienee were in possession under a mortgage, and the mortgagor died insolvent before the debt became due, and his alienee also became insolvent and left the state, it was held that no presumption of payment of the mortgage could arise under the circumstances from lapse of time: *Brobot v. Brock*, 10 Wall. 519, 535; and if mistake is relied on as a ground of relief, there must be due and reasonable diligence after the discovery of the mistake, since delay will be fatal: *Sugden on Vendors*, 8th Am. ed., Perkins's notes, 171.

ADMIRALTY. — Stale claims will not be entertained in a court of admiralty any more than in a court of equity; "and to determine what is stale, resort is sometimes had to the limitation in common-law actions established by statute, but the statutes themselves are not binding. The court is emphatically a commercial court, and requires reasonable promptness on the part of its suitors": *Ocean Ins. Co. v. Sun Mutual Ins. Co.*, 15 Blatchf. 249. But where it was sought, three years and a half subsequent to the time when the cause of action accrued, to have a lien enforced against a vessel by reason of its alleged failure to fulfill a contract of affreightment, and in the mean time the ownership of the vessel had changed hands, it was held that the lien was

not barred by laches. The court said in this case: "1. That while courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense; 2. That no arbitrary or fixed period of time has been or will be established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case; 3. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter time and a more rigid scrutiny of the circumstances of the delay than when the claimant is the owner at the time the lien accrued": *The Key City*, 14 Wall. 653, 660. Though a lien not sought to be enforced by a material-man within three years, when a third person had in the mean while become the owner of the vessel, is barred by reason of laches: *The Buckeye State*, 1 Newb. Adm. 111; and a suit brought for wages three years after the right thereto had accrued, and in the mean time the ownership of the vessel had changed and one of the owners had become insolvent, was declared to be such a delay as to bar any relief: *The Louisa*, 2 Wood. & M. 48; see also *Willard v. Dorr*, 3 Mason, 161; *Pitman v. Hooper*, 3 Sum. 286; *Joy v. Allen*, 2 Wood. & M. 304. In *Smith v. Sturgis*, 3 Ben. 330, a suit was brought for damages arising from a collision between a steam-tug and another vessel, and it appeared that the owners of the vessel against whom the libel was filed had been in the district for a period of six years after the collision, and up to the time of bringing the suit, and that the vessel itself had been kept there for over a year subsequent to the collision. It was held that a delay from December, 1859, to March, 1866, before bringing suit was, without any reasonable excuse for delay, such laches that the action was barred.

Excuses. — It is a rule founded in justice and reason that equity will not refuse relief where there has been a reasonable excuse for the delay: Wood on Limitations of Actions, ed. 1883, sec. 60, p. 124. But if no active steps are taken to enforce one's rights, it will not avail such party that he constantly asserted them, or made a continual claim thereto: *Clegg v. Clegg*, 3 Jur., N. S., 299. The court said in this case: "I cannot agree to a doctrine so dangerous as that the mere assertion of a claim, unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded": *Id.* 303; see also *Lehmann v. McArthur*, L. R. 3 Ch. 496. So laches or lapse of time may be excused where the plaintiff was unable, from the obscurity of the transaction, to obtain full information in regard to his rights: *Murray v. Palmer*, 2 Schoales & L. 474, 486.

Circumstances of Embarrassment or Continuing Influence are material as an excuse. So where a person in distressed circumstances, by reason of undue influence brought to bear upon him, executes a conveyance, or enters into a contract, acquiescence will not be imputed so long as the same conditions continue to exist; it is only when the distressed party is relieved from the oppression which controlled in the first instance that he can be expected to act: Note 4 to *Crosse v. Ballard*, 1 Ves. Jr., Sumner's ed., 221, citing *Purcell v. Macnamara*, 14 Ves. 106, 121; *Gowland v. De Faria*, 17 Id. 25; *Aylward v. Kearney*, 2 Ball & B. 477; *Wood v. Downes*, 18 Ves. 128. It was held in *Roberts v. Tunstall*, 4 Hare, 257, that the poverty of the *cestui que trust* was not sufficient to excuse delay in prosecuting his claim to relief. The case was one where it was sought, after a period of nearly eighteen years, to set aside a sale and purchase by a trustee claimed to have been made at an undervalue; the trustee was also a tenant for life, and died two and a half years after the execution

of the deed. It was also decided that the time which might elapse during such tenancy would not alone be considered as amounting to laches. Inasmuch as this case is frequently cited as an authority upon the main question as to poverty not being an excuse, we cite from the opinion of the court as showing that no general rule to such effect was intended to be laid down. The court declares that "where a transaction of this kind has been brought about by misrepresentation, concealment, or undue influence, or where the vendor is dependent on the bounty of the purchaser, the court considers that the right of the vendor to rescind the sale exists, without the importation of laches, until such time as it was shown that he was released from the position in which he was placed by these circumstances. The poverty of the vendor, added to the other circumstances, is also a material ingredient in such a case. But where none of the special grounds of complaint exist,—where there is no misrepresentation, concealment, or undue influence, and no dependency of the seller on the purchaser, where the right to rescind the transaction is an equity arising out of the transaction itself, as in the case of a sale of the reversionary interest, is it to be said that waiver will not apply, or that no time will be a bar merely because the seller was poor? . . . In *Roche v. O'Brien*, 1 Ball & B. 330, a fraud was committed upon a distressed man in the situation of an expectant heir, by the purchase from him of his expected reversion by the defendant, an experienced attorney; and that fraud was continued in a second transaction, intended to confirm the first, and entered into some years afterwards while the distress of the vendor continued. Upon a bill filed to set aside the transaction twenty-seven years after it took place, Lord Mannors did not say that mere pecuniary distress would excuse the delay; on the contrary, his language was against such a conclusion." But the court (after saying that it found nothing in the authorities to the effect that poverty was an excuse in the absence of the existence of the special grounds of complaint above stated, and that it thought that the reasoning was the other way) added: "I do not mean to lay down any general rule; but in the circumstances of this case, . . . my opinion is, that the consequences of unexplained delay must prevail. It is contrary to all experience to suppose that because a party is poor he is therefore unable to obtain professional advice": See 1 Perry on Trusts, 3d ed., sec. 230, cases in note 4; and the case of *Hovenden v. Annesley*, 2 Schoales & L. 639, decides that the fact that the complainants were embarrassed and reduced by the fraud of others is no excuse for laches. But it is said in note 4 to *Crowe v. Ballard*, 1 Ves. Jr., Sumner's ed., 221, that "a mere general embarrassment, having no reference to any fraud with respect to the particular contract complained of, is not a circumstance upon which the court will act to set aside, after a long lapse of time, conveyances deliberately executed. If this were the practice, there would be an end of all limitations of suits in the cases of distressed persons, and all property would be thrown into confusion": See also *Gregory v. Gregory*, Coop. 205; and that poverty may be a defense, see *Mason v. Crosby*, Dav. 303; and see title "Patents," ante.

Infancy and Coverture constitute, with few exceptions, a valid excuse for laches: *Whaley v. Elliott's Heirs*, 1 A. K. Marsh. 345; *Steele v. McKnight*, 1 Bay, 65; *Blandford v. Marlborough*, 2 Atk. 545; *Bennett v. Colley*, 1 Mylne & K. 225, 233; *Copen v. Fletcher*, 1 Bond, 440; *Chew v. Hyman*, 7 Fed. Rep. 7. See, however, *Havens v. Patterson*, 43 N. Y. 218; *Kemp v. Cook*, 18 Md. 130; and on the point of coverture, see *Beddian v. Seaton*, 3 Wall. Jr. 279, 287; *Elling v. Marx*, 4 Hughes, 312; 4 Fed. Rep. 673; 22 Myer's Fed. Dec., sec. 326; *Harrison v. Gibson*, 23 Gratt. 212. In the case of minors, this rule was

held especially applicable, where the minors had no knowledge of their rights, and their residence was in a different state: *Heirs of Ware v. Brush*, 1 McLean, 533. But voluntary disabilities, such as absence from the state, are no defense against the charge of staleness: *Bedilian v. Seaton*, 3 Wall. Jr. 279, 287. And that the defendant is an infant is no excuse for laches on the part of the plaintiff: *Jones v. Turberville*, 2 Ves. Jr. 11.

Pendency of Suit. — As a rule, a party's right is not prejudiced by lapse of time while a suit is pending: *Darby and Bosanquet on Limitations*, ed. 1867, 199; nor is a party prejudiced by lapse of time when a court of equity has prevented him from pursuing his remedy: *Id.* But the pendency of an action was held no excuse, where it appeared upon a bill brought against several parties for an account of profits for infringement of a patent right that the plaintiffs had, prior thereto, instituted a suit against only one party for violating the patent, but had not notified the others of the claimed infringement, nor taken any steps against them until after that suit was determined. The patent expired in 1849, and the test suit was brought in 1852, and decided in 1853: *Smith v. London etc. R. R. Co.*, 1 Kay, 408. But see title "Patents" herein, *ante*. And the fact that a party has been compelled to bring a bill of discovery against persons who have in their possession the papers necessary to enable him to obtain his rights, is an excuse for what might otherwise be delay sufficient to constitute laches: *Bond v. Hopkins*, 1 Schoales & L. 413.

Creditors. — Equity will not aid a creditor who waits forty-six years to collect a claim, although he believed that his debtor was insolvent during all that time, where it appears that he might, by the exercise of reasonable diligence, have recovered his money by a suit at law: *Maxwell v. Kennedy*, 8 How. 181. Nor does laches apply to a large body of creditors: *Whicote v. Lawrence*, 3 Ves. Jr. 740.

PLEADING. — The complainant "should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill": *Marsh v. Whitmore*, 21 Wall. 178, 181, citing from *Badger v. Badger*, 2 Id. 95. So the time and means of the discovery of a secret fraud must be particularly alleged: *Badger v. Badger*, 2 Cliff. 137. "And especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, and what the discovery is; so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made; for if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity on account of the laches": *Stearns v. Page*, 1 Story, 204, 215. So in cases where it is sought to open an account on the ground of fraud, mistake, etc., the exercise of ordinary diligence in making the discovery of the same is an important factor; and for this reason, the time when the discovery was made, as well as what the discovery is, must be distinctly averred: *Stearns v. Page*, 7 How. 819, 829.

Demurrer. — The objection to a stale demand, lapse of time, or laches, may be taken by demurrer when apparent on the face of the pleadings: *Maxwell v. Kennedy*, 8 How. 210; *Sullivan v. Railroad Co.*, 94 U. S. 811; *Copen v. Fleisher*, 1 Bond, 440. Courts of equity as a rule, however, are very reluctant to sustain a demurrer to a bill on the ground of staleness alone, unless it is such that the delay would bar a suit at law on the same claim, or unless there is a clear and strong analogy between the case in chancery and

a case at law on which a statute of limitation would operate: The court in *Putnam v. New Albany*, 4 Biss. 365, 372. But it is not necessary, in order to avail himself of the defense of staleness of the demand, that a party should rely upon a plea, answer, or demurrer; since such defense may be suggested at the hearing: *Baker v. Biddle*, 1 Bald. 394, 418; *Fisher v. Boody*, 1 Curt. 206, 218; *Sullivan v. Railroad Co.*, *supra*.

THE DEFENSE OF THE STATUTE OF LIMITATIONS may be raised by demurrer: *Smith v. Fly*, 76 Am. Dec. 109, and note 114.

EVIDENCE. — If laches are set up as a defense by a party against whom fraud is established, the burden is upon him to prove the time when knowledge of such fraud was obtained by the other party, and that he was guilty of laches in prosecuting his rights thereafter: *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221. So the burden of proving laches or acquiescence is on the party setting it up: *Wall v. Cockrell*, 1 H. L. Cas. 229, 243; and every presumption that can fairly be made against a stale demand may be made: *Pickering v. Stamford*, 2 Ves. Jr. 581.

LAPSE OF TIME WHEN A BAR in matters of summary jurisdiction over attorneys, see note to *Burns v. Allen*, *post*, p. 860, subtitle "Lapse of Time a Bar."

CROSS v. EUREKA LAKE AND YUBA CANAL CO.

[78 CALIFORNIA, 302.]

PLEDGER OF CORPORATE STOCK has right to retain it until the debt for which it was pledged is fully satisfied, but during such time he cannot assert that he holds it adversely, and thereby acquire title under the statute of limitations.

As BETWEEN PLEDGER AND PLEDGOR of corporate stock, the general property remains in the latter, and when the debt to secure which the pledge was given is paid, the lien is extinguished.

WHEREIN SUIT BY PLEDGER OF CORPORATE STOCK to recover dividends against the corporation the latter deposits the money in court, and has the pledgor and his assignee made defendants, and it appears that the debt for which the stock was pledged is liquidated, whereupon judgment is rendered by consent of the pledgor for the assignee for the entire amount sued for, as the pledgee has no interest in the money he cannot complain of the judgment awarding the assignee the dividends accruing prior to its rendition.

Freeman, Bates, and Rankin, and H. V. Reardan, for the appellant.

R. H. Taylor, E. H. Gaylord, T. M. Osment, and Taylor and Craig, for the respondents.

By Court, BELCHER, C. C. The plaintiff, as administrator of the estate of T. W. Sigourney, deceased, brought this action against the Eureka Lake and Yuba Canal Company, a corporation, to recover the sum of fifteen thousand dollars for dividends alleged to have been declared by the company after

December 1, 1878, upon 750 shares of its capital stock, owned by the estate of Sigourney.

The complaint was filed on the 14th of June, 1884, and thereafter, under the provisions of section 386 of the Code of Civil Procedure, the company paid the money into court, and James Reid and M. Zellerbach were substituted as defendants. Reid and Zellerbach filed an answer to the complaint, in which they denied that on the first day of January, 1867, or at any other time, Sigourney was, or until his death continued to be, the owner of the stock; and they averred that in pursuance of a certain written agreement made by and between Sigourney and Zellerbach, on the twenty-third day of August, 1865, the stock was deposited in the hands of John Parrott, who delivered it to Sigourney, and that Zellerbach became entitled to receive back the stock before Sigourney's death, and was thereafter entitled to receive the same from his estate, and from the plaintiff as the administrator of the estate; that subsequently, on or about the seventh day of January, 1881, Zellerbach sold, assigned, and transferred all his interest in the stock, and the proceeds thereof, and all dividends accrued or to accrue thereon, to Reid, and that Reid then became and ever since has been the owner of the stock, and entitled to receive all dividends declared thereon. The plaintiff filed an answer to "that part and those allegations of the pleading filed herein by the said Reid and Zellerbach, the interpleaders, upon which they base their claim to affirmative relief, and to the funds and moneys sought to be recovered by plaintiff in this action," in which he denied each and all of the facts set up by the interpleaders.

The case was afterwards tried by the court without a jury, and findings of fact were filed as follows:—

"3. In 1866 Zellerbach deposited with one John Parrott 1,250 shares of the stock of said corporation, as security for the payment of two promissory notes made by him, Zellerbach, to said T. W. Sigourney, one note for \$40,000, and one for \$10,000. Afterwards Zellerbach deposited with said Parrott the 750 shares above mentioned, as additional security for said notes.

"4. During the time said 1,250 shares and 750 shares were in the hands of Parrott, said Zellerbach voted them at the meetings of the corporation, and received to his own use all the dividends thereon.

"5. On the twentieth day of April, A. D. 1881, plaintiff,

as administrator of the estate of T. W. Sigourney, deceased, filed a supplemental complaint in the superior court of Nevada County, in the action commenced by said Sigourney, July 1, 1864, in the district court for said county. In said supplemental complaint the said forty-thousand-dollar and ten-thousand-dollar notes were sued on. In said action a judgment and decree was rendered, under which the 1,250 shares were sold, and realized a sum sufficient to satisfy said notes, together with all interest thereon, and all costs of the action, and costs and expenses of sale, leaving the said 750 shares the property of Zellerbach, free and clear of any charge or encumbrance. The said Reid was not a party to said action. Zellerbach continued to be the owner of the stock until January 7, 1881.

"6. On the seventh day of January, A. D. 1881, said Zellerbach assigned to said Reid the said 750 shares of stock, and also all and singular his claim and demand against the estate of T. W. Sigourney, deceased, for the said stock, or the value thereof. At that date said Reid became and still is the owner of said 750 shares of stock.

"7. There is no evidence to show when the dividends, amounting to said sum of fifteen thousand dollars, were declared, except that they were declared since December 1, 1878.

"8. The said fifteen thousand dollars is deposited and remains in this court to abide the decision of this action."

Upon these findings, judgment was entered in favor of Reid "for the sum of fifteen thousand dollars, the amount in controversy between him and the plaintiff," and directing that the said sum be paid to him out of the money deposited in court in the action.

The plaintiff then moved for a new trial, and his motion being denied, appealed from the judgment and order.

It is now claimed for appellant that the clause, "afterward Zellerbach deposited with Parrott the 750 shares above mentioned as additional security for said notes," found in finding 3, and the clauses, "leaving the said 750 shares the property of Zellerbach, free and clear of any charge or encumbrance," and "Zellerbach continued to be the owner of the stock until January 7, 1881," found in finding 5, and the clause, "at that date said Reid became and still is the owner of said 750 shares of stock," found in finding 6; are not supported by but are contrary to the evidence.

This is said to be so, because, — 1. It appears from the evi-

dence that the 750 shares were deposited to secure Sigourney for a balance due him upon a previous transaction, in which Zellerbach had settled with him in greenbacks, and had agreed to pay the difference between greenbacks and gold, that difference being fifteen thousand five hundred dollars; and 2. The plaintiff and his intestate had held the stock, claiming it adversely to Zellerbach, for a time more than sufficient to give them title to it under the statute of limitations.

As to the evidence, it is sufficient to say that there was a substantial conflict between that produced by plaintiff and defendants. The defendants' evidence fully supports the findings, and they cannot, therefore, be set aside for the reason urged. And as to the claim of title under the statute of limitations, the answer is, that if the stock was in fact pledged, as the court found it to have been, then Sigourney had a right to retain it until the debt for which it was pledged was satisfied. But that debt was not fully satisfied until the judgment of this court, affirming the judgment of the lower court in *Cross v. Zellerbach and Eureka Lake and Yuba Canal Co., Consolidated*, No. 9,796, was entered. The case is not reported, but the record here shows that the judgment of affirmance was entered on the thirtieth day of November, 1885. It is evident, therefore, that while Sigourney held the stock as additional security for the forty-thousand-dollar and ten-thousand-dollar notes, and had a right to so hold it, he could not assert that he held it adversely, and thereby acquire a right to it under the statute.

It is also claimed that when the certificate for the 750 shares was issued to Sigourney, he became the owner of the legal title to the stock, and that that title must prevail here, this being a mere action at law. This claim cannot be maintained. Sigourney was only the pledgee of the stock, and as between him and the pledgor the general property remained in the latter: Civ. Code, sec. 2888; *Dewey v. Bowman*, 8 Cal. 151; *Brewster v. Hartley*, 37 Id. 25; 99 Am. Dec. 237. And when the debt to secure which the pledge was given was paid, the lien was extinguished. Besides, this is not an action to recover the stock, but dividends declared upon the stock, in which the plaintiff has no interest.

The point is made that the assignment of the stock to Reid did not carry antecedently accrued dividends, and that as the court did not find that the dividends in question were declared subsequent to the time of that assignment, Reid was not en-

titled to them. There might be something in this point if Reid was seeking to recover the dividends from the plaintiff or the estate of Sigourney. In that event, the plaintiff could probably resist payment until a full and complete right to the money was established in the party claiming it. But that is not the case. Here the money is in the court, and both parties are actors in seeking to obtain it. The plaintiff, as has been shown, has no interest in the money; and whether it should be paid over to Reid or Zellerbach is a matter that does not concern him. Zellerbach united with Reid in asking for the judgment rendered, and if it be conceded to be wrong, the plaintiff cannot be heard to complain of it.

Several other points are made, but they do not require special notice.

The judgment and order should be affirmed.

FOOTE, C., and HAYNE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Hearing in bank denied.

AS BETWEEN PLEDGOR AND PLEDGEE, the latter only has the right of possession of the thing pledged until his debt is paid: *Luchetti v. Townsend*, 49 Am. Dec. 723.

[IN BANK.]

CHANDLER v. PEOPLE'S SAVINGS BANK.

[78 CALIFORNIA, 317.]

WHERE JUDGMENT IS REVERSED, AND CAUSE REMANDED for further proceedings according to the views expressed in the opinion in relation to a particular finding not sustained by the evidence, the trial court need not proceed to try the entire case anew, but may confine the testimony to the issue erroneously decided, and in other respects pass upon the issues in the light of the evidence already before it, or adopt the facts already found upon such testimony.

H. O. Beatty, and Beatty and Denson, and A. L. Hart, for the appellant.

Joseph McKenna, and Freeman and Bates, for the respondent.

By Court, SEARLS, C. This cause was here in 1882, upon two appeals, one by the plaintiff from part of a judgment in favor of the intervenor, and the other by the intervenor from a part of the judgment in her favor, and from an order denying a new trial, in the superior court of Sacramento County.

Upon the plaintiff's appeal, and as to him, the judgment was affirmed: 61 Cal. 396.

Upon the appeal of the intervenor, it was held that a finding of the court below as to the interest on certain monthly balances in favor of Chandler, from December, 1865, until October, 1878, amounting to \$2,710, was not supported by the testimony, and therefore that the finding was erroneous, and the judgment as to the intervenor was reversed, and the cause remanded for further proceedings, according to the views therein expressed: 61 Cal. 401.

The cause was brought up again in 1884, upon an appeal by the plaintiff, and from the record it appeared that certain evidence offered by the plaintiff, and tending to show that the balances in his favor were of a kind which entitled him to interest thereon, was ruled out; and this court said, in speaking of its former decision:—

"As we understand the judgment in the case, a reversal was ordered because the finding was not sustained by the evidence, and the cause was remanded for further proceedings according to the views expressed in the opinion.

"Certainly this order of the court left the inquiry as to interest open, as if no trial had been had on it. The plaintiff was at liberty, in a new trial, if in his power, to show that the balances were of the kind which bore interest. The offers of the plaintiff, which were ruled out, were made with this view, that is, to show that the balances were of the character which entitled him to have interest on them: Civ. Code, sec. 1917. The court should have allowed these offers. In our view, the case was open for a new trial, subject to the views expressed by the court," etc.; and the judgment was reversed, and the cause remanded for a new trial, subject to the views expressed by this court: 65 Cal. 498.

Upon the cause again coming up in the court below, the sense of the court was taken as to the extent of the new trial granted by this court under the decision last above referred to, and the court held "that a new trial was only granted as to the character of the balances mentioned in the opinion of the court on intervenor's appeal (61 Cal. 401) as to their being interest-bearing, and that the burden of the proof was on the plaintiff."

Counsel for plaintiff excepted to said decision, and asked that intervenor introduce her proof in support of her complaint of intervention, which she declined to do, whereupon

plaintiff moved for a nonsuit as against the intervenor, upon the ground that she had introduced no evidence, etc.

The motion was overruled, and plaintiff excepted.

The court then heard testimony in reference to the character of the balances mentioned in the decisions, and excluded testimony relating to other portions of the case.

Written findings were filed, covering the whole case, upon which judgment was entered in favor of intervenor, ordering a sale of the mortgaged premises, and that the proceeds, to the extent of \$8,435.81 and costs, be paid to her, etc.

The question presented is this, Was it the duty of the court below to proceed to try the entire case anew, or could it confine the testimony to the issue erroneously decided, and in other respects pass upon the issues in the light of the testimony already before it, or adopt the facts already found upon such testimony?

Under the former decision in this cause, we are of opinion it was not incumbent on the court below to try the entire cause anew, and that the judgment and order appealed from should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

NEW TRIAL REOPENS WHAT ISSUES: *Foster v. Browning*, 67 Am. Dec. 505.

[IN BANK.]

McLERAN v. BENTON.

[78 CALIFORNIA, 329.]

RES JUDICATA—**LAW OF CASE.**—Lease which has been treated as valid by the court and all the parties as creating a term for years, on two former appeals, may be introduced at a third trial to show that it creates but a tenancy at will, and held invalid as a lease for years, on account of defective acknowledgment.

LEASE PURPORTING TO BE FOR YEARS, BUT VOID for defective acknowledgment, constitutes the lessee who has entered under it by consent of the lessor but a tenant at will, without the right to assign the remainder of the term, and whose holding may be terminated by the lessor at any time.

TENANCY AT WILL IS NOT ASSIGNABLE, and if the tenant attempt to underlet or surrender, he thereby terminates his will and relinquishes his estate.

TENANT AT SUFFERANCE HAS MERELY NAKED POSSESSION, stands in no privity to the landlord, is not liable for rents unless under the statute, and is not entitled to notice to quit. The landlord may terminate the tenancy when he pleases, and may in some cases treat the tenant as a trespasser.

WHERE LESSEE HOLDING UNDER VOID LEASE from a tenant in common releases to a party who has contracted to purchase from the tenant in common, the purchaser is neither a tenant at will nor sufferance, and a deed to him by the tenant in common, with intention to pass the title, vests in him all the grantor's right of possession, and makes his possession adverse as against the other tenants in common, so as to vest the title under the Van Ness ordinance of San Francisco in him, which relinquishes the city's right in favor of prior possessors.

WHEN EXECUTOR'S OR ADMINISTRATOR'S RIGHT TO RECOVER PROPERTY of the estate is barred by the statute of limitations, the heir or devisee is also barred, though the latter may be under the disability of infancy at the time the action accrued to the representative.

ONE WHO WAS PRIOR POSSESSOR within the limits embraced in the Van Ness ordinance of San Francisco, which relinquished the city's title in favor of such possessor, but who was ousted before the ordinance went into effect, in order to acquire the ordinance title, must recover possession of the intruder by virtue of his prior possession, in suit commenced before his right of action on his prior possession is barred by the statute of limitations. He cannot recover from the intruder by virtue of any title vested in him by such ordinance.

WHERE RIGHT OF ACTION ACCRUES TO ONE UNDER NO DISABILITY, but who dies without bringing suit, the statute of limitations continues to run, notwithstanding the disability of one claiming under the deceased.

EJECTMENT. In 1849 J. Harmon and wife entered into the land in dispute, and the wife was divorced the same year, the court decreeing to her one undivided half of the property, from which the husband appealed; he died in 1850, and his executors were substituted as parties. He had but two children, and to his son, five years old, he devised two undivided thirds of the property; and to his daughter he bequeathed the remainder when she attained the age of eighteen, if her conduct was satisfactory to the executors. The decree of divorce was confirmed, and the land sold under order of court to Mrs. Harmon, she being the highest bidder. The children were not made parties. After Mrs. Harmon had obtained her deed, she married one Foley, and they went into possession in 1851, and the same year Comerford went into possession as tenant under a parol agreement with Foley and wife. In 1852 the same parties executed an instrument, which was recorded but never acknowledged, and under which it was agreed that Comerford was to hold the premises from August, 1852, to January, 1856. Comerford remained in possession until January, 1853, but the court found that he held only as tenant

at will, the parties treating the lease as void at the trial, and only admissible as showing the nature of the tenant's possession. In June, 1853, Foley and wife agreed to sell the land to Brannan & Co., and assigned the lease for six thousand dollars; the latter paid one hundred dollars on account, and it was agreed that the deed was to be made only when arrangements had been made with the tenant to give possession to Brannan & Co. He assigned his interest in what they considered the valid lease to them, and surrendered possession, when they paid the balance due, and Foley and wife attempted to convey by deed to them, but the deed was void for want of proper acknowledgment on the part of Mrs. Foley. From December, 1853, to October, 1855, Comerford was in the employ of Brannan & Co. The defendants went into possession in 1854, under deeds from Brannan & Co., and have ever since remained in peaceable possession. The only issue of the Foleys was Kitty, born July, 1853. The son of the first marriage, J. Harmon, died unmarried in 1859, and his mother, Mrs. Foley, died the same year. The daughter of the first marriage, Mary A. Harmon, married, and in May, 1861, conveyed the land in dispute to the plaintiff, from whom he derains title. From 1854 until this suit was commenced, neither Mrs. Foley nor any of the children had possession of the land. By the Van Ness ordinance, the city of San Francisco relinquished its title to certain lands, including that in dispute, to persons in actual possession on or before January, 1855, "provided such possession has been continued up to the time of the introduction of this ordinance in the common council [June, 1855], or if interrupted by an intruder or trespasser, has been or may be recovered by legal process." The court found the title to be in defendants. Other facts are stated in the opinion.

A. L. Rhodes, for the appellant.

Wilson and Wilson, and S. M. Wilson, for the respondents.

By Court, PATERSON, J. This action was commenced twenty-five years ago, and has been before this court several times on appeal. The tracts of land in controversy are of great value, and are popularly known as "Woodward's Garden," "Benton's Church," and "Judson and Shepard's Acid Factory." The property is within the exterior limits of the territory described in the Van Ness Ordinance, and the principal questions in-

volved relate to the title conferred by that ordinance, and to defendant's plea of the statute of limitations. After the second decision by this court (43 Cal. 473), the defendants filed in the court below an amended answer, setting up more fully the facts upon which they relied in their affirmative defense.

Inasmuch as the appellant places great reliance upon the decisions on the former appeals, it becomes necessary for us to review the matters adjudicated, and ascertain to what extent the law of the case has been established. It is said that because the lease was regarded and treated at the first and second trials, and on the former appeals, as valid by all the parties and by this court, the objection made at the last trial and on this appeal, that it is invalid because not acknowledged by Mrs. Foley, cannot be considered; that it must now be regarded as a valid lease. The fact is, as stated, that the lease was at the first and second trials regarded as valid, and creating a term for years, and was so treated by this court on appeal: 31 Cal. 29; 43 Id. 468.

At the last trial, however, the lease was objected to, and held to be void as a lease for a term of years, but was introduced and considered in evidence only "to show the character of Comerford's holding; to show a recognition of tenancy on the part of Comerford creating a tenancy at will; and to illustrate the possession that was taken subject to it."

We do not think that the decisions upon this question on the former appeals have become the law of the case. The evidence, and the purposes for which the pretended lease was introduced, present a different question on this appeal. It is only where the evidence is the same that the doctrine contended for by appellant applies. It is doubtless true, as a general proposition, that a previous ruling of the appellate court upon a matter directly in issue is, as to all subsequent proceedings, a final adjudication, and becomes the law of the case, from which the court ought not to depart, nor allow the parties to be relieved. But when such a ruling relates to a matter of fact, the principle can be invoked only when the fact appears again to the appellate court under the same circumstances in respect to which it was originally considered: *Mitchell v. Davis*, 23 Cal. 381; *Trinity County v. McCammon*, 25 Id. 121; *Leese v. Clark*, 20 Id. 418; *Nieto v. Carpenter*, 21 Id. 483.

In our opinion, therefore, the court below was not bound to consider the lease as a valid lease for a term of years; and

that it created simply a tenancy at will, we have no doubt Taylor's Landlord and Tenant, secs. 19, 112.

It is further contended that the decree and sale, followed by a deed from the commissioners to Eleonora, executed March 28 1851, were void as to the children of Jacob Harmon, deceased, because they had not been made parties to the action after the death of their father, and therefore, that Eleonora and the children were tenants in common.

On the second appeal it was said: "The decision on the former appeal, *Ewald v. Corbett*, 32 Cal. 493, would be destitute of all basis if the estate of Jacob Harmon would not descend, or could not be distributed, under the statute regulating common property"; and it was in effect decided that the commissioners' deed of March 28, 1851, was void, and the fact that the defendants and others effected their purchase from Mrs. Foley in good faith was immaterial, the paper which the parties executed having shown that the premises were a portion of the Harmon estate in which the children of Mrs. Foley had an interest, which Mrs. Foley had not competent power to convey. Under that decision, we must hold that "the undivided half of the premises,—that is to say, the undivided half of the interest therein which Harmon and wife held immediately preceding his death,—vested in Eleonora, either by virtue of the decree of divorce, or the statute of this state providing for the distribution of the common property upon the dissolution of the community by the death of the husband, and the remaining half vested in their two children; that the right and interest in the premises acquired or held by Harmon by virtue of his possession, conceding they were the lands of the pueblo or the city, would descend to his heirs, if not devised by him, and that the same might be distributed under the statute relating to common property." It would seem to follow, therefore, that Eleonora and the children were tenants in common at the time the lease to Comerford was delivered (43 Cal. 476); and that if they had been in possession of the property on January 1, 1855, and remained until June 20, 1855, they would have received the Van Ness ordinance title. The same result probably would have followed had Comerford remained in possession under the lease until June 20, 1855. If we assume this to be true, then up to the time of the assignment by Comerford of his interest in the lease to Brannan and others, December, 1853, the rights of Mrs. Foley and the children in the premises would be fully pre-

served. This brings us to the inquiry—a most important one so far as Mrs. Foley's interest is concerned at least—as to the legal effect of Comerford's assignment to Brannan and others. By the terms of the instrument it was provided “that, whereas T. O. Larkin . . . and Samuel Brannan have become the owners by purchase of the within-described premises, now, therefore, in consideration of the sum of five thousand dollars to me paid, . . . I do by these presents assign, transfer, and surrender to said . . . and Brannan all my right, title, and interest in the said premises, under and by virtue of the within lease.”

What right, title, or interest did Comerford hold by virtue of the lease which could be transferred by him? He was a mere tenant at will, and could not assign the remainder of the term named in the lease. A tenancy at will is not assignable. If a tenant at will attempt to underlet or surrender, he thereby determines his will, and relinquishes the estate: *Cooper v. Adams*, 6 Cush. 90; *Taylor's Landlord and Tenant*, secs. 62, 83. Without the consent of Mrs. Foley, Brannan and others would be merely tenants at sufferance, and liable to an action of trespass against them: *Reckhow v. Schank*, 43 N. Y. 451.

The tenant at sufferance has merely a naked possession; stands in no privity to the landlord; is not liable for rents, unless expressly made so by statute; nor is he entitled to notice to quit. The landlord may put an end to the tenancy when he thinks proper, and may, under certain circumstances, treat the one in possession as an intruder or trespasser: *Hauxhurst v. Lobree*, 38 Cal. 563; *Meier v. Thiemann*, 15 Mo. App. 307; *Taylor's Landlord and Tenant*, sec. 65. The relation of Brannan and others to the Foleys, therefore, depended upon the understanding and oral agreement of all the parties, and there is no question as to what that agreement was. The court found, and the finding is supported by evidence, that the preliminary agreement of sale under which Brannan and others were let into possession was a mere temporary arrangement, with a view, before completion of the purchase, to securing from Comerford a termination of his tenancy; and it was not until after this was accomplished that the purchase price was paid by Brannan and others to the Foleys. There was no recognition by the Foleys of Brannan and others as tenants. The transaction was, as between the Foleys and Brannan and others, to be a sale of all right, title, and interest of the former, or the one hundred dollars which had been paid

was to be returned to the latter. The consent of Comerford was not necessary to terminate his interest in the property. The Foleys could have terminated it without his consent; and the sale by them to Brannan and others was itself a sufficient expression of their will to end the tenancy, and precludes the idea of a tenancy at will on the part of Brannan and others: *Pratt v. Farrar*, 10 Allen, 520.

If the Foleys had sold to strangers instead of to Brannan and others, the latter would not have been entitled to a notice to quit from the purchaser. The conveyance of the property *ipso facto* destroys all privity or relationship between the owners and the tenant at sufferance: *Esty v. Baker*, 50 Me. 325; 79 Am. Dec. 616.

The same result must follow when the sale is made to the tenant at sufferance himself, especially when, as in this case, it is expressly understood that the sale depends upon the result of negotiations on the part of the purchaser and seller, to secure the surrender of all claim on the part of the tenant at will, so that the full title may vest in the purchaser. There was no relation of landlord and tenant between the Foleys and Brannan and others. Such relationship was never contemplated. The Foleys recognized Brannan and others as purchasers of the land. The parties all acted in good faith, believing that all the right, title, and possession of the Foleys had passed to their grantees. Comerford paid rent to no one after they all arrived at this understanding, but was permitted to remain on the place till the fall of that year to gather his crop, at which time he surrendered possession to Brannan and others, who paid him five thousand dollars therefor. After such surrender, the court finds that he acted as the bailiff or care-taker for the purchasers. The Foleys received six thousand dollars, the purchase price in full, from the purchasers, in June, 1853, left the premises, and never afterward claimed any right to the same; nor has any one, on their behalf, ever offered to repay any money received by them. The fact that the writings which passed between the parties turned out to be void cannot change the acts, nor can it alter the intention of the parties verbally expressed; and that intention was, that Brannan and others should have actual possession of the premises, to have and to hold the same in their own right, without interference or claim, trespass or intrusion. Such possession they took in 1854, and held until the commencement of this suit, eight years later; and unless we are

mistaken as to the effect of the attempted assignment by Comerford to them, they received by virtue of the possession thus given to them the Van Ness ordinance title, to the extent, at least, of the interest held and controlled by Mrs. Foley, who voluntarily relinquished the premises.

The possession of Brannan and others was clearly adverse, and the statute began to run in their favor, and against the executors, from the time of their entry: *Packard v. Moss*, 68 Cal. 123; *Mulford v. Le Franc*, 26 Id. 90; Angell on Limitations, secs. 388-410.

Another and more difficult question relates to the interest which descended to the heirs of Harmon. The executors have never been discharged. When Harmon died, in 1850, Mary Ann and Jacob, Jr., were respectively seven and four years of age. Neither Mrs. Foley nor her children had possession of the premises after December 16, 1853, and this action was not commenced until June 4, 1862; and upon the authorities construing the statutes then in force, and determining the rights of minors in property represented by executors, we must hold that there was, during the period mentioned, no saving of infancy. The will was duly probated. The executors took possession of the property, and retained the same until put out by the sheriff, under order of the court, made in the action for divorce and division of the property. If the entry of the defendants was wrongful, the devisees of Harmon could not maintain an action, for that right existed exclusively in the executors, who, in all suits for the benefit of the estate, represented both the creditors and the heirs: *Cunningham v. Ashley*, 45 Cal. 493; *Halleck v. Mixer*, 16 Id. 579. It would seem to follow, therefore, that when the executor is barred of his action, the heir is barred, although the heir or devisee be laboring under a disability: *Wilmerding v. Russ*, 33 Conn. 68. The general rule is, that when a trustee is barred by the statute of limitations, the *cestui que trust* is likewise barred, even though an infant (Hill on Trustees, 267, 403, 504), and that the heir or devisee is dependent upon the diligence of the executor for the maintenance of his rights with respect to the real property, but is not without a remedy by an action for damages against his executor and his sureties, or by a proper proceeding to compel him to bring suit: *Tyler v. Houghton*, 25 Cal. 29.

This subject has been very carefully considered, and the decisions and statutes of this state elaborately reviewed, by

the circuit court and the supreme court of the United States, and the conclusion reached that, where the administrator in this state neglects to bring an action to recover property of the estate until it is barred under the statute of limitations applicable to the subject, the heir is also barred, even though the heir be a minor at the time the action accrues to the administrator: *Meeks v. Vassault*, 3 Saw. 214; *Meeks v. Olpherts*, 100 U. S. 564.

But it is claimed by the appellant that he is not seeking a recovery upon the title or right of possession held by Jacob Harmon in his lifetime; that the only purpose of proving prior possession was to prove and identify the persons in whom the Van Ness ordinance title vested; that it is upon that title that this action is brought, and as that title never was in Harmon or his estate, the executor could not maintain an action upon the title; and that the interruption by an intruder or trespasser, referred to in the ordinance, means an ouster between the 1st of January, 1855, and the 20th of June, 1855; also that the statute did not commence to run against the Van Ness ordinance title until it vested in plaintiff's grantor, which was not until May 11, 1858. Unfortunately, however, for the appellant, all of these contentions have been disposed of adversely to him by the decisions of this court. There was no ouster during the interval referred to; and the proviso under which they claim title embraces persons evicted by intruders and trespassers as well before the 1st of January as those evicted afterward, and before the 20th of June. The statute commenced running on the eleventh day of April, 1855; and one who was ousted by an intruder before the ordinance took effect, in order to acquire the ordinance title, must recover possession from the intruder by virtue of his prior possession, in a suit commenced before his right of action on his prior possession is barred by the statute of limitations. He cannot recover from such intruder by virtue of any title vested in him by the ordinance: *Pickett v. Hastings*, 47 Cal. 269; *McLeran v. Benton*, 43 Id. 467; *McManus v. O'Sullivan*, 48 Id. 7.

On the day that the statute of limitations commenced to run, April 11, 1855, Mrs. Foley was a widow, and could have maintained an action. She died in November, 1859; but as the statute had commenced to run, it did not stop at her death because of the disability at that time of any person claiming under her. The disability must exist at the time the right of

action first accrues. The statute commenced to run against the executors on the eleventh day of April, 1855. Their cause of action was therefore barred on the 11th of April, 1860; and this bar operated equally against the devisees of Harmon.

The finding of the court as to ownership is sufficient: *Murphy v. Bennett*, 68 Cal. 530.

We have examined the evidence, and think that it supports the findings. There are some errors relied upon by appellant, but we find nothing prejudicial in any of them, and the judgment and order must be affirmed, except as to those parcels of land described in the stipulation of counsel, upon which an order of dismissal has been entered herein.

RES JUDICATA, WHAT CONSTITUTES: *Slocumb v. De Liardé*, 99 Am. Dec. 140, and note 749.

TENANT AT WILL HAS NO ESTATE in the land, cannot transfer the possession to another, or make any contract regarding the possession; and a conveyance by him is mere desertion, which constitutes his grantee an adverse holder as against the landlord: *Doak v. Donelson*, 24 Am. Dec. 485.

TENANT AT WILL OR SUFFERANCE, whether entitled to notice to quit: Note to *Stedman v. McIntosh*, 42 Am. Dec. 123-130; *Dillon v. Brown*, 71 Id. 700.

STATUTE OF LIMITATIONS HAVING RUN AGAINST EXECUTOR, administrator, or trustee, the infant is also barred: *Worthy v. Johnson*, 54 Am. Dec. 163; *Coleman v. Walker*, 77 Id. 163, note 166.

WHERE CAUSE OF ACTION HAS ACCRUED during the lifetime of party, and the statute of limitations has commenced to run, it still continues to run notwithstanding the death of the party: Note to *Miller v. Surle*, 65 Am. Dec. 54-59 et seq.; but see *Tynan v. Walker*, 95 Id. 152.

[IN BANK.]

HUTCHINSON v. AINSWORTH.

[78 CALIFORNIA, 452.]

NOTARY IS NOT NECESSARY PARTY DEFENDANT to action to foreclose the mortgage of a married woman, and to reform the notary's certificate before whom the mortgage was acknowledged.

COMPLAINT IN ACTION TO FORECLOSE MORTGAGE and to reform the certificate of acknowledgment of a notary thereto states but one cause of action.

NOTE AND MORTGAGE WERE EXECUTED September 3, 1878, and suit to foreclose was brought March 25, 1880. Plaintiff asked to amend the complaint August 19, 1880, so as to obtain reformation of the notary's certificate of acknowledgment to the mortgage. This was denied, but the judgment was reversed March 28, 1883, and the following May 11th an amended complaint was filed. *Held*, that the statute of limitations

did not run against the right to have the mortgage reformed pending the appeal, and that the amended complaint should be deemed and treated as having been filed as of the date of application therefor and refusal.

WHILE TO REFORM WRITTEN INSTRUMENT on the ground of mistake, the mistake must be established in a clear and convincing manner, and to the entire satisfaction of the court, still relief will not be denied because the testimony is conflicting.

MORTGAGE PROPERLY EXECUTED AND ACKNOWLEDGED, though the certificate of acknowledgment is defective, is valid as against a subsequent purchaser without notice of the mortgage as recorded, though without notice that it was properly acknowledged, where he gives no value therefor, and incurred no liability except a contingent one, for which he never became liable.

George W. Tyler and W. B. Tyler, for the appellants.

William Reade and W. C. Belcher, for the respondent.

By Court, SEARLE, C. J. This cause was here on a former appeal, the decision on which is reported in 63 Cal. 286. In 1878, the defendants, Anna Ainsworth and A. G. Ainsworth, made their promissory note to Margaret M. Hutchinson for three thousand five hundred dollars, payable on the third day of September, 1879, with interest at ten per cent per annum. The note was given for money loaned to said defendant by plaintiff, who is a married woman, and was her separate property.

To secure the payment of the promissory note, Anna Ainsworth executed the mortgage, to foreclose which this action is brought. The property mortgaged was the separate property of Anna Ainsworth, who is a married woman.

The acknowledgment made by said Anna Ainsworth is found to have been properly taken, but the notary, in certifying thereto, failed to specify that he made her acquainted with the contents of the instrument, separate from and without the hearing of her husband.

A copy of the certificate is set out in the report of the case on the former appeal. In that appeal this court reversed the judgment and order of the court below, upon the ground of error in refusing plaintiff's application to amend her complaint so as to show that the acknowledgment was actually taken in compliance with the statute, with a view to a judgment correcting the certificate as provided by section 1102 of the Civil Code. The action was brought March 25, 1880.

Upon the return of the cause to the court below, and on the eleventh day of May, 1883, the complaint was amended, averring the acknowledgment to have been properly taken, and asking that the certificate be reformed and corrected.

To this amended complaint defendant demurred, upon the grounds, among others, — 1. That there is a non-joinder of parties defendant, in that William H. Burrill, the notary who took the acknowledgment, should have been made a defendant; 2. That two causes of action are joined in the complaint without being separately stated; 3. That the cause of action is barred by subdivision 4 of section 338 of the Code of Civil Procedure.

The demurrer was overruled, and this action is assigned as error. The demurrer was properly overruled.

The notary was not a necessary party defendant to the reformation of his certificate. The reformation, if made at all, could only be so made by the judgment of the court: *Wedel v. Herman*, 59 Cal. 515.

The objection of the demurrer is not that two causes of action are improperly united, but that they are contained in the complaint, and are not separately stated. Waiving the question whether or not a proper uniting of two causes of action in the same complaint, without stating them separately, is a cause for demurrer, we are of opinion the complaint states but one cause of action.

"An action is an ordinary proceeding in a court of justice, by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense": Code Civ. Proc., sec. 22.

The facts upon which the plaintiff's right to sue is based, and upon which the defendant's duty has arisen, coupled with the facts which constitute the latter's wrong, make up the cause of action.

If these facts taken together give a unity of right, they constitute but one cause of action.

In equity, the relief or the enforcement of a single right may be varied, and the facts essential to such relief may be set out without objection as auxiliary to the right to be enforced.

In the case at bar, the object of the action is to collect a single debt, and to enforce a single lien to redress a single wrong. To accomplish this object, dual relief is sought, but this circumstance, so frequent in equity, does not constitute two causes of action. Pomeroy, at section 459 of his work on remedies, in discussing this question, uses the following language: —

"Actions brought to reform instruments in writing, such as

policies of insurance and other contracts, mortgages, deeds of conveyance, and the like, and to enforce the same as reformed by judgments for the recovery of the money due on the contracts, or for the foreclosure of the mortgages, or for the recovery of possession of the land conveyed by the deed, fall within the same general principle. One cause of action only is stated in such cases, however various may be the reliefs demanded and granted": *Meyer v. Van Collem*, 7 Abb. Pr. 222; *McClurg v. Phillips*, 49 Mo. 315.

3. Is the cause of action barred by the statute of limitations?

To repeat: the note and mortgage were executed September 3, 1878, and fell due September 3, 1879. Suit brought March 25, 1880.

Leave to amend the complaint was asked and refused by the court at the first trial, on the nineteenth day of August, 1880. Judgment reversed March 28, 1883. Amended complaint filed May 11, 1883.

It will be observed that three years had not elapsed from September 3, 1878, the date of the mistake in the certificate, when plaintiff asked and was denied the privilege of amending her complaint so as to have such mistake corrected.

Under such circumstances, the plaintiff having a legal right to file her amended pleading, and having been prevented from so doing by the act of defendants and through the error of the court below, it should, by application of the doctrine of relation, be deemed and treated as having been filed as of the date of the application and refusal.

If A has a right to answer a complaint filed against him, which right is denied by the *nisi prius* court, after an appeal and reversal of the order denying such right, he cannot be met with the answer that his time to answer has expired under the statute.

This doctrine is quite different from that which prevents a party from taking advantage of a disability, unless it existed in his favor at the time that the statute began to run.

A disability to sue may be a misfortune, but as it cannot be attributed to the acts of others, it must be borne by the party upon whom it rests, except so far as relieved against by statute.

Plaintiffs were under no disability. They asked to exercise a right which was refused by the court, and as they might well do, they procured a correction of the error by appeal, where-

upon they were entitled to stand in the position they would have occupied had the right been granted them in the first instance. Any other rule would render a successful appeal fruitless in a variety of cases.

This reasoning proceeds upon the theory that the application to reform the certificate was a cause of action which would be barred within three years from the date of the mistake sought to be corrected, or if not then known, within three years after its discovery; but it may well be doubted whether the right to reform the certificate of acknowledgment was not a mere incident to the right to recover upon the note and mortgage, which would stand or fall with its principal.

Had we confined ourselves to the statements of the complaint, we might have disposed of the demurrer thereto more briefly; but as the same question is presented upon a broader field by the findings, we have discussed it in its latter aspect, and are of opinion the demurrer was properly overruled, and that the findings against the plea of the statute of limitations are fully warranted.

We are asked to review the evidence upon the question of a mistake by the notary in certifying to the acknowledgment, and to set aside the finding of the court, upon the ground that it is not supported by the evidence; and in this connection are referred to a number of cases in which it is held that to authorize the correction of mistakes by reforming written instruments, the alleged mistake must be clearly made out by proofs entirely satisfactory, and that nothing short of a clear and convincing state of facts showing the mistake will warrant the court to interfere with and reform the instrument.

As was said in *Lestrade v. Barth*, 19 Cal. 660, "the evidence, if it is true, must be clear and convincing, making out the mistake to the entire satisfaction of the court, and not loose, equivocal, or contradictory, leaving the mistake open to doubt."

The conclusion from the sum of all the authorities on the subject is, not that relief must necessarily be denied because there is a conflict of testimony, for that would result in a denial of justice in some of the plainest cases calling for such relief, but that upon all the proofs, taking the facts as they appear to the court after eliminating testimony unworthy of credence, or based upon mistake or uncertainty, as in other cases, the mistake must be established in a clear and convincing manner, and to the entire satisfaction of the court. Viewed in this

light, and we cannot say the court was unauthorized by the testimony in the conclusion it reached.

The testimony of the notary, Burrill, is clear and explicit to the facts: that he went to the house of the mortgagor; that her husband retired from the room; that he then and there made her acquainted with the contents of the instrument, and that she acknowledged it, etc., all without the presence or hearing of her husband; and that upon returning to his office, he inadvertently attached a printed certificate, which would have been valid under the statute as it formerly existed, but which failed to certify that he made the mortgagor acquainted with the contents of the instrument without the presence and hearing of her husband, as required by the present law. This was a mistake which might well have happened; and upon such testimony, if believed to be true, the court below was fully warranted in the conclusion it reached.

The conveyance, then, having been properly executed and acknowledged (though not properly certified), was valid as between the parties to it, and all the world, except subsequent *bona fide* purchasers for a valuable consideration, without notice.

The court found that the defendant, Tyler, had notice of the mortgage as recorded, but no notice, in fact, that it had been properly acknowledged; that he gave no money or thing of value therefor, and incurred no liability on account thereof, except the contingent liability that if the rents of the property which was covered by the mortgage did not amount to five hundred dollars, he would pay his grantor that amount, and that the rents paid said sum, and he never became liable therefor.

The testimony supports this finding, and had the court found a fuller and more complete notice in Tyler, we do not see that such finding could have been disturbed by this court.

The judgment and order appealed from are affirmed.

MORTGAGE MAY BE REFORMED in foreclosure suit: Note to *Bartlett v. Judd*, 78 Am. Dec. 137; 2 Jones on Mortgages, sec. 1464.

MISTAKE MUST BE MADE OUT by proof strong and clear, and to the satisfaction of the court: *Gillespie v. Moon*, 7 Am. Dec. 559; *Smith v. Allen*, 21 Id. 23.

ESTATE OF NOAH.

[73 CALIFORNIA, 588.]

WHEREIN WIFE VOLUNTARILY AGREES WITH HER HUSBAND for separation, and for a money consideration releases all her marital claims, and receives and enjoys the benefits of the money paid for her support during the separation, and voluntarily continues to live apart from him, without any attempt to set aside the agreement or to again assume the marital relation or to demand further means for her separate support, she does not thereafter constitute a member of the immediate family of the husband, and upon his death is not entitled to an allowance for her maintenance out of his estate, under sections 1466 and 1467, California Code of Civil Procedure.

Henry E. Highton, for the appellant.

Pillsbury and Blanding, Horace G. Platt, William Loewy, E. N. Deuprey, and Gordon Blanding, for the respondents.

By Court, MCKINSTRY, J. The appellant, Harriet T. Noah, as widow of the deceased, petitioned the superior court for an allowance of one hundred dollars a month for her maintenance, under sections 1466 and 1467 of the Code of Civil Procedure. There was no child the issue of the marriage of petitioner and decedent.

The executors answered the petition, and at the trial testimony was given to prove that decedent and petitioner were married October 14, 1875, and after living together five or six weeks, separated, and thenceforth lived separate and apart until his death, which occurred on the 28th of August, 1883; that within six weeks prior to the marriage, decedent gave to the petitioner \$2,825 for her personal use, and supplied her liberally during the time they lived together; that the separation was by mutual consent of the parties; that upon the separation, the petitioner for the allowance received from the decedent \$10,500, \$500 of which was paid by her to an attorney at law, who negotiated the settlement for her; that at the time of the marriage, decedent owned certain improved real estate at the corner of Spring and California Streets, San Francisco, the income from which was then about \$500 a month, and had in cash about \$35,000; that after the separation the decedent contributed nothing to her support, and she did not look or apply to him for her support or maintenance. They were as utter strangers, and never spoke or corresponded; that she had expended the money paid her on the separation prior to a point of time about four years before the filing of her petition for the allowance, and during

such four years she supported herself from her own earnings with the assistance of her mother and brother. The value of the property in the hands of the executors when the petition for allowance was heard was \$26,400; there was no community property of the marriage. The petitioner, although informed of the death of decedent, did not attend his funeral.

The executors introduced a written agreement for separation, whereby, in consideration of the consent of the decedent that the said Harriet T. should live separate and apart from him, and of the receipt of \$10,500 by her, she agreed not to demand any alimony or support from him; that she would not contract any debts on his account; that the \$10,500 should be in full satisfaction of "all her marital claims," etc.

By our law, a husband and wife may agree in writing to an immediate separation, and may make provision for the support of either of them during such separation: Civ. Code, sec. 159. Of course the transaction is subject to the rules which control the contracts of those occupying confidential relations: *Id.* sec. 158.

It is said by appellant that, upon her application for an allowance, the burden was on the executors of alleging and proving the "fairness" of the contract. The answer of the executors was not demurred to by the petitioner. The answer set forth facts which, if proved, justified the court in finding the agreement to have been fair, and the evidence, admitted without objection, tended to establish its fairness. The precise objection, that the agreement was not admissible under the averments of the answer, was not made by appellant when the agreement was offered in evidence. The objection was, that it was "incompetent, immaterial, and irrelevant, on the ground that it was not sufficient in law to vary, alter, or affect the legal rights of the petitioner on her application as the widow of the deceased."

Moreover, the agreement, as far as it was an agreement to separate, and for her support during the separation, was fully executed during the lifetime of the deceased. The husband paid the money, and never sought to compel subsequent cohabitation. The wife received the money, applied it to her support, and ever after voluntarily lived separate and apart from her husband. The order of the superior court was not based upon the agreement alone, but on the further facts that, in accordance with its terms, she ceased to live with him, and from thenceforward was not a member of his family.

In this court, the appellant urges that the agreement is void because not acknowledged by her in the manner prescribed for the acknowledgment of conveyances of the separate property of the wife. The objection was not taken in the court below; and when the contract was entered into, the wife had no vested interest—certainly no “separate” interest—in the separate property of the husband.

But it is said the agreement did not affect the rights of the appellant as a widow,—rights which did not accrue until after the death of Joel Noah. It is not necessary here to decide that appellant, by entering into the agreement, waived or released any of her rights as heir of Joel Noah, deceased. We do not think she was absolutely entitled, as of right, to an allowance during the administration of his estate.

It was held in Massachusetts that while an antenuptial agreement between the widow and deceased, whereby she covenanted to accept a certain settlement in lieu of dower, and in place of any and every claim against his estate, would, if performed, be effectual as a release of dower, it was no answer to her claim for a distributive share of personal estate left by her husband: *Sullings v. Richmond*, 5 Allen, 187; and that such an agreement was of itself no defense to a petition for an allowance for necessaries: *Blackinton v. Blackinton*, 110 Mass. 461; see also *Wentworth v. Wentworth*, 69 Me. 254. The decisions seem to be based on the limited and inferior jurisdiction of the probate courts in Massachusetts, which had no power to construe or enforce marriage contracts: *Sullings v. Richmond*, *supra*. The contracts in the cases referred to,—which preceded the marriage and contemplated its continuation until the death of one of the parties,—in no way operated to disturb the harmony of their personal relations, and they continued to live as husband and wife until the decease of the husband. In none of the cases was there any question that the surviving wife, or wife and children, constituted the family of the deceased at the time of his death.

It was held in New York that an antenuptial contract, such as above mentioned, precluded the widow from demanding certain articles of personal property directed by statute to be set apart to her: *Matter of Estate of Young v. Hicks*, 92 N. Y. 235.

Section 1465 of the California Code of Civil Procedure provides that upon the return of the inventory of an estate, the court wherein the administration is pending may set aside for

the use of the surviving wife, or wife and children, the property exempt from execution. And section 1466 provides that if the amount set apart be insufficient for the support of the widow, or widow and children, the court, or the judge thereof, "must make such reasonable allowance out of the estate as may be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate."

By statute of Maine, it was enacted, "when an estate is insolvent, or no provision is made for the widow in the will of the husband, the widow shall be entitled to so much of the personal estate . . . as the judge deems necessary, according to the degree and estate of her husband, and the estate of her family under her care": *Gilman v. Gilman*, 53 Me. 191; 83 Am. Dec. 502. In *Kersey v. Bailey*, 52 Me. 201, the court said the original intention of the statutes of Maine, giving the power to the probate court to set aside property to her, was to furnish a temporary supply for the wants of the widow and family while the estate was in process of settlement. And the learned court also said: "From the tenor of the statute [in this respect like the provision of our code authorizing an allowance] directing the attention of the judge to the estate and condition of the husband and the state of the family under the widow's charge, it is apparent that the legislature, in making the provision, was contemplating the ordinary case where the parties to the marriage relation have lived together till death severed the tie." In that case, the widow, though the legal wife of the deceased, had not lived or cohabited with him as such for more than forty years. He had deserted her, but she, supposing him to be dead, married another man, with whom she lived as his wife until the death of her real husband. She lost nothing by his death which she had before possessed, and there seemed to have been a tacit relinquishment by each of all claims upon the other for a long period of time. The court concluded she was not entitled to have any part of the estate set aside to her under the statute. The same court had previously held the widow's claim for an allowance was not an absolute right; that the order was in the discretion of the probate judge: *Murray v. Cargill*, 32 Me. 516.

Section 122 of the former probate act of this state reads: "The probate court or judge shall make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to the circumstances," etc.

In *Estate of H. H. Byrne*, the learned judge of the probate court of San Francisco (afterward one of the justices of this court) said that the right to an allowance, under the section of the statute quoted, was founded on the statute alone. "It is quite different from the right of the heir to inherit, or of the widow to her dower, or the right to one half of the community property. It is an allowance made to the family. . . . I think that the statute was intended to embrace those who were the immediate family of the deceased; those who were by law entitled, up to his death, to look to him for support and protection. . . . Yet any person, to be entitled to any allowance out of the estate, must have been in the receipt or in law entitled to demand of deceased a maintenance before his death": Myrick's Prob. Rep. 1.

We concur in this view of the law. We also think that in enacting 1466 of the Code of Civil Procedure, the legislature had in contemplation the ordinary case where "the parties to the marriage relation live together until death severs the tie." The letter of the statute may cover other cases. We are not to be understood as saying that in every instance where the husband and wife have separated, the widow should be denied an allowance. She may have been driven from her home by the cruelty of her husband; and in such case, the superior court may, perhaps, make an allowance, although the widow made no effort during the lifetime of the deceased to resume matrimonial relations with him. It is enough to say that—since the appellant voluntarily made an agreement with her husband for separation, such as our law authorizes, received and enjoyed the benefits of the money paid for her support during the separation, and voluntarily continued to live apart from him without any attempt to set aside the agreement, or to assume again the matrimonial connection, or even to demand further means for her separate support—the court below was justified in holding that the petitioner did not constitute the immediate family of the deceased, to whom was to be continued, during the settlement of the estate, the "reasonable support" which the husband, in ordinary cases, is presumed to furnish his wife.

Order affirmed.

ESTATE OF NOAH.

[73 CALIFORNIA, 560.]

ORDER OF COURT REFUSING TO SET APART HOMESTEAD will not be reversed because the court did not find upon the issues made by the pleadings, when the bill of exceptions fails to show that the findings were not waived.

COURT CANNOT SET APART AS HOMESTEAD to surviving husband or wife property of the estate which could not have been selected as a homestead during the continuance of the marriage.

COURT CANNOT SET APART HOMESTEAD to the value of five thousand dollars to the surviving husband or wife, out of an estate consisting of a lot and four-storied brick building, erected and used exclusively for business purposes, and valued at twenty-five thousand dollars, and which cannot be divided without material injury.

WHERE NO HOMESTEAD HAS BEEN SELECTED during the lifetime of the husband or wife, and there is no property out of which the survivor may select a homestead, the court cannot order a sum of money paid to such survivor in lieu of a homestead.

WHERE HOMESTEAD SELECTED DURING LIFETIME OF HUSBAND OR WIFE is inventoried at more than five thousand dollars, and a homestead to that amount cannot be carved out of it, the court may order the sale of the homestead as selected, and pay to the survivor that amount of the proceeds.

Henry E. Highton, for the appellant.

Pillsbury and Blanding, Horace G. Platt, E. N. Deuprey, and William Loewy, for the respondents.

By Court, **McKINSTRY, J.** Deceased left a will wherein no provision was made for his widow, Harriet T. Noah, the appellant. The will was duly probated September 28, 1883, and on the sixth day of August, 1884, appellant petitioned the superior court for an order setting apart a homestead out of the real property of the estate, "or for such other or different order as may be just and proper in the premises." There was no community property, and the only separate real property of the deceased at the time of his death was a certain lot in San Francisco, covered entirely or partially by a brick building four stories high, and which was and had been used exclusively for business purposes.

The answer of the executors to the petition of the widow, besides the facts above mentioned, set forth the matters averred in the answer to the application of the widow for an allowance, as contained in the transcript in *The Matter of the Estate of Joel Noah, ante*, p. 829. It is averred in the petition for homestead that the property above described "cannot be divided without material injury."

In the view we take, it is unnecessary to inquire what might have been the legal effect of the post-nuptial contract given in evidence, had there been any property out of which a homestead could have been carved, or whether the court below erred in overruling the objection to the introduction of that contract in evidence.

Appellant contends the order of the court below refusing to set apart a homestead should be reversed, because the court did not find upon the issues made by the pleadings. But if the findings were proper, the bill of exceptions fails to show that they were not waived.

Section 1465 of the Code of Civil Procedure provides, if no homestead (as was the case here) has been selected, designated, and recorded during the lifetime of the deceased, "the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife, and the minor children, . . . out of the common property, or if there be no common property, then out of the real estate belonging to the deceased."

The sections of the code relating to homesteads to be set apart by the court — probate homesteads — do not define the word "homestead."

It may be conceded that the real property set apart as a homestead to the surviving husband or wife, by order of the court, need not be actually occupied at the time when the order is made. But it would seem that it must be property which could have been selected as a homestead during the continuance of the marriage. Mr. Justice Rhodes, speaking for the supreme court, said that there was nothing in the homestead act as it existed in 1866 "which tended to the conclusion that any property could be set apart as a homestead by the probate court which might not have been dedicated as a homestead under the homestead act immediately preceding the death of the deceased": *Kingsley v. Kingsley*, 39 Cal. 666. So far as they bear upon the question we are considering, we find no substantial variance between the provisions of the codes and those of the homestead act referred to in *Kingsley v. Kingsley*, *supra*.

It would be doing violence to the plain intent of the statute to attempt to set apart as a homestead a lot and four-storied brick building of the value of twenty-five thousand dollars, the building having been erected and occupied exclusively for

business purposes, when, as averred in the petition here, "the property could not be divided without material injury."

The homestead consists of a dwelling-house in which the claimant resides, and the land on which the same is situated: Civ. Code, sec. 1237. The property spoken of in the petition was dedicated to business purposes, and the owner could not have converted an undivided portion of it into a homestead by living in some of the rooms and filing a declaration.

The probate court may, in a proper case, set apart a homestead, the value whereof—that is, the value of the land and dwelling-house—does not exceed five thousand dollars. The law does not authorize the court to set apart five thousand dollars' worth of property, or five thousand dollars' worth of land on which a dwelling-house may subsequently be erected. This is the more apparent with reference to setting apart as a homestead, for the use of the survivor, separate real property of the deceased "for a limited period": Code Civ. Proc., sec. 1468.

The superior court would be justified in refusing to set apart land as a homestead, unless it were made to appear that there was thereon an edifice which could be used as a dwelling-house. Where the survivor seeks to have set apart a portion of a large building, "and the land on which the same is situated," it should at least be made to appear affirmatively that partition of the land and building was practicable. Here it only appeared to the court below that the property was the separate property of the deceased; that it was of the value of twenty-five thousand dollars; that the building was of brick, four stories high; that it had been rented to divers persons, who carried on various kinds of business therein; and that the property could not be divided without material injury.

It is urged by appellant that the court below should have ordered the land and improvement sold, and that five thousand dollars of the proceeds be paid to her in lieu of a homestead.

It is difficult to see why, if she was not entitled to a homestead, she should have money as a substitute for a homestead. But there is no provision of the codes which authorizes such an order, and by strong implication such an order is prohibited. When a homestead, selected in the lifetime of the deceased, is inventoried at more than five thousand dollars, and a homestead of five thousand dollars cannot be carved out of it, the court may order a sale of the homestead as

selected, and distribute to the surviving wife five thousand dollars of the proceeds: Code Civ. Proc., sec. 1476. Here no homestead was selected during the lifetime of the decedent.

Moreover the appellant sought to have set apart to her a homestead out of the ~~separate property~~ of deceased. In such cases the court can only set apart a homestead "for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order": Code Civ. Proc., sec. 1468. How was the court to estimate the cash value of the use as a homestead, for a period never fixed by order, of part of property, undivided and inseparable? There certainly is no statutory provision authorizing the court to substitute five thousand dollars in money for the temporary use of property as a homestead.

BUILDING CONSISTING OF OFFICES, STORES, ETC., and used for business purposes, is not subject to be selected as homestead: *Casselman v. Packard*, 82 Am. Dec. 710, and note 712; *Kerr v. Branch*, 81 Id. 435, note 438.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

STATE v. HOXSIE.

[15 RHODE ISLAND, L.]

FACT THAT JUROR HAS CONTRIBUTED MONEY FOR PROSECUTION OF PERSONS GENERALLY who were charged with keeping liquor nuisances is not ground for challenging him off the jury, on the trial of a person charged with keeping a liquor nuisance.

COURT IS NOT BOUND TO INSTRUCT JURY IN LANGUAGE OF REQUEST, even when the instruction requested is proper.

PROSECUTION IS NOT BOUND TO ESTABLISH GUILT OF ACCUSED CONCLUSIVELY, but only beyond a reasonable doubt. And therefore an instruction whose language implies that the state is bound to prove conclusively the guilt of a defendant is rightly refused.

MERE PROOF OF SALE OF INTOXICATING LIQUOR IS SUFFICIENT to justify the jury in finding that the sale was illegal, where the statute provides that evidence of the sale or keeping for sale shall be evidence that the sale or keeping is illegal, since it would be unnatural for the accused not to produce his license if he had one.

REQUEST TO CHARGE THAT NOTORIOUS CHARACTER OF DEFENDANT'S PREMISES, or the notoriously bad and intemperate character of persons visiting the same, or the keeping of implements or appurtenances usually appertaining to grog-shops, tippling-shops, and places where intoxicating liquors are sold, is not *prima facie* evidence that such places are nuisances, is properly refused as ambiguous, where the statute makes such matters evidence, but not *prima facie* evidence, of a nuisance.

CREDIBILITY OF WITNESS IS TO BE DETERMINED BY JURY.

"SPOTTER," OR PAID INFORMER, IS NOT ACCOMPLICE, in contemplation of law.

TWO PERSONS MAY BE JOINTLY CONVICTED OF SAME NUISANCE, although one assists the other merely as an agent or clerk.

PLACE USED FOR PURPOSE OF SELLING LIQUORS MAY BE LIQUOR NUISANCE, although that be only an incidental or subordinate, and not the main, purpose.

INDICTMENT for nuisance. The opinion states the case.

Benjamin M. Bosworth, assistant attorney-general, for the plaintiff.

Crafts and Tillinghast, for the defendants.

By Court, DUFFEE, C. J. This case comes up on exceptions from the court of common pleas. It is an indictment for nuisance under the Public Statutes of Rhode Island, chapter 80. The indictment was found and tried at the May term, 1884.

The first exception is for the refusal of the court below to allow the defendants to ask one of the jurors called to sit in the trial, on his *voir dire*, "whether he had contributed money for the purpose of prosecuting persons charged with keeping liquor nuisances, and having them bound over to the court of common pleas for indictment at said May term." The contention is, that the juror was open to challenge if he had so contributed. It will be noticed that the question was not whether the juror had contributed money for the purpose of having the defendants prosecuted and bound over, — the record does not show in fact that the defendants had been bound over, — but whether the juror had contributed for the prosecution of persons generally who were charged with keeping nuisances. If the question had been allowed and had been answered affirmatively, the answer would show, not any personal hostility to the defendants, but only that the juror was an earnest temperance man, who had demonstrated his zeal in the cause by giving of his means to aid in the enforcement of the law against the illegal sale of intoxicating liquors. The fact that he had given money would not affect him with any pecuniary interest in the conviction of the defendants. We do not see, therefore, how he could be challenged off the jury, unless every strong temperance man is liable to be challenged off simply because he is a strong temperance man, anxious to have the law enforced. In *Commonwealth v. O'Neil*, 6 Gray, 343, it was held that members of an association for the prosecution of a certain class of offenses, who had subscribed to the funds of the association, were not incompetent to sit as jurors on the trial of a prosecution of an offense of that class commenced by the agent of the association and carried on at its expense, inasmuch as it did not appear but that they had paid their subscription before the prosecution was commenced, though the court remarked that it might have been well if the

presiding judge had, in his discretion, excused the jurors. The case is much stronger than the case made here. And to the same or like effect, see *State v. Wilson*, 8 Iowa, 407; *Musick v. People*, 40 Ill. 268; *Boyle v. People*, 4 Col. 176; *Commonwealth v. Thrasher*, 11 Gray, 55; Thompson and Merriam on Juries, sec. 181. The first exception must be overruled.

The other exceptions are for refusals by the presiding judge to give certain instructions to the jury as requested by the defendants. We do not think the court is bound, even when the instructions requested are proper, to give them in the language of the requests; for the language, though perfectly correct, may be such that a jury would not readily understand it. One of the instructions requested and refused was "that the sale of intoxicating liquor on divers occasions at a place or tenement is not conclusive evidence that the sale was illegal, unless the state prove that the defendants at the time of said sales had no license." The language implies that it was necessary for the state, for the purpose of convicting the defendants, to establish their guilt conclusively, and not simply beyond a reasonable doubt. We think, therefore, that the instruction was rightly refused. The statute (Pub. Stat. R. I., c. 80, sec. 3) provides that "evidence of the sale or keeping of intoxicating liquors for sale in any building, place, or tenement shall be evidence that the sale or keeping is illegal"; and we see no reason why a jury might not be satisfied beyond a reasonable doubt, by the mere proof of the sale, that the sale was illegal, since it would be unnatural, not to say unreasonable, for the accused, if he had a license, not to produce it. And see *State v. Higgins*, 13 R. I. 330; *State v. Mellor*, 13 Id. 666.

The bill of exceptions sets forth that at the trial testimony was introduced by the state going to show that during the time covered by the indictment intemperate persons were in the habit of resorting to the shop complained of, and that the implements and appurtenances which are usual in a grog-shop or tippling-shop were there. The defendants requested the presiding judge to charge the jury that "the notorious character of the defendants' premises, or the notoriously bad or intemperate character of persons visiting the same, or the keeping of the implements or appurtenances usually appertaining to grog-shops, tippling-shops, and places where intoxicating liquors are sold, is not *prima facie* evidence that such places are nuisances." The judge refused, on the ground that the request was inapplicable, and did instruct the jury that

they must be satisfied of the truth of the charge. The statute makes the matters mentioned in the request evidence of a nuisance, but not *prima facie* evidence. The objection to the request is, that it is ambiguous. The defendants may have meant simply that the jury was not necessarily obliged, in the absence of counter-evidence, to find the defendants guilty on such evidence. The request so understood would be proper enough, for unquestionably the jury ought to be satisfied of the guilt of the defendants beyond a reasonable doubt before returning a verdict against them. The request, however, may have been intended to have, or, if given, might have been understood by the jury as having, another meaning; namely, that proof of the matters mentioned would not be sufficient to throw upon the defendants the burden of defending themselves, or to warrant a conviction, even though the jury were satisfied by said matters beyond a reasonable doubt that the defendants were guilty as charged. The request so understood would be repugnant to the statute, and therefore the judge rightly refused to give it, leaving it to the jury to say, on all the testimony, whether they were satisfied beyond a reasonable doubt of the guilt of the defendants.

The bill of exceptions shows that among the witnesses called by the government were witnesses who testified that they were employed at so much compensation a day in this and other cases, and that they made it their business to procure illegal sales of intoxicating liquors for the purpose of prosecuting the sellers. The defendants requested the judge to charge the jury in regard to these witnesses, "that the testimony of 'spotters' is to be received with great caution and distrust." But the judge refused, and instructed the jury "that they must weigh all testimony with caution, especially where they see any reason to doubt its truth or to discredit it." We do not see any error in this. The credibility of witnesses is a question for the jury. Counsel are always permitted to argue it to the jury as a matter peculiarly within their province. Without doubt it is proper for the court to direct the attention of the jury to anything in the conduct or character of witnesses which affects their credibility; and we think the court below, though it might doubtless have expressed itself more pointedly without fault, did all that it was necessary for it to do. A "spotter" is not, in contemplation of law, an accomplice.

One of the witnesses called by the government testified that during the time covered by the indictment there was a sign

over the shop complained of bearing the words "George W. Hoxsie & Co.," and that George W. Hoxsie and Albert F. Hoxsie were members of the firm of George W. Hoxsie & Co. The only other evidence going to show that said Albert F. Hoxsie was one of the firm, or one of the proprietors of the shop, was to the effect that said Albert and one Charles Hoxsie were seen in and about the shop making sales, and acting as a clerk or proprietor would act. The shop was a country store, containing dry goods, groceries, etc. The defendants requested the court below to instruct the jury "that a witness has no right to testify who were the members of a firm, that being a question of law, and that the testimony of a witness to that effect, unsupported by any facts or explanation, is entitled to no weight." The court refused, on the ground that the instruction requested was inapplicable, and did instruct the jury to find whether one or both of the defendants kept and maintained the place, instructing them that it might have been kept or maintained by both, even if they were not copartners. We do not see any error here. If the defendants had wished to object to the testimony, they should have objected when the testimony was offered; for if they had objected then, the state could have required the witness to give the ground of it; and for anything that appears, the defendants themselves may have told him that they were carrying on the business as partners. The court, moreover, rested its refusal on the ground that the instruction requested was inapplicable; which we infer means that the government did not press for conviction on account of any copartnership, but asked for it only on the evidence that the two defendants were both actually and actively engaged in carrying on the business; and we think the instruction given was correct; namely, that both might be convicted if both took part in maintaining the nuisance, even though one simply assisted the other as agent or clerk: *Commonwealth v. Burke*, 114 Mass. 261; *Commonwealth v. Gannett*, 1 Allen, 7; 79 Am. Dec. 693; *Commonwealth v. Dowling*, 114 Mass. 259.

The defendants also requested the court to instruct the jury that proof that they or either of them kept intoxicating liquor for illegal sale, during the time and at the place named, was not conclusive evidence that they or either of them kept a nuisance; that the jury might, notwithstanding, acquit them, if the jury were satisfied that the sale of liquors was not one of the main purposes of the place, but that the sales were isolated

instances. The court refused so to charge, but did charge the jury that they must find that the defendants kept and maintained a place as described in the indictment. We do not think it was necessary for a conviction that the jury should be satisfied that the sale of liquors was one of the main purposes of the place complained of; on the contrary, we think it was enough if liquor-selling was one of the purposes, though it may have been only an incidental or subordinate purpose, and manifested by only a few instances of sale: *Commonwealth v. Higgins*, 16 Gray, 19; *Commonwealth v. Gallagher*, 1 Allen, 592; *Commonwealth v. Cogan*, 107 Mass. 212. Whether a single sale would suffice, if no other was or ever had been intended, is a more debatable question, which we leave for decision when it shall be duly raised. Our conclusion is, that the exceptions must be overruled, and the case remitted for sentence.

MEMBER OF VOLUNTARY ASSOCIATION FORMED FOR PROSECUTION OF VIOLATIONS OF CERTAIN LAWS, whether competent to serve as juror on trial of complaint for such violation: See *Commonwealth v. Moore*, 58 Am. Rep. 128; *Boyle v. People*, 34 Id. 76.

WHETHER SALE OF INTOXICATING LIQUORS BY SERVANT IS SALE BY MASTER: See *Commonwealth v. Briant*, 56 Am. Rep. 707; *People v. Roby*, 50 Id. 270.

INTENT TO SELL PROHIBITED ARTICLE MAY BE INFERRED FROM KEEPING IT IN STOCK: See *State v. Dunbar*, 57 Am. Rep. 33.

DETECTIVE IS NOT ACCOMPLICE: See *State v. McKean*, 14 Am. Rep. 530; *Speiden v. State*, 30 Id. 126; *Wright v. State*, 32 Id. 599. In incest, the woman is an accomplice: See *Freeman v. State*, 40 Id. 787; but see the note to that case 789. In abortion, the woman is not an accomplice: See *Dunn v. People*, 86 Am. Dec. 319, note 327, where other cases in that series are collected. Who is an accomplice: See *Cross v. People*, 95 Id. 474, note 484.

CONSTITUTIONALITY OF ACT MAKING EVIDENCE OF SALE OF LIQUORS PRIMA FACIE EVIDENCE THAT SALE IS ILLEGAL: See *State v. Benwick*, 43 Am. Rep. 26, note; *State v. Thomas*, 36 Id. 98, note 102.

MISLEADING INSTRUCTIONS SHOULD BE MODIFIED OR REFUSED: See *Snydacker v. Brosse*, 99 Am. Dec. 551, note 556, where other cases in that series are collected.

AMBIGUOUS INSTRUCTIONS SHOULD NOT BE GIVEN: See *Southern R. R. Co. v. Kendrick*, 90 Am. Dec. 332, note 344, where other cases in that series are collected.

PRISONER'S GUILT MUST BE ESTABLISHED BEYOND REASONABLE DOUBT: See *Billard v. State*, 94 Am. Dec. 317, note 322, where other cases in that series are collected.

CREDIBILITY OF WITNESS IS QUESTION FOR JURY: See *Graham v. Anderson*, 92 Am. Dec. 89; *Baker v. Young*, 92 Id. 149.

BURNS v. ALLEN.

[15 RHODE ISLAND, 32.]

ATTORNEY AT LAW WHO RETAINS OUT OF MONEY COLLECTED BY HIM FOR HIS CLIENT EXCESS so apparent as to amount to misconduct will be required by the order of the court to pay over to his client the amount collected, less a reasonable compensation for his services. In this case, the amount collected being seventy-five dollars, thirty per cent is held to be as much as the attorney had a right to charge.

ATTORNEY HAS NO RIGHT TO CHARGE FOR SERVICES RENDERED IN OTHER LITIGATION about officers' fees which grows out of the suit in which he is employed, where the client is not interested in such litigation.

PETITION for an order of court requiring the respondent to pay over to the petitioner moneys collected by him as an attorney. The facts are stated in the opinion.

John M. Brennan, for the petitioner.

Nicholas Van Slyck, for the respondent.

By Court, STINESS, J. In *Orr v. Tanner*, 12 R. I. 94, the court recognized the liability of an attorney at law to summary process for the payment of money in his hands belonging to his client. See also *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489; *In re Fincke*, 6 Daly, 111; *In re Bleakley*, 5 Paige, 311; *In re Aitkin*, 4 Barn. & Ald. 47.

Proceedings of this kind, however, cannot be entertained when the case simply presents a difference of opinion as to the fair amount to be retained for services. The court cannot thus undertake to adjust accounts between counsel and client. But when an attorney withholds the whole, or a sum so much exceeding a proper or justifiable charge as to amount to a breach of his duty, and to raise a presumption of bad faith, the court which admits him to the privilege of practicing at its bar should require of him the fulfillment of the obligations that attend the privilege. Such a process is not, as contended by the respondent, in contravention of his right of trial by jury. He is an officer of the court; he has taken an oath that he will demean himself, as an attorney and counselor of the court, "uprightly, and according to law." When the court undertakes to enforce this plain duty of its officer, it is doing that which a jury trial cannot do. It does not undertake, primarily, to settle the rights and credits of the parties, but only to require that its officers do not make illegal exactions, nor deny to clients their indisputable rights. A jury is the tribunal to settle what is fairly due to the parties under their

contract. Except incidentally, the court does not touch that matter in a proceeding like this, but simply acts with reference to an excess so apparent as to amount to misconduct.

As stated by the court in *Bowling Green Savings Bank v. Todd*, *supra*, "the law is not guilty of the absurdity of holding that, after a client has spent years in collecting through his attorney a lawful demand, he shall be put to spending as many more to collect it from his attorney, and if that attorney should not pay, then try the same track again."

In this case, the respondent attached property, and obtained a judgment of seventy-five dollars and costs for the petitioner against the American Mills Company, in the justice's court of Warwick, in April, 1881. In November, 1881, a subsequent attaching creditor brought a bill in equity against the sheriff and deputy sheriff to review the taxation of costs, and to restrain the sheriff from paying over the costs as taxed. As these costs were incident to judgments, the judgment plaintiffs were afterwards made parties to the bill. But the only question at issue was the amount due to the officers and keepers, no question being made as to the judgment debt itself. The petitioner was in no way interested in the result; for, not having paid these costs, he would be under no obligation to pay them at all if they were decided to be illegal, and otherwise the sheriff would pay them, as he had received the money for that purpose. It was a matter in which only the officers were interested, although others were nominal parties to the bill. Numerous hearings were had, and after decision another suit was brought against the sheriff in the circuit court of the United States about the same matter, which is still pending; but to this suit the petitioner and other judgment creditors are not parties. The respondent claims to hold the whole amount of the judgment for services rendered in these cases and hearings, and also in a suit which he brought against the sheriff in a special court of common pleas, without the knowledge or authority of the petitioner, and which was, under the circumstances, both unnecessary and fruitless. We do not think he is entitled to maintain such a claim. The only service rendered to the petitioner was the issuing of a writ, attaching property, and obtaining a *nil dicit* judgment, followed by execution, on which, after considerable trouble it is true, the money was paid in full. The petitioner cannot be held to pay for defending the large allowance made to the officers for costs. The respondent charges, among other things,

for going to Philadelphia, pending the bill in equity, to induce the petitioner not to sell his claim to other parties. But he cannot charge for doing that. If the petitioner was willing to sell his claim, subject to the lien for costs and service, it was no part of his counsel's duty to prevent it. On the contrary, if he was to be charged with all the litigation then in prospect, it would have been greatly to his advantage to sell and get what he could out of it, before the whole was consumed in expenses; and his counsel, if asked, should have so advised him.

The whole controversy was about the officers' fees, and the defense to the litigation was solely to enable them to hold that which had been allowed to them. No doubt the respondent thought that, as plaintiff's attorney in the justice's court suits, he was bound to defend the officers in the litigation that ensued, and that he had the right to make charges to his clients therefor, but he had not the right to think so. The fact that the cause of complaint against the officers happened to grow out of those suits did not cast upon the plaintiffs the burden of defending them. Moreover, it appears by the record in the Furbush case that, in a week after the filing of the bill, the *ex parte* injunction, which had been granted to restrain the sheriff from paying out the funds in his hands, was dissolved as to the judgment debts and all costs, except those taxed for taking inventories and for keepers' fees. From that time, it cannot be claimed that the petitioner and other judgment creditors had any interest in the suit, even though they were made parties to it for the purpose of reaching the officers, if possible. Upon motion, the sheriff could have been ordered to pay over to them all but the costs in dispute, which in no event were to go to them, and consequently, it is not to be presumed that they would have been held liable for costs, if the complainants had prevailed. The respondent must have understood the matter in this way, for he did not, in that suit, enter an appearance for the petitioner, or for any of the plaintiffs in the justice's court suits, but only for the officers. Clearly he cannot charge the petitioner for services in matters where he did not appear for him. To withhold his money on that account is to withhold it without a legal right to do so.

Under the circumstances, we think that thirty per cent of the judgment debt is certainly as much as could be claimed for all services that the respondent had the right to charge for, and that he should pay over all that he holds above that limit.

SUMMARY JURISDICTION. — Primarily, the power of the court to exercise summary jurisdiction over attorneys and counselors at law rests upon the fact that they are officers of the court, and are therefore responsible to it for professional misconduct in certain cases: *Weeks on Attorneys*, ed. 1878, secs. 77, 80; *Ex parte Garland*, 4 Wall. 333, 378; *Clark v. Willett*, 35 Cal. 354, cited from in note 16 Am. Dec. 99; *Ex parte Bradley*, 7 Wall. 374; *Ex parte Burr*, 2 Cranch C. C. 385; and see note 16 Am. Dec. 98. They are made such officers by the entry of the order of admission, which is the judgment of the court that the attorney is properly qualified for admission: *Ex parte Garland*, 4 Wall. 333, 378; and the office continues for life, subject, however, to the power of the court to suspend or disbar the attorney for proper cause: *Case of Austin*, 5 Rawle, 191, 202, 205; 28 Am. Dec. 657. While, as a general rule, the party must be an attorney of the court, yet he need not necessarily be an attorney of the particular court exercising the jurisdiction, since the misconduct charged may arise out of a cause conducted by him before the particular court, in which case he is amenable to the jurisdiction of that court: *In re Lord*, 2 Scott, 131; *Thompson v. Gordon*, 4 Dowl. & L. 49.

WHAT COURTS MAY EXERCISE JURISDICTION. — All courts of record having authority to admit attorneys to practice have power to exercise summary jurisdiction over them in cases of contempt, in all cases where they are guilty of fraud, dishonest or unprofessional conduct, and frequently in matters of gross negligence, and may in all cases punish them by fine or imprisonment, or, in gross cases of misconduct, may strike their name from the roll: *Ex parte Wall*, 107 U. S. 265, 273; *Floyd v. Nangle*, 3 Atk. 568; *Ex parte Biggs*, 64 N. C. 202; *Whitcomb's Case*, 120 Mass. 118, 120; 21 Am. Rep. 502; *Bradley v. Fisher*, 13 Wall. 335; *Smith v. State*, 1 Yerg. 228; *Rice v. Commonwealth*, 18 B. Mon. 472, 484; *Case of Austin*, 5 Rawle, 191, 203; 28 Am. Dec. 657; *Ex parte Bradley*, 7 Wall. 374; *Ex parte Burr*, 2 Cranch C. C. 379, 386, et seq.; *Baker v. Commonwealth*, 8 B. Mon. 592, 599; *In re Peyton's Appeal*, 12 Kan. 398, 403; *Jackson v. State*, 21 Tex. 668; *Ex parte Robinson*, 19 Wall. 505, 510; *Weeks on Attorneys*, ed. 1878, sec. 80; 1 Archbold's *Queen's Bench Practice*, Chitty's ed., 1866, 147; *In re Davies*, 93 Pa. St. 116; *Cartwright's Case*, 114 Mass. 230, 238; and see note 95 Am. Dec. 334; 12 Id. 178; 79 Id. 536. And this power exists in cases of professional misconduct in and out of court: *People ex rel. Elliott v. Green*, 7 Col. 237, 242; and it is also extended, not only to attorneys and solicitors, but also to clerks, sheriffs, and other officers of courts: *Cartwright's Case*, 114 Mass. 230, 239; therefore, a person appointed by the court as a receiver of an insolvent company, being an officer of the court, is subject to the exercise of its summary jurisdiction: Id.; and inferior courts may punish for contempt: note 12 Am. Dec. 180. But the power to punish for contempt rests only in legislative or judicial bodies, and for this reason the common council of a city has no such power, and a statute vesting such authority in it is unconstitutional and void: *Whitcomb's Case*, 120 Mass. 118, 123; 21 Am. Rep. 502. As to the power of the legislature to punish for contempt, see note 74 Am. Dec. 681; and that a committee of a state senate may punish a witness for contempt for refusal to answer in proceedings before it, see *People v. Sharp*, 107 N. Y. 427; 1 Am. St. Rep. 851. And in the United States courts, the power to exercise jurisdiction in cases of contempt, although called into existence the moment the court is invested with jurisdiction over any matter, is limited and defined by act of Congress: *Ex parte Robinson*, 19 Wall. 505, 510. See, upon the general subject of the power of the court to punish for contempt, notes 100 Am. Dec. 514; 1 Id. 252; 12 Id. 178; 98 Id. 413; 58 Id. 642; 42 Id. 162; as to the authority of the court in cases of con-

structive contempt, see 2 Id. 391; and upon the question of the power of a judge out of court to act in cases of contempt, see 12 Id. 183.

IS A DISCRETIONARY POWER. — The right of the courts to exercise summary jurisdiction in certain cases is a judicial act resting in sound discretion, and it ought to be exercised justly and legally, with great caution and moderation, especially in cases of disbarment: *State v. Kirke*, 12 Fla. 287; 95 Am. Dec. 314; *Rice v. Commonwealth*, 18 B. Mon. 472, 484; *Ex parte Burr*, 9 Wheat. 529; *Ex parte Brownsall*, Cowp. 829; *In re Davies*, 93 Pa. St. 121. The discretion to be exercised is not arbitrary, however, but must be applied according to legal rules: *State v. Chapman*, 11 Ohio, 430, 432; or, as Lord Tenterden says in *Ex parte Bayley*, 9 Barn. & C. 691, "according to law and conscience"; so it was declared in this connection in *Ex parte Secombe*, 19 How. 9, 13, that this "power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility, but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court itself." For this reason, a removal from the bar should never be ordered where any other less severe punishment, as a reprimand, fine, or temporary suspension, would answer: *Bradley v. Fisher*, 13 Wall. 335; see also *Dickens's Case*, 67 Pa. St. 169; 5 Am. Rep. 420; and it is held in *State v. Kirke*, 12 Fla. 287, that inferior courts have not an unlimited discretion in cases coming within the exercise of their summary jurisdiction.

DUE PROCESS OF LAW. — Such summary proceeding against an attorney for an indictable offense does not violate that provision of the constitution which forbids the depriving of any person of life, liberty, or property without due process of law, since such proceeding by the court in cases within its jurisdiction is due process of law: *Ex parte Wall*, 107 U. S. 265, 288.

EXCESS OF POWER. — Where, in an order disbarring an attorney from practice, the court adjudges him infamous, such order is wholly without precedent, and illegal, since no power to make such an order exists in any court or judge: *Fletcher v. Dangerfield*, 20 Cal. 427, 430.

NATURE OF POWER. — In cases of disbarment, the exercise of the right, which the court possesses by reason of its summary jurisdiction, is not intended as a punishment, but simply for protection, being merely the exercise of the court's discretion whether a person should be continued as an attorney: *Ex parte Wall*, 107 U. S. 265, 273; *People v. Turner*, 1 Cal. 143; *Case of Austin*, 5 Rawle, 191, 203; 28 Am. Dec. 657; *State ex rel. McCormick v. Winton*, 11 Or. 456; 50 Am. Rep. 486; *Ex parte Biggs*, 64 N. C. 202; *State v. Holding*, 1 McCord, 379; *Jackson v. State*, 21 Tex. 668, 673; *Walker v. Commonwealth*, 8 Bush, 94.

CHARACTER OF PROCEEDINGS. — It is held in Massachusetts that proceedings of this character, in matters of contempt, are criminal in their nature: *Cartwright's Case*, 114 Mass. 230. So it is held that proceedings to disbar are penal in character in New York: *In re —*, 1 Hun, 321; and the same ruling obtains in Alabama, where the action is under the code: *Thomas v. State*, 58 Ala. 365, 368. So in Indiana, where the matter is governed by statute: *Klingensmith v. Kepler*, 41 Ind. 341; and in Kansas and Texas it is declared not to be a civil case, but a criminal or quasi criminal one: *Peyton's Appeal*, 12 Kan. 398, 405; *State v. Tunstall*, 51 Tex. 81; see also *Middlebrook v. State*, 43 Conn. 257; 21 Am. Rep. 650; and notes 12 Am. Dec. 186; 95 Id. 335. But in *Ex parte Wall*, 107 U. S. 265, 288, it is declared that removal from office

for an indictable offense is no bar to an indictment, since the proceeding is civil in its nature, and collateral to any criminal prosecution.

Proceedings to Disbar Distinct from Those for Contempt. — The power possessed by courts to disbar attorneys is dependent upon other grounds distinct from those upon which rest the power to punish for contempt: *Ex parte Robinson*, 19 Wall. 505, 512; *Jackson v. State*, 21 Tex. 668; *Case of Austin*, 5 Rawle, 191, 204; 28 Am. Dec. 657; *Ex parte Bradley*, 7 Wall. 374; see titles *post*, "Practice," and "Remedy against Unjust or Illegal Exercise of Power."

CONSTRUCTION OF STATUTORY PROVISIONS. — In New York it is held that the statute authorizing the exercise of summary jurisdiction is substantially an exposition of the common law: *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489; and see note 12 Am. Dec. 179; and in Michigan it is declared that the court may disbar an attorney for other causes than those specified in the statute: *In re Mills*, 1 Mich. 392; though the rule in Indiana is, that where the proceeding is regulated by statute, the provisions must be complied with: *Ex parte Trippe*, 66 Ind. 531. So in cases of disbarment, all statutory provisions should be strictly construed: *Klingensmith v. Kepler*, 41 Ind. 341. In North Carolina it is decided that an act is constitutional which provides that before disbarment there must first be a conviction for a criminal offense, or a confession in open court: *Ex parte Schenck*, 65 N. C. 353; see also, upon statutory provisions in matters of contempt, note 98 Am. Dec. 413.

ACTS COMPLAINED OF MUST BE CONNECTED WITH ATTORNEY'S PROFESSIONAL CHARACTER, although courts may exercise summary jurisdiction over attorneys in order to protect suitors in their rights, and prevent their being exposed to wrongful acts of improper officers; yet where it is sought to compel an attorney to fulfill an undertaking to pay money, or perform a contract, such jurisdiction can only be exercised when the contract or undertaking is made by one in his character of attorney, or so connected with such character as to bring it within the power of the court to require that its officer should behave well as an officer: *Re Hill*, L. R. 3 Q. B. 543, 547; *Weeks on Attorneys*, ed. 1878, sec. 78; though the employment is not confined to suits depending in court: *Anderson v. Bosworth*, 15 R. I. 443, 445; since, if the matter in question be wholly unconnected with the solicitor's professional character, or if the misconduct charged be entirely independent of his profession, the court will not interfere: *In re Aikin*, 4 Barn. & Ald. 47; *Matter of Husson*, 62 How. Pr. 358; 13 N. Y. Week. Dig. 542; 26 Hun, 130. So where an attorney who holds property as a trustee, unconnected with his professional character, violates such trust, and wrongfully and illegally sells the same and converts the proceeds to his own use, this will not warrant the court to act in this proceeding. The remedy must be by private action: *People v. Appleton*, 105 Ill. 474; 44 Am. Rep. 812. Nor will the court make any order to deliver any writing or papers or moneys coming into an attorney's hands in any other way or on any other account than in the course of his professional business, but will leave the party to his remedy by action: *Ex parte Burr*, 2 Cranch C. C. 386; *Tidd's Practice*, ed. 1856, 86. Nor will the court compel a solicitor to fulfill an engagement regarding the loan of money made outside of his professional capacity: *In re Clitty*, 2 Dowl. P. C. 421. Nor does the fact that the attorney was acting professionally for the party in other matters which were unconnected with the matter in question furnish a ground for the application: *Matter of Husson*, 62 How. Pr. 358. And where an attorney was directed to employ a proctor to obtain probate of a will, this was held not to constitute such an employ-

ment of him in his professional character as to render him liable to the summary jurisdiction of the court in regard to money received by him to pay the proctor: *Ex parte Cohen*, 3 Dowl. P. C. 600. So charges to disbar must relate to the attorney's professional character; those affecting his character as a man or integrity as a private citizen are no ground: *People v. Allison*, 68 Ill. 151. Nor does it constitute a sufficient ground to disbar a solicitor that he cheated in gambling, the relation of attorney and client having ceased: *Ex parte Stratford*, 12 L. J. Q. B. 231. Again, where a statute provided that no attorney should be struck from the rolls for contempt "unless it involve fraudulent or dishonorable conduct or malpractice," it was held that conduct as an attorney, and not as a person, was meant, and that applying opprobrious and abusive epithets to a judge in vacation was not such a contempt: *Jackson v. State*, 21 Tex. 668, 674.

Exceptions to Rule. — But a different and a less strict rule governs in cases where the act complained of is one which would subject the person to a criminal proceeding here; the court has jurisdiction, although such misconduct is not directly or incidentally connected with the offender's character as attorney. This is illustrated by a case where an attorney who was acting as clerk to a firm of attorneys completed the sale of certain property intrusted to the firm, and appropriated the sum so realized to his own use. Here the court exercised its power by suspending the attorney: *Re Hull*, L. R. 3 Q. B. 543, 547.

Another exception is declared in the case of *People v. Appleton*, 105 Ill. 474, 481, 44 Am. Rep. 812, to exist where the misconduct in the attorney's private capacity is of so gross a character as to render him unfit to be longer permitted to be an attorney. And the court in *Baker v. Commonwealth*, 8 B. Mon. 597, declares that "where an attorney commits an act, whether in the discharge of his duties as attorney or not, showing such a want of personal or professional honesty as renders him unworthy of public confidence," he should, upon proper proceedings, be struck from the roll. But in the case of *In re Blake*, 30 L. J. 32, 35, the court goes to the extent of holding that the misconduct charged need not "arise out of a transaction in which the relation of attorney and client subsists between the attorney and the person against whom the misconduct is practiced."

SUSPENSION AND DISBARMENT OF ATTORNEY. — The cases are numerous where the court, in the exercise of its summary jurisdiction, has ordered attorneys suspended from practice or struck from the rolls. Any breach of the official oath is a good ground for disbaring an attorney: *Case of Austin*, 5 Rawle, 191, 204; 28 Am. Dec. 657. Gross misconduct is a sufficient ground for the exercise of summary jurisdiction as to an attorney, where it relates to matters intrusted to him in his professional capacity, or where it arises or is connected with matters concerning which the presumption arises that the employment or confidence was given in consequence of this professional character as an officer of the court: Archbold's Queen's Bench Practice, Chitty's ed., 1866, 148; *Anonymous*, 6 Mod. 187, case 276; *In re Aikin*, 4 Barn. & Ald. 47; *Ex parte Hall*, 7 Moore, 437. So an attorney has been ordered struck off the rolls for accepting a retainer on both sides: *Mason's Case*, Freem. 74; but see Archbold's Queen's Bench Practice, Chitty's ed., 1866, 150, where it is said that the court would not go to such an extent at the present day, in the absence of gross misconduct. So for any ill practice attended with fraud and corruption, for moral delinquency, or act committed against the principles of common justice and honesty, or "i' guilty of fraud against their clients, or of stirring up litigation by corrupt devices,

or using the forms of law to further the ends of injustice, — in fine, for the commission of any other act of official or personal dishonesty and oppression, they become subject to the summary jurisdiction of the court": *Ex parte Bradley*, 7 Wall. 374; *Penobscot Bar v. Kimball*, 64 Me. 140, 148. But the court should only entertain such charges of moral delinquency as are in their nature gross, and unfit the attorney for an honest discharge of his official trust: *In re Mills*, 1 Mich. 392, 400. Procuring money from the husband of his client upon an order for alimony in a divorce suit, obtained by a false affidavit, to which the attorney fraudulently signed his client's name, is a sufficient ground: *People v. Leary*, 84 Ill. 190. So is forging a deposition to be used in court: *Penobscot Bar v. Kimball*, 64 Me. 140. So is making an improper change in a writing offered as evidence on a trial: *Rice v. Commonwealth*, 18 B. Mon. 472, 482. And an attorney may be disbarred for tampering with a witness, as in case where the answers to the interrogatories to a deposition were all written out by the attorney and furnished the witness, who read them, and for which act the witness was paid money by the attorney, who used the deposition: *In the Matter of Eldridge*, 82 N. Y. 161; 32 Am. Rep. 558. So, for inducing a witness who was subpoenaed by the other side to absent himself: *Stephens v. Hill*, 10 Mees. & W. 28. And the court will suspend an attorney for an attempt to "practice upon witnesses" for the United States in a criminal prosecution: *Ex parte Burr*, 2 Cranch C. C. 400. So it will disbar or suspend an attorney for gross malpractice and dishonesty: *Ex parte Wall*, 107 U. S. 265, 273; *Ex parte Burr*, 2 Cranch C. C. 379, 400; *United States v. Porter*, 2 Id. 60. And an attorney may be struck from the roll for colluding with a debtor to enable him, under color of law, to defraud his creditors: *Ex parte Burr*, 2 Id. 388. So for obtaining a bill of sale from a client of her personal property, then by false representations inducing her to leave the state, and converting the goods to his own use: *Strout v. Procter*, 71 Me. 288. And for obtaining a change of venue by means of a forged affidavit, in violation of a statute: *Ex parte Wall*, 64 Ind. 461; for representing a plaintiff in a divorce suit without authority: *Dillon v. State*, 6 Tex. 55; for making false statements to a client in order to fraudulently retain his money (case under the code): *Stemmer v. Wright*, 54 Iowa, 164; for compromising a criminal charge, as where an attorney took money from a person charged with forgery to let him out of custody: *Rex v. Vaughn*, 1 Wils. 221; for misconduct gravely affecting his professional character: *Ex parte Wall*, 107 U. S. 265, 273; for manufacturing evidence which, if not wholly untrue, is deceptive, to obtain a divorce: *In re Gale*, 75 N. Y. 526; for any fraud or deception practiced on the court by an attorney in obtaining and justifying bail procured by him for his client: *In re Hirst*, 9 Phila. 216; for an infamous crime: *In re Niles*, 5 Daly, 465; for conviction of a felony: *Ex parte Wall*, 107 U. S. 265, 273; *Ex parte Brounsall*, Cowp. 829; for forgery: *Ex parte Burr*, 2 Cranch C. C. 388; for conviction or subornation of perjury: *State v. Holding*, 1 McCord, 379; for killing a person in a duel: *Smith v. Tennessee*, 1 Yerg. 228; for wrongfully converting to his own use money given him by his client for a specific purpose, as to pay a bond or a mortgage: *In re Burd*, 9 N. Y. Week. Dig. 562; for appropriating to his own use money received by him as a collector of taxes: *Delano's Case*, 58 N. H. 5; 42 Am. Rep. 555; for embezzlement of a bond of his client: *In re Davies*, 93 Pa. St. 121; 39 Am. Rep. 729; for accepting a challenge to fight a duel: *Smith v. State*, 1 Yerg. 228; for forging or attempting to forge any matter of record: *Ex parte Burr*, 2 Cranch C. C. 386; for threatening, by letter or otherwise, to put in motion a prosecution against a person, for the purpose of obtaining money

from him: *King v. Southerton*, 6 Term Rep. 125, 142; for disloyalty or treason to the state or national government: *Cohen v. Wright*, 22 Cal. 293; for an offense indicating a depraved professional morality: *In the Matter of —*, 86 N. Y. 563; for conviction of a crime, although pardoned: *Id.*; for trying to induce a member of the bar to get another attorney drunk in order to unfairly obtain a postponement of a pending case: *Dickens's Case*, 67 Pa. St. 169; 5 Am. Rep. 420; for using abusive language to a judge in the street concerning his judicial action in a pending case: *People ex rel. Elliott v. Green*, 7 Col. 237; 49 Am. Rep. 351; for a publication calculated and intended to injure the court: *Ex parte Biggs*, 64 N. C. 202, 398; for an attempt to overawe the court by menace and challenge, or by means of the press: *Case of Austin*, 5 Rawle, 191, 205; 28 Am. Dec. 657; for beating or insulting a judge on the street for a decision in court: *Id.*; for threatening personal chastisement to a judge out of court for his conduct during a trial: *Bradley v. Fisher*, 13 Wall. 335; for incorporating in a petition for a rehearing of a case in the supreme court language contemptuous, insulting, and scandalous to the court: *In re Woolley*, 11 Bush, 95.

But a libel on the court, to amount to a breach of professional duty by an attorney sufficient to warrant disbarment, "should be clearly shown to have been the acquirement of an influence over the judge in the exercise of his judicial functions by the instrumentality of popular prejudice": *Ex parte Steinman and Hensel*, 95 Pa. St. 220, 239. In the case of *In re Palmer*, 10 Leg. Obs. 84, upon application made under the statute 22 Geo. II., c. 26, sec. 11, an attorney's name was struck off the rolls for permitting an unqualified person to conduct an action in his name; and it was held in *Earl Cholmondeley v. Clinton*, 19 Ves. 261, that an attorney could be prevented from giving evidence of his client's secrets by striking him from the roll. The court held in *Sharon v. Hill*, 11 Saw. 122, that an attorney who came into the federal court armed was guilty of unprofessional conduct, and should be suspended or disbarred. Maintenance and barratry are also said to afford sufficient grounds for the exercise of summary jurisdiction: *Weeks on Attorneys*, ed. 1878, secs. 86-88. Upon the question of disbarment, see, further, notes 95 Am. Dec. 335; 42 Am. Rep. 563.

INDICTABLE OFFENSE. — The power of the court to punish for contempt, or to strike from the rolls, does not depend on whether the act done or offense charged be punishable or not by indictment: *Cartwright's Case*, 114 Mass. 230, 239; *Baker v. Commonwealth*, 8 B. Mon. 598, 599; *In re Blake*, 30 L. J. 32, 35; *In re Davies*, 93 Pa. St. 116, 121; 39 Am. Rep. 729; *Stephens v. Hill*, 10 Mees. & W. 28; *United States v. Porter*, 2 Cranch C. C. 60; but see *Anonymous*, 5 Barn. & Adol. 1088.

WHETHER THERE SHOULD BE PRIOR CONVICTION WHERE OFFENSE IS INDICTABLE. — In *Ex parte Wall*, 107 U. S. 265, the question arose and was argued at length as to whether an attorney who had committed an indictable offense could be disbarred until after he had been regularly convicted by a jury in a criminal proceeding; and the court, after exhaustively reviewing the English authorities, said that the rule to be deduced therefrom "seems to be this: that an attorney will be struck off the roll if convicted of felony, or if convicted of a misdemeanor involving want of integrity, even though the judgment be arrested or reversed for error; and also (without a previous conviction) if he is guilty of gross misconduct in his profession, or of acts which, though not done in his professional capacity, gravely affect his character as an attorney; but in the latter case, if the acts charged are indictable, and are fairly denied, the court will not proceed against him until he has been

convicted by a jury, and will in no case compel him to answer under oath to a charge for which he may be indicted. This rule has, in the main, been adopted by the courts of this country." The court then reviews the American authorities, and criticises the cases of *State v. Foreman*, 3 Mo. 412, *Ex parte Fisher*, 6 Leigh, 619, *Beene v. State*, 22 Ark. 149, *Ex parte Steinman and Hensel*, 95 Pa. St. 220, 40 Am. Rep. 637, as being based upon statutory provisions, and therefore not in point; but adds that "the cases now cited do undoubtedly hold that where the offense charged is indictable, and is committed outside the attorney's professional employment or character, and is denied by him, a conviction by a jury should be had before the court will take action for striking his name from the rolls." The cases of *Ex parte Burr*, 1 Wheel. Crim. Cas. 503, 2 Cranch C. C. 379, *Fields v. State*, Mart. & Y. 168, *Smith v. State*, 1 Yerg. 228, *Perry v. State*, 3 G. Greene, 550, *In re Percy*, 36 N. Y. 651, *Penobscot Bar v. Kimball*, 64 Me. 140, *Delano's Case*, 58 N. H. 5, 42 Am. Rep. 553, *In re Wood*, 33 Mich. 299, *Ex parte Walls*, 64 Ind. 461, and *People v. Appleton*, 15 Chic. L. N. 241, were summed up as cases in which a previous conviction was held not necessary; and the conclusion of the court from this review of the authorities was, that "whilst it may be the rule that a previous conviction should be had before striking an attorney off the roll for an indictable offense committed by him when not acting in his character of attorney, yet that the rule is not an inflexible one; . . . that the circumstances of the case, and not any iron rule on the subject, must determine whether and when it is proper to dispense with a preliminary conviction. If . . . the evidence is conflicting, and any doubt of the party's guilt exists, no court would assume to proceed summarily, but would leave the case to be determined by a jury. But where the case is clear, and the denial is evasive, there is no fixed rule of law to prevent the court from exercising its authority." As will be seen from the above, the supreme court divided the acts into those committed by an attorney as such, and those committed by him when not acting in his character of attorney. The theory upon which the English cases proceed is, that an attorney ought not to be compelled to answer, under oath, to an indictable offense, because it would compel the attorney to criminate himself; and this rule is an eminently proper one, and one within the dictates of justice and of common sense, which is the basis of law. That a conviction should precede, see *Anonymous*, 7 N. J. L. 162; *Kane v. Haywood*, 66 N. C. 1 (by statute); that it should not precede, see *State ex rel. McCormick v. Winton*, 11 Or. 456; and see also note 42 Am. Rep. 563.

IN MATTERS OF CONTEMPT. — The court may require, by virtue of its summary jurisdiction, that members of the bar, who had published certain matter libelous in its character, and well calculated to impair the respect due the court, should appear and purge themselves of a charge of contempt: *In re Moore*, 63 N. C. 397. As to the question of contempt arising from publications in newspapers, or from making public speeches about a pending cause, see notes 93 Am. Dec. 413; 97 Id. 629; 1 Id. 252; and upon the liability of an attorney for contempt for improper written communications to a judge, or for a libel on a judge, see notes 26 Am. Rep. 752; 40 Id. 642. The contempt may be something spoken, or may be set out in a written argument: *In re Woolley*, 11 Bush, 99; and it is held in Massachusetts that it is the act done, not the intent with which it was committed, which determines the question whether there is a contempt: *Cartwright's Case*, 114 Mass. 230, 239. An attorney may be punished for contempt for disobeying the rules of court, of which he expressly or impliedly had notice: 1 Bac. Abr., Bouvier's

ed. 1868, 509. So for not complying with an order of court of which the attorney had personal notice: *Weeks on Attorneys*, ed. 1878, sec. 97; *Ex parte Burr*, 2 Cranch C. C. 386; or for preparing an hypothetical case in order to obtain from the court a construction of the terms of a will: *In re Bloom*, 5 Dowl. & R. 389; or for coming into a federal court armed with a deadly weapon, although done to protect himself: *Sharon v. Hill*, 11 Saw. 122; and where a receiver of a court was ordered to restore certain moneys wrongfully taken by him in that capacity, and he failed to obey the order, the court exercised its summary jurisdiction by committing him for contempt: *Cartwright's Case*, 114 Mass. 230. So an attorney may be committed for contempt in refusing to obey an order of court to pay over moneys to his client, and such committal is not imprisonment for debt: *Smith v. McLendon*, 59 Ga. 523.

SUMMARY JURISDICTION IN BEHALF OF CLIENTS. — Although a client may have an action in certain cases against his attorney, yet the courts now give the client a much speedier remedy, and will, in all proper matters coming before it, exercise summary jurisdiction in his behalf to enforce obligations and undertakings to compel the payment over of moneys wrongfully detained, to order the delivery of papers, and frequently adjudge the payment of costs by the attorney, by way of indemnity or otherwise. In short, the court will, as a general rule, afford relief whenever there has been a breach or gross abuse of professional trust arising out of the employment of an attorney as such: *Floyd v. Nangle*, 3 Atk. 568; *Merrifield on Attorneys*, 82; and cases cited *post*. But the relation of attorney and client is an essential and necessary factor to the exercise of such power: *Matter of Attorney*, 63 How. Pr. 152; see cases *post*; though it is said in *Anderson v. Bonworth*, 15 R. I. 443, 445, that the exercise of summary jurisdiction is not confined strictly to such relation. So money will not be ordered paid over upon the motion of a third party, but only at the request of a client to whom the money is due: *In re Fenton*, 5 Nev. & M. 239.

PAYMENT OF MONEYS. — The court, in the exercise of its summary jurisdiction, possesses the power to order an attorney to pay over money to his clients, which he has received in his official capacity, and withholds from them: *In re Brenen*, 17 N. Y. Week. Dig. 163; *Ex parte Burr*, 2 Cranch C. C. 386; *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489; *Cottrell v. Finlayson*, 4 How. Pr. 242; *Dunn v. Vannerson*, 7 How. (Miss.) 579; *In the Matter of Bleakley*, 5 Paige, 311; *People v. Wilson*, 5 Johns. 367; *Grant v. Chester*, 17 How. Pr. 260; and this, although the attorney denies that he owes the client, and claims that money would be due him on an accounting: *In re Brenen*, 17 N. Y. Week. Dig. 163, citing *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489. Nor does the fact that other parties claiming such money have notified him not to pay warrant his holding the same: *Dunn v. Vannerson*, 7 How. (Miss.) 579. But where an action is brought by the client to recover moneys in the attorney's hands, and judgment is obtained, this is a waiver by the client of his right to an attachment: *Cottrell v. Finlayson*, 4 How. Pr. 242; though it is not essential that the attorney should have received the money in any suit or legal proceeding, or that he should have been employed to commence legal proceedings: *Grant v. Chester*, 17 How. Pr. 260. So an attorney will be compelled to account for moneys received by him on mortgage deeds which he prepared for his client: *Ex parte Cripwell*, 5 Dowl. P. C. 689; and the court will order a firm of attorneys to refund money which has been paid to one of the partners, and which has been applied to their banking account: *In re Ford*, 8 Id. 684. So it will compel an attorney

to repay money received by him to pay into court, but which is not so applied: *In re Lawrence*, 2 Smale & G. 367. So where an attorney, acting within the scope of his professional employment, receives money from his client for a specific purpose, as to pay the interest on a mortgage, and he converts the same to his own use, he is subject to the summary power and control of the court, and the lien of such attorney does not attach to money so received: *In re Farnsworth*, 20 N. Y. Week. Dig. 72; and a solicitor, who is also a trustee under a will, may, upon motion, be ordered to pay trust money, admitted by him to be in his possession, into court: *Re Clerihew's Estate*, 24 Law Rep. 860; and the court will compel an attorney of an administrator to render an account to the executors of such administrator: *In re Aitkin*, 4 Barn. & Ald. 47. Again, where money was deposited by the plaintiff's attorneys as security for costs, and it came into the hands of the defendant's attorney upon an *ex parte* order in supplementary proceedings, the court ordered the repayment of such money into court, that a proper application, upon advisement, might be made of the same, it appearing that the money had been paid over to his client by the defendant's attorney: *Fraser v. Ward*, 9 N. Y. Civ. Proc. Rep. 11. So the court will, upon application, order an attorney to pay to his client moneys which the attorney has received from the attorney of the opposite party as pay for his services: *Orr v. Tanner*, 12 R. I. 94. In another case, where an attorney, by a suppression of material facts amounting to fraud, procured an order of court, and obtained money on such order, it was held that he should repay the same: *Wilmerdings v. Fowler*, 45 How. Pr. 142; and if an attorney in the settlement of a suit takes illegal costs against the defendant, and by fraudulent statements induces the payment of them, the court will interfere, and order him to refund the excess; otherwise, in the absence of fraud, the party must resort to his ordinary remedy by action: *Barker's Case*, 49 N. H. 195; though an attorney will only be liable for the moneys actually collected, and may not be held responsible on such motion for negligence or failure through other causes to obtain a judgment for the full amount: *Croft v. Hicks*, 26 Tex. 383. But an attorney cannot retain his fees out of money received from his client in deposit for a special purpose: *Anderson v. Bosworth*, 15 R. I. 443. As to the general lien of an attorney, see cases under the title "Redelivery of Papers," *post*.

Summary Proceeding not a Bar to an Action. — A proceeding seeking the exercise of the summary jurisdiction of the court to compel an attorney to pay over money does not constitute a bar to an action by the client therefor: *Coopwood v. Baldwin*, 25 Miss. 129.

Previous Demand Necessary. — There must be a previous demand by the client for payment before the court will interfere to compel the payment over of moneys: *Cottrell v. Finlayson*, 4 How. Pr. 242; *Ex parte Ferguson*, 6 Cow. 595.

UNDERTAKINGS AND AGREEMENTS. — The court may, in a summary proceeding, inquire into a fact in dispute relating to the existence of an agreement wherein the attorney's compensation is claimed to be fixed: *Porter v. Parmley*, 39 N. Y. Sup. Ct. 219; and it will enforce the performance of an undertaking to pay a debt given by an attorney of the defendant, and in consequence of which the plaintiff withdrew proceedings; and it is no defense that it was an undertaking to pay the debt of another, and within the statute of frauds: *In re Hilliard*, 2 Dowl. & L. 919. So an attorney may be ordered to execute a deed or release to his client, where he has procured him for an inadequate consideration, and by false representations, to assign to him the cause of action; and if he refuses to obey the order, he may be kept

in jail till he does: *Kane v. Haywood*, 66 N. C. 1. In the case of *Ex parte Hughes*, 5 Barn. & Ald. 482, H., a former attorney of E., gave up to G., another attorney, certain papers, upon an unqualified agreement in writing, made between G. and H., that G. should procure E. to execute certain papers. G. having refused to fulfill the undertaking, the court decreed that he perform the same, and furnish bonds for such performance. So where a lease was given an attorney to enable him to make an assignment of it, he was ordered to carry out the agreement: *In re Lowe*, 8 East, 237; though, on the other hand, where a proper and legal contract exists between attorney and client, it will be supported: *Floyd v. Goodwin*, 8 Yerg. 484; 29 Am. Dec. 130.

REDELIVERY OF PAPERS. — As a general rule, an attorney has a lien on papers coming into his hands in the course of his professional employment: *Stevenson v. Blaklock*, 1 Maule & S. 535; *Colmer v. Ede*, 40 L. J. Ch. 185; *Champernown v. Scott*, 6 Madd. 93; *Ex parte Pemberton*, 18 Ves. 282; upon the question of an attorney's lien in general, see notes 95 Am. Dec. 455; 31 Id. 755. A client is, however, entitled to all papers for which he has paid, and the court will, in a proper case, order such papers given up to him: *Anderson v. Passmas*, 7 Car. & P. 193. But upon a summary application to surrender papers, the attorney may set up a lien thereon for services rendered, and the court will not interfere unless such lien is satisfied, or if questioned, is determined by a proper investigation: *Matter of an Attorney*, 63 How. Pr. 152; 1 Bac. Abr., Bouvier's ed. 1868, 503; 1 Tidd's Practice, ed. 1856, 86. So, upon a satisfaction of his lien, an attorney will be compelled to deliver up papers, deeds, or writings which came into his hands in the course of his business, or even if they came into his possession as a steward of the court and a receiver of the rents: *Hughes v. Mayre*, 3 Term Rep. 275. But where certain papers were delivered by an executor to the attorney for the estate, and one of the legatees made an application to the court, and took out summons why the attorney should not deliver up the papers, or furnish copies of them to him, the court refused to order them delivered up or copies furnished, although they were the only papers showing title to the applicant's personal estate: *Miers v. Evans*, 3 Jur. 170. And where there is a doubtful case, or where all the parties for whom the attorney is employed do not join the application, the court will not order the delivery of papers, as in a case where one of the executors of an estate refused to join his co-executor and other parties in the application: *In re Bunting*, 2 Ad. & E. 467. But if papers are ordered delivered up, the court may exercise summary jurisdiction to compel the party to whom they are surrendered to give security for the production and inspection of such papers, on demand of third parties who are interested: *Hughes v. Mayre*, *supra*.

COSTS — GROSS NEGLIGENCE. — Costs will be imposed in cases where there has been gross fraud or malpractice, and often where the attorney has been careless or grossly negligent: *Weeks on Attorneys*, ed. 1878, sec. 95; 1 Tidd's Practice, ed. 1856, 85; *Faulkes v. Pratt*, 1 P. Wms. 593. But the courts will only interfere where the negligence has been gross: *Dickenson v. Jacobs*, 5 L. T. 757; 1 Bac. Abr., Bouvier's ed. 1868, 506; and it is held that the court will not try the question of negligence in this proceeding: *Brazier v. Bryant*, 2 Dowl. P. C. 603. So, although costs may have been unnecessarily incurred, an attorney will not be compelled to pay back such costs to his client unless they have been the result of gross negligence and inattention on his part: *Meggs v. Binns*, 2 Bing. N. C. 625. The court may, however, impose costs on an attorney for instituting, from improper motives and without good grounds, proceedings to disbar another attorney: *Matter of Kelley*, 62 N. Y. 198; and if a solicitor has once entered upon a case, and he

neglects to proceed, and judgment of *non pros.* is entered against the client, the court will order the attorney to pay the costs of such judgment: 1 Tidd's Practice, ed. 1856, 86. So where an attorney brought a suit without consent of the plaintiff, he was ordered to pay to the latter the costs he had been compelled to pay the defendant on failure of the suit: *In re Henderson v. McMahon*, 12 U. C. Q. B. 268; Weeks on Attorneys, ed. 1878, sec. 79.

ADJUTMENT OF ATTORNEY'S FEE. — The court on this motion will adjudge the amount of fees to be retained by the attorney out of his client's money: *Crest v. Hicks*, 26 Tex. 383.

WHEN SUMMARY JURISDICTION WILL NOT BE EXERCISED. — *Disbarment.* — The indulgence in vices affecting to some extent the moral character, when it does not affect the attorney's personal or professional integrity, is not sufficient to warrant disbarment: *Baker v. Commonwealth*, 8 B. Mon. 598. Nor is it a sufficient cause for disbarment that an attorney has brought several *qui tam* actions for revenge: *Ex parte Warren*, 1 Har. & W. 113; nor that after bringing such actions an offer is made to compromise with the defendant: *Smith v. Gillett*, 3 Dowl. P. C. 364. Nor is the wrongful conversion by one of a firm of attorneys of money in the firm's hands a ground for disbarring the other partner: *Klingensmith v. Kepler*, 41 Ind. 341. Nor is the fact that an attorney has exceeded his authority in settlement of his client's claim, by taking notes and other claims, any ground for such proceeding: *Banks v. Cage*, 1 How. (Miss.) 293. Nor is the mere giving of information which may be used against a former client such a betrayal of a client's secrets as to give the court summary jurisdiction: *In re Cutts*, 18 L. T. 71. Nor is it usual for the court to interfere for a mere breach of promise, where there is nothing criminal: 1 Tidd's Practice, ed. 1856, 86. Nor is gross ignorance of the law, where the statute fails to make a knowledge of the law a prerequisite to admission to the bar, a ground for disbarment: *Bryant's Case*, 24 N. H. 140. Nor will such jurisdiction be exercised for appearing in the suit of another without directions, unless there be some circumstance of fraud or corruption: *Ex parte Burr*, 2 Cranch C. C. 386. Nor is it a sufficient ground for striking an attorney from the rolls, that he exhibited a panorama of the Rebellion, and offered gifts of valuables at the close of each entertainment, for the purpose of drawing full houses: *Dickens's Case*, 67 Pa. St. 169; 50 L. T. 488; 5 Am. Rep. 420. And where a judgment was obtained against two attorneys as partners by a client for moneys of his in their hands, and upon dissolution of the copartnership one of the attorneys assumed the obligations, and the firm debts were assigned to him, it was held that it was no reason for disbarment that the attorney failed to collect the debts and pay such judgment: *Kepler v. Klingensmith*, 50 Ind. 434. As a rule, an attorney is not professionally answerable for a scrutiny into the official conduct of a judge which would not expose him to legal animadversion as a citizen; as in case where a judge sent a letter to several attorneys of his court, wherein the lack of discipline in the court-room, disorder in the conduct of business, and remarks made by them calculated to cause an unfavorable impression against the court in the minds of the public were mentioned, and in which the appointment of a successor was suggested as a favorable solution of the difficulty, and the attorneys, in response thereto, and in respectful language, addressed a communication to the court, stating that he had lost the public confidence, and suggested his retirement as a means of restoring it, it was held not a sufficient ground for disbarment; nor did the fact that the letter was published in a public newspaper alter the situation in this respect, when such publication was made for the purpose of

defending their own reputation, and not of assailing that of the court: *Case of Austin*, 5 Rawle, 191, 206; 28 Am. Dec. 657.

Contempt. — Where an attorney, subsequent to the trial of a cause, publishes an article in a newspaper reflecting on the rulings of the court in such trial, it is not a contempt, since it was not "towards the court while engaged in the discharge of a judicial duty": *State v. Anderson*, 40 Iowa, 207.

Payment of Moneys. — Where a client has sued an attorney and recovered judgment for moneys received by him in his character as an attorney, the court will not compel the payment of such moneys: *In re Davies*, 15 L. T. 161. So in a case where it was sought by this proceeding to compel an attorney to pay over money, it was held that the fact that the client had instituted an action against the attorney under which he was arrested, and that the action was then pending, was a sufficient ground for the court to deny such application: *In re Mott*, 36 Hun, 569. And after a client has sued an attorney and recovered judgment, the court will refuse to compel the attorney to pay over the judgment balance, since it will not interfere where the relation between the parties has thus become merged in that of debtor and creditor: *Winsor v. Brown*, 15 R. I. 182. In England it is held that an application will not be granted to compel an attorney to pay counsel fees which had been paid him for that purpose: *Re Angell*, 29 L. J. 227; nor will the court compel an attorney to account simply because he holds security for his claim: *In re Cardross*, 7 Dowl. P. C. 861; and where no fraud or misconduct is suggested, and more than seven years have elapsed since the transactions were closed and adjusted and the money paid over, the court will not give its aid to have them reopened: *Ex parte Shipden*, 6 Dowl. & R. 339.

Delivery of Papers. — The court will not order the delivery up of papers placed in the attorney's hands for a particular professional purpose, as where a deed was given an attorney for him to get another party, who was his client, to execute it, the court refused to interfere: *Ex parte Smith*, 1 Har. & W. 528. So the court refused to act in a case where deeds had been given an attorney to raise money on them: *In re Millard*, 1 Dowl. P. C. 140.

Miscellaneous. — Where an attorney without objection becomes surety for costs, he cannot be proceeded against summarily, but the remedy against him is the same as against any other surety: *Willmont v. Meserole*, 16 Abb. Pr., N. S., 308; and the court will refuse to interfere in cases of mistake only, but will leave the party to his action: *Barker v. Butler*, 1 Black, 780; nor will it as a rule act in cases of negligence or unskillfulness, unless it be very gross: 1 Tidd's Practice, ed. 1856, 86. For other cases where the court refused to interfere, see note 95 Am. Dec. 338.

PRACTICE. — In proceedings to disbar an attorney, the usual rule of practice is to make written charges, and if a proper case be presented, the court will grant a rule to show cause why the attorney's name should not be struck from the roll, which rule is served and returned and the case heard and determined: *State v. Kirke*, 12 Fla. 278; 95 Am. Dec. 314; *Beene v. State*, 22 Ark. 149; *In re Orton*, 54 Wis. 385; *Anonymous*, 22 Wend. 656; *Weeks on Attorneys*, ed. 1878, sec. 83; 1 Bac. Abr., Bouvier's ed. 1868, 508.

When Affidavit is Necessary. — The charges should ordinarily be verified by affidavit: *State v. Kirke*, 12 Fla. 278; 95 Am. Dec. 314; *Walker v. Commonwealth*, 8 Bush, 86; *Ex parte Burr*, 9 Wheat. 529. In the last case it is said that the charges must be under oath, otherwise they would not be acted on or received, and such rule to appear and answer will be granted on motion: *Ex parte Bradley*, 7 Wall. 374. The affidavit in English practice must state not only facts from which the misconduct may be inferred, but a belief that

the attorney has been actually guilty of such misconduct must be asserted: *In re King*, 3 Nev. & M. 716; *Whiteway's Hints to Solicitors*, ed. 1883, 15, 20. In addition, the accusation should set out the specific offense charged, or the insulting words used, or the disrespectful acts done: *Weeks on Attorneys*, ed. 1878, sec. 83; *Perry v. State*, 3 G. Greene, 550; *In re Mills*, 1 Mich. 392; *Dickinson v. Dustin*, 21 Id. 561; *In re Orton*, 54 Wis. 379; since an attorney can only be tried on the charges contained in the information: *People ex rel. v. Allison*, 68 Ill. 151. Though an attorney will not be compelled to answer any matters charged in the affidavit which might if answered be the grounds for an indictment against him: *Robertson v. Mills*, 1 Dowl., N. S., 772; *Stephens v. Hill*, 10 Mees. & W. 28.

When the Court may Proceed of its Own Motion.—Although it is not regular to grant a rule to show cause why an attorney should not be stricken from the roll without an affidavit charging the facts against him, and proper service thereof, yet if the alleged wrongful act is done in the actual presence and knowledge of the judge, he may proceed of his own motion to grant a rule to show cause: *Walker v. Commonwealth*, 8 Bush, 86; see *Rice v. Commonwealth*, 18 B. Mon. 472, 482; *In re Orton*, 54 Wis. 379; *Ex parte Steinman and Hensel*, 95 Pa. St. 220. So where the act charged was a heinous offense, and done virtually in the presence of the court, the attorney having actively participated in the hanging of a man in open day in front of the court-house, and during a temporary recess of the actual session of the court, and a hearing having been had, the court held that the want of an affidavit did not render the proceeding void as *coram novo judice*: *Ex parte Wall*, 107 U. S. 265, 271. In Alabama it is held that unprofessional or disrespectful conduct, although amounting to contempt, or sufficient to warrant an attorney's removal or suspension, will not authorize the court to exclude him from practice at the bar, but he must be proceeded against in the regular way; there must be a judgment of removal or suspension founded on the causes specified in the code: *Withers v. State*, 36 Ala. 252, 267.

Notice and Hearing must be Given.—The attorney is in all cases entitled to notice of the grounds of complaint against him, and has a right to appear and be fully heard before he can be disbarred; since courts possess no power to suspend or disbar an attorney upon *ex parte* proceedings, and thereby illegally deprive him of the personal or property rights which he has in his possession: *Ex parte Garland*, 4 Wall. 333, 378; *In re Davies*, 93 Pa. St. 121; 39 Am. Rep. 729; *Ex parte Steinman and Hensel*, 95 Pa. St. 220, 237; 40 Am. Rep. 637; *Ex parte Robinson*, 19 Wall. 505, 512; *Ex parte Bradley*, 7 Id. 364, 375; *Beene v. State*, 22 Ark. 149; *Ex parte Heyfron*, 7 Miss. 127; *Weeks on Attorneys*, ed. 1878, sec. 83; *Peyton's Appeal*, 12 Kan. 398, 408; *Dickinson v. Dustin*, 21 Mich. 561; *Fletcher v. Dangerfield*, 20 Cal. 427, 430; *People v. Turner*, 1 Id. 143; *In re Houghton*, 67 Id. 511, 517; but see *Cohen v. Wright*, 22 Id. 293. Although it is held in Kentucky that notice to the offender is not essential where the alleged contempt is committed in open court: *In re Woolley*, 11 Bush, 95, 99; but see *Withers v. State*, 36 Ala., N. S., 252, 267; and compare cases under subtitle, *ante*, "When the Court may Proceed of its Own Motion."

Waiver.—Formal proceedings may be waived by the attorney: *In the Matter of —*, 86 N. Y. 563; *Ex parte Burr*, 9 Wheat. 529; and see *Ex parte Wall*, 107 U. S. 265, 271.

Proceeding may be Entitled in the name of the state or the people or the commonwealth: *Peyton's Appeal*, 12 Kan. 398, 405.

Party.—The court proceeds by attachment at the instance of the party injured: *Ex parte Burr*, 2 Cranch C. C. 286. And it is held in Kentucky that

the person preferring the charges and making the affidavit is neither a necessary nor proper party to the proceeding, which is properly conducted in the name of the commonwealth: *Turner v. Commonwealth*, 12 Met. 619.

Where Charge should be Made. — The charge must be made to the court in which the attorney practices; and in England it may be made to the court, or, in certain cases, to a judge in chambers: 1 Archbold's *Queen's Bench Practice*, Chitty's ed. 1836, 152. And in Tennessee it is held that the charge may be exhibited to a judge out of court, if the attorney has notice, and is properly cited to appear: *Smith v. State*, 1 Yerg. 228.

Change of Venue. — In Kansas, a change of venue, or a trial before a judge *pro tem.*, will be granted an attorney in proceedings to disbar him, where it is shown that the regular judge entertains a prejudice against him: *Peyton's Appeal*, 12 Kan. 398; so in Iowa: *State v. Clarke*, 46 Iowa, 155; see also *Baker v. Commonwealth*, 8 B. Mon. 592.

Adjournment. — Upon the hearing, an attorney is entitled to an adjournment to obtain an affidavit out of the county, and also the testimony of a material and necessary witness out of the county; and a refusal to grant such adjournment is error: *Welker v. State*, 4 W. Va. 749.

Lapse of Time a Bar. — An application to strike an attorney from the rolls for misconduct was held made too late after a lapse of three and a half years: *In re* —, 2 Barn. & Adol. 766. And where the charge was of gross oppression to a client, it was held that the application was too late when made after three terms: *Garry v. Wilks*, 2 Dowl. Pr. 649; see also *Ex parte Stappden*, 6 Dowl. & R. 339, where the court refused to reopen certain transactions after a lapse of seven years, cited *ante*. But where an attorney is called upon to pay money according to his undertaking, the fact that two years have elapsed constitutes no defense: *In re Swan*, 15 L. J. Q. B. 402.

Judgment must be Entered: Weeks on Attorneys, ed. 1878, sec. 83; and the exact cause for which an attorney is suspended must be set out in the order: *State v. Watkins*, 3 Miss. 602; and a judgment striking an attorney from the rolls cannot be impeached in a collateral proceeding: *Smith v. State*, 5 Tex. 578.

Jury Trial. — As to the right to a trial by jury in cases of contempt, see note 48 Am. Dec. 192.

DEFENSES. — The fact that a settlement was subsequently made between an attorney and his client of the matter in question does not operate as a defense by the attorney, since the exercise of the power is not to enforce civil remedies between the parties, but to protect the court and the public against unprofessional and unworthy practices by an attorney: *In re Davies*, 93 Pa. St. 122; since conviction can only be had upon clear proof of guilt: *In re Houghton*, 67 Cal. 511; if there is a disavowal of a criminal intention in proceedings for disbarment and contempt, if the attorney positively denies the malpractices imputed, or disavows any criminal intention, the rule will be discharged: *Ex parte Briggan*, 64 N. C. 202, 215, 398; *In re Moore*, 63 Id. 397; 1 Tidd's *Practice*, ed. 1856, 88; see *In re Hurst and Ingersoll*, 9 Phila. 216. But it is held in Kentucky that where the language used to the court is in itself insulting and offensive, the fact that the attorney using such language disavows any intention to commit a contempt does not justify the act, though it may tend to excuse him: *In re Woolley*, 11 Bush, 95. The fact that an attorney has been acquitted on a trial under an indictment for the same act does not affect the right of the court to disbar: *In the Matter of* —, 86 N. Y. 563. Nor that the attorney has been pardoned of the crime in question: *Penobscot Bar v. Kimball*, 64 Me. 140. Nor that one has ceased to be an attorney since

the act was done for which the summary jurisdiction of the court is sought. "The rule is, once an attorney always an attorney, for that purpose": *Simms v. Gibbs*, 6 Dowl. 310.

PUNISHMENT. — Fine and imprisonment is not an appropriate remedy for moral delinquency on the part of an attorney: *Kane v. Haywood*, 66 N. C. 1, 32; but is a proper punishment for contempt of court: *Beene v. State*, 22 Ark. 149; *Kane v. Haywood*, 66 N. C. 1, 32. But if the offense is not committed in the presence of the judge, or is denied by the accused, he should not be punished for contempt, if there is any other way of attaining justice: *In re Hurst and Ingersoll*, 9 Phila. 216. But the court will enforce its orders for the payment of moneys or costs, or the delivery of papers or other matters, by attachment or by commitment for contempt, or if the attorney then refuses, by striking from the roll: 1 Tidd's Practice, ed. 1856, 85; *In the Matter of Bleakley*, 5 Paige, 311; although courts are very loth to resort to the last measure, except in extreme cases, and will in lieu thereof suspend the attorney for a definite period: 1 Archbold's Queen's Bench Practice, Chitty's ed. 1866, 147 et seq.; see note 95 Am. Dec. 340; and total insolvency and absolute inability to pay, coupled with the fact that the attorney could obtain no aid from his friends, and had nothing wherewith to support his family, is sufficient to entitle him to relief from arrest and imprisonment, it appearing that no contempt of court was intended in disobeying an order to pay over moneys: *Kane v. Haywood*, 66 N. C. 1. Upon the question of contempt as a ground for disbarment, see note 95 Am. Dec. 334.

Commitment for Contempt is Void if there is a want of jurisdiction: Note 79 Am. Dec. 536.

Issuing Process. — In *Paul v. Purcell*, 1 Browne, 348, the court directed an officer, who had applied to it for advice, not to issue any process, writs, or orders signed by an attorney who had been suspended.

REMOVAL FROM ONE COURT—RIGHT TO PRACTICE IN OTHERS. — By the statute 23 & 24 Vict. (A. D. 1860), c. 127, sec. 25, any attorney struck from the roll by order of court is to be struck from the rolls of other courts; see also 1 Archbold's Queen's Bench Practice, Chitty's ed. 1866, 147. But in the United States, the fact that an attorney who was a practitioner in the highest courts of a state has been struck from the roll of the district court of the United States in that state, for contempt, is no ground for refusal to admit him to practice in the United States supreme court: *Ex parte Tillinghast*, 4 Pet. 108. So where an attorney was disbarred in the criminal court of the District of Columbia, it was held that he was not thereby disbarred from the bar of the supreme court of that district, since the criminal court was then an independent and separate court: *Bradley v. Fisher*, 13 Wall. 335. And in Florida it is held that striking an attorney from the roll of the county court only denies him the privilege of that court: *State v. Kirke*, 12 Fla. 278; 95 Am. Dec. 314; and see note 95 Am. Dec. 334.

ATTORNEY DISBARRED MAY BE REINSTATED. — Striking from the roll is not a perpetual disability, but the attorney may afterwards be reinstated on motion: 1 Bac. Abr., Bouvier's ed. 1868, 509; *Rex v. Greenwood*, 1 Black. 222; *In re Davies*, 93 Pa. St. 122; 39 Am. Rep. 729; *Ex parte Browne*, 2 Col. 553; Weeks on Attorneys, ed. 1878, sec. 82; see note 95 Am. Dec. 344. Though where an attorney was convicted of a conspiracy to extort money by means of a libel, it was held that he could not be readmitted to practice: *In re Hasdane*, 9 Dowl. Pr. 970.

REMEDY AGAINST ILLEGAL OR UNJUST EXERCISE OF POWER. — Exactly what steps shall be taken to obtain a review of proceedings, or whether mas-

mandamus is the proper remedy to restore an attorney to his rights in cases of disbarment, when an inferior court has decided erroneously, or has unjustly exercised its power, or has exceeded its jurisdiction, is a question which has been the subject of much discussion in the courts. The following cases hold that *mandamus* is the proper remedy: *State v. Kirk*, 12 Fla. 278, 287; 95 Am. Dec. 314; *People v. Turner*, 1 Cal. 143; 1 Id. 190; *People v. Justices of Delaware*, 1 Johns. Cas. 181; *Withers v. State*, 36 Ala. 252, 268; *Ex parte Robinson*, 19 Wall. 505, 513; *Ex parte Bradley*, 7 Wall. 364; *Ex parte Burr*, 9 Wheat. 529. In the last case it was said that the higher court could only interfere where the lower court had clearly exceeded its powers, or had decided erroneously on the testimony, and if, upon the evidence, any doubt existed, it would not act, and that the power should be exercised with great caution. A writ of *mandamus* is not a matter of right, but of discretion with the court, whether it should issue in each particular case: *Randall, Petitioner*, 11 Allen, 481, 482; see also note 95 Am. Dec. 333; therefore the writ will not be issued where, from all the facts of the case, it appears that the attorney had full opportunity to be and was heard, although the preliminary proceedings were irregular: *Randall, Petitioner*, 11 Allen, 473. In a proceeding by *mandamus* to restore an attorney to practice, all the facts necessary to give him the rights claimed must be distinctly averred: *Withers v. State*, 36 Ala. 252, 261. But it was held in *Ex parte Secombe*, 19 How. 9, 13, that the act of the court in disbarring an attorney was judicial, and done in the exercise of discretion, and that a superior court could not therefore issue a *mandamus* to reverse such decision and restore an attorney to his office: See also note 95 Am. Dec. 333; and to the same effect is *Ex parte Biggs*, 64 N. C. 202. but see note 52 Am. Dec. 302; and for a case where an attachment was refused against a judge of a lower court for neglect to comply with a writ of *mandamus*, see *People v. Turner*, 1 Cal. 188; upon the question of whether *mandamus* is a proper remedy to reinstate an attorney who is disbarred, see notes 95 Am. Dec. 344; 52 Id. 302. In the following cases it is held that an order disbarring an attorney is appealable: *In re Orton*, 54 Wis. 379; *Turner v. Commonwealth*, 2 Met. (Ky.) 619; *Walker v. Commonwealth*, 8 Bush, 96; *Dickinson v. Dustin*, 21 Mich. 561; *Ex parte Trippe*, 66 Ind. 531. But it was held in *Ex parte Biggs*, 64 N. C. 202, that no appeal lies in such a case; and in *State v. Tunstall*, 51 Tex. 81, it was declared not to be such a proceeding as to come within a statute allowing an appeal in civil cases; and in the case of *Beene v. State*, 22 Ark. 149, a writ of error was held to be the proper mode of procedure; while in *Ex parte Biggs*, 64 N. C. 202, the court decided that the proper method to obtain a review of the proceedings was by a *certiorari* in the nature of a writ of error. In cases of contempt, however, no appeal or writ of error lies: *Beene v. State*, 22 Ark. 149; see, however, notes 50 Am. Dec. 218; 38 Id. 558, 559; 12 Id. 184, 186; 24 Am. Rep. 624. But although the court will not retry questions of contempt, and has "no jurisdiction for that purpose, still it has power to revise and correct erroneous and illegal sentences or judgments pronounced against such offenses": *Turner v. Commonwealth*, 2 Met. (Ky.) 619, 624. But the higher court should in no case interpose unless the power be clearly exceeded or abused, "as it cannot decide with the same means of information that the court below was in possession of": *Rice v. Commonwealth*, 17 B. Mon. 472, 484. As to how far a judgment for contempt is reviewable on *habeas corpus* proceedings, see note 26 Am. Dec. 49.

POWER OF PRESIDENT OF UNITED STATES TO PARDON in cases of contempt, to remit fines therefor, etc.: See 4 Op. Att'y-Gen. 458; *In re Mullee*, 7 Blatchf. 24; 3 Op. Att'y-Gen. 622.

REXROTH v. COON.

[15 RHODE ISLAND, 85.]

BEES ARE *FERÆ NATURÆ*, and the only ownership in them, until reclaimed and hived, is *ratione soli*.

ACTION OF REDUCING THING *FERÆ NATURÆ* INTO POSSESSION CREATES NO TITLE thereto if such act be wrongful; and therefore a trespasser, who places in a tree on another's land a box for bees to hive in, cannot maintain trover against a third person for taking bees and honey from the box.

WHERE FACTS FOUND BY COURT BELOW ARE BROUGHT UPON RECORD BY BILL OF EXCEPTIONS, in a case heard by the court without a jury, both as to law and facts, the supreme court has power to review the rulings of law made by the lower court upon the facts so found.

TROVER. The opinion states the case.

Thomas H. Peabody, for the plaintiff.

A. B. Crafts, for the defendant.

By Court, TILLINGHAST, J. This is an action on the case in trover for the recovery of damages for the wrongful conversion of a hive of bees, together with the honey and honey-comb, belonging, as is alleged, to the plaintiff. The case was originally brought and tried in the justice's court of the town of Westerly, from whence it was carried by appeal to the court of common pleas. In the court of common pleas, jury trial was waived, and it was tried to the court upon the law and the facts. It comes here by bill of exceptions, the only exception taken being to the ruling of the court that, upon the facts which appeared in evidence, the plaintiff was not entitled to recover. Said facts are incorporated in the bill of exceptions, and are a part of the record of the proceedings. They are substantially as follows, namely: In May, 1881, the plaintiff placed a small pine box, called a bee-hive, in the crotch of a tree, in the woods on land of Samuel Green, in the town of Hopkinton. It remained in this position until about the 1st of September, 1883, when the defendant went upon the premises, and took and carried away the hive, together with a swarm of bees that was then in it, also the honey and honey-comb, and appropriated the same to his own use. The plaintiff had visited the hive about twice a year, while it remained in its position, for the purpose of ascertaining whether any bees were in it, or had been. He had found none. The plaintiff never had any express permission or license from the owner of the land to place or keep his hive in said tree.

The defendant never had any express permission or license

from the owner of the land to come upon it, and take and carry away said property. Said hive was at some distance from any house; and no person knew where said bees came from into said hive, although a number of people kept bees in said town. There was evidence that for several years signs had been posted up by said Green on his premises, forbidding all persons from trespassing thereon, and that one of said signs was within about twenty rods of said hive; but the plaintiff testified that he never saw any of them, and that he never had any notice to keep off said premises. The defendant split open said hive, took out its contents, and then nailed it together again, and replaced it in said tree in as good condition as it was before he took it away. The defendant testified that he knew the owner of said land had forbidden all persons from trespassing thereon; but that said owner had told him that he did not put up said notice to keep off his neighbors, and had given him permission to go upon said land. Demand was made upon defendant in due form before the commencement of suit. After the suit was commenced, the defendant turned over to said Green what then remained in his hands of said bees and honey-comb. The value of the property taken was variously estimated at from \$2.50 to \$10. Upon said facts, the court ruled that the plaintiff was not entitled to recover, and rendered judgment for the defendant for his costs, to which ruling the plaintiff duly excepted.

The only question, therefore, is, whether said ruling was correct.

The plaintiff claims that he hived the bees, and that he thereby acquired at least a qualified property in them, notwithstanding they were upon the land of another, which was sufficient to enable him to maintain this action. We do not think the claim can be substantiated. The action is trover, and in order to recover, the plaintiff must prove some title in himself, coupled with possession, or the right of immediate possession. We do not think he has proved either.

Bees are *feræ naturæ*, and the only ownership in them until reclaimed and hived is *ratione soli*. This qualified ownership, however, although exceedingly precarious, and of uncertain tenure, cannot be changed or terminated by the act of a mere trespasser. That is to say, the act of reducing a thing *feræ naturæ* into possession, where title is thereby created, must not be wrongful. And if such an act is effected by one who is at the moment a trespasser, no title to the prop-

erty is created: *Blades v. Higgs*, 11 H. L. Cas. 621. "Property *ratione soli*," said the lord chancellor in said case, "is the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil." It was further held in the same case that such animals when found killed, and taken by a mere trespasser, became also the property of the owner of the land, the same as if taken by him or his servants: See *Sutton v. Moody*, Ld. Raym. 250; *Earl of Lonsdale v. Rigg*, 11 Ex. 654; *Rigg v. Earl of Lonsdale*, 1 Hurl. & N. 923.

We understand that the law in this country with regard to property in animals *feræ naturæ* is substantially in accord with that of England, excepting, of course, all game laws and statutory regulations, which are now very numerous upon this subject: See *Idol v. Jones*, 2 Dev. 162.

In support of the plaintiff's position in the case at bar, he cites the following authorities, namely: 1 Swift's Digest, 169; 2 Bla. Com. *393; 3 Kent's Com. *350; 2 Inst. 1, 14, 15; *Merrills v. Goodwin*, 1 Root, 209; *Gillett v. Mason*, 7 Johns. 16; and *Goff v. Kilts*, 15 Wend. 550. All of these authorities, in so far as they are pertinent, omitting, of course, the citations from the civil law, which is not in force here, tend in our judgment to support the defendant's position rather than that of the plaintiff.

The case of *Merrills v. Goodwin*, 1 Root, 209, cited by the plaintiff, decides that a man's finding bees in a tree standing upon another man's land gives him no right either to the tree or the bees; and that a swarm of bees going from a hive, if they can be followed and identified, are not lost to the owner, but may be reclaimed. That is to say, a man may pursue his property of this sort even upon the land of another, and retake it; and this, although the owner might be liable for a trespass in so doing.

Gillett v. Mason, 7 Johns. 16, cited by the plaintiff, also recognizes the doctrine of a qualified ownership in bees, *ratione soli*; and while it decides that hiving or inclosing them gives property therein, and that he who first incloses them in a hive becomes their proprietor, yet it is clear from the general tenor of the case, as from the note which follows it, that it "must be understood with the restriction that a person could not come

upon the land of another without his consent for the purpose of taking bees, although unreclaimed."

The case of *Goff v. Kilts*, 15 Wend. 550, is clearly against the position taken by the plaintiff. It was trespass for taking and destroying a swarm of bees which was the property of the plaintiff, but which left the hive and flew off into a tree on land of another. The owner, however, kept the bees in sight, followed them, and marked the tree into which they entered. The court held that the plaintiff's qualified property in the bees continued so long as he could keep them in sight, and possessed the power to pursue them; and that, even though he might be liable for trespass in following and retaking them upon the land of another, yet that the qualified property remained in him, and that no one else would be entitled to take them. With regard to obtaining the ownership in bees, the court say: "According to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarm would be entitled to the property in it; but since the institution of civil society, and the regulation of the right of property by its positive laws, the forest, as well as the cultivated field, belong exclusively to the owner, who has acquired a title to it under those laws. . . . The natural right to the enjoyment of the sport of hunting and fowling, wherever animals *feræ naturæ* could be found, has given way in the progress of society to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the inclosure of another for that purpose. He would be a trespasser, and as such liable for the game taken." See also *Ferguson v. Miller*, 1 Cow. 243; 13 Am. Dec. 519; *Adams v. Burton*, 43 Vt. 36, 38; and Bennett on Farm Law, 64.

In the case at bar, the plaintiff was a trespasser upon the land of Green from the beginning. He had no right to place the box or hive in the tree; and by placing it there he acquired no title to the bees which subsequently occupied it, or to the honey which they produced. Neither is it material to the issue for us to inquire whether the defendant, by taking the bees and honey away without previous permission from the owner of the land, was also a trespasser; for even admitting that he was does not in any way aid the plaintiff in this suit. The fact that A commits a trespass upon land of B, and carries away some of his personal property, would hardly be considered a cause of action in favor of C.

As to the point raised by defendant's counsel, that no ex-

ception can be taken to the judgment where the court below finds both as to the law and the facts, we have to say that we do not so construe the statute. It provides that "if such . . . party be aggrieved by any opinion, direction, ruling, or judgment of the court of common pleas on any matter of law raised by the pleadings, or by an agreed statement of facts, or apparent upon or brought upon the record by a bill of exceptions, shall be entitled to have such matter of law heard and decided by the supreme court," etc.: Pub. Stats. R. I., c. 220, sec. 10. The ruling complained of in this case was made upon a certain state of facts, first found by the court below, which facts are brought upon the record by a bill of exceptions. With regard to the finding of those facts we have nothing to do; but with regard to the law applicable to that state of facts we have to do upon proceedings of this sort: See *Providence Co. Savings Bank v. Phalan*, 12 R. I. 495; *Providence Gas Burner Co. v. Barney*, 14 Id. 18; *Kenney v. Sweeney*, 14 Id. 581.

Exceptions overruled.

BEES ARE FREE NATURE, AND UNTIL HIVED AND RECLAIMED, NO PROPERTY CAN BE ACQUIRED IN THEM: See note to *Wheatley v. Harris*, 70 Am. Dec. 280, where this subject is discussed.

HAMMOND v. HAMMOND.

[15 RHODE ISLAND, 40.]

DIVORCE WILL NOT BE GRANTED FOR HUSBAND'S FAILURE TO PROVIDE necessities for his wife, when he was unable to do so, though such inability resulted from his imprisonment as a punishment for crime by him committed.

PETITION for divorce. The opinion states the case.

Charles F. Baldwin, for the petitioner.

A. and A. D. Payne, for the respondent.

By Court, DUFFEE, C. J. Two causes for divorce are assigned in the petition, namely, extreme cruelty, and neglect or refusal to provide necessities, the respondent being of sufficient ability. Extreme cruelty has not been proved. The only proof of neglect to provide is, that, about a year and a half before the preferring of the petition, the respondent was arrested in Albany, New York, for burglary in the third degree, so called, convicted, and imprisoned in New York for two years. He was destitute of property of any sort, and of

course could not, while in prison, have the fruit of his labor. Clearly, therefore, he did not have sufficient ability to provide necessaries for his wife, and we do not see how it can be said that the statutory cause has been proved. It is urged that the lack of ability ought not to avail the respondent, because he lost the ability by his own fault. We do not think any estoppel can be applied against a respondent in a divorce case. The question of divorce is not a matter which is merely personal to the parties. The state has an interest in it, and has clearly specified the causes; one or more of which must be shown to exist to the satisfaction of the court before the divorce can be granted. We cannot hold that the respondent had sufficient ability, when it is clear that he did not have it, merely because he lost it by his own fault. The fact that the fault was also a crime makes no difference, in a legal point of view; for it is not the crime which the statute makes a cause for divorce, but neglect or refusal to provide, being of sufficient ability. If the divorce were grantable in this case, notwithstanding the husband's lack of ability, we do not see why it would not be grantable for a like reason if the husband had simply disabled himself by breaking an arm or a leg by assuming an unnecessary risk, or by falling sick from a reckless exposure to contagious disease.

Petition dismissed.

NEGLECT TO PROVIDE WIFE WITH NECESSARIES is not a sufficient cause for divorce, when it was not in the husband's power so to provide: *Washburn v. Washburn*, 9 Cal. 475; nor when such necessaries were supplied by her out of her own earnings, they being sufficient for that purpose: *Rycraft v. Rycraft*, 42 Id. 444.

TOWN OF PAWTUCKET v. BALLOU.

[15 RHODE ISLAND, 58.]

IN RHODE ISLAND, WITNESSES TO WILL MUST SUBSCRIBE THEIR NAMES IN PRESENCE of the testator, and the acknowledgment in his presence of their signatures, affixed without his presence, is not sufficient.

APPEAL. The opinion states the case.

Thomas P. Barnefield, for the town of Pawtucket.

Benjamin M. Bosworth, for the appellee.

By Court, DUFFEE, C. J. The question is whether, under the agreed statement of facts, the paper offered for probate is

entitled to probate as the will of Ovis J. Ballou. We think not. Our statute provides that an instrument intended to be a devise of real estate "shall be attested and subscribed in the presence of the deviser by two or more witnesses, or else shall be utterly void and of no effect," and that personal property may be disposed of by will in the same manner as real estate: Pub. Stats. R. I., c. 182, secs. 4, 8. The paper was not subscribed by the witnesses in the presence of Otis J. Ballou. It was subscribed by them while he was absent, where he could not see them subscribe it. The execution is therefore clearly invalid, unless the acknowledgment of subscription by the witnesses was equivalent in law to an actual subscription in the presence of Otis J. Ballou. We do not think it was. Our statutes prescribe the manner in which property, real and personal, shall descend or be distributed, when not disposed of by will. A will may—this paper, if admitted to probate, would—make an entirely different disposition. An instrument purporting to be a will, therefore, ought not to be allowed to have effect as a will, unless it fully answers the requirements of the statute. The declaration of our statute that such an instrument shall be attested and subscribed in the presence of the testator, "or else shall be utterly void and of no effect," is very significant, and demonstrates an intention on the part of the general assembly to make subscription by the witnesses in the presence of the testator of the very essence of the execution. We are unwilling to speculate upon the possibilities of human action, and to take the responsibility of holding that an acknowledgment of subscription by the witnesses in the presence of the testator answers all the purposes of actual subscription in his presence, and that it therefore shall have the same effect. Acknowledgment of subscription is not the same in fact as actual subscription, and, in view of the statute, we do not think we have any right to decide that it is the same in law.

The only case in which acknowledgment of subscription has been held to be equivalent to subscription itself in the presence of the testator is *Sturdivant v. Birchett*, 10 Gratt. 67, which was decided by the court of appeals of Virginia by a divided court. On the other hand, the cases which more or less strongly support the view which we have expressed are numerous. Most of them are cited and reviewed by Judge Gray in an elaborate opinion in *Chase v. Kittredge*, 11 Allen, 49; 87 Am. Dec. 687. In that case one of the witnesses subscribed

the will in the absence of the testator, and before it was signed by him, and after it was signed, acknowledged his signature in the presence of the testator and the other witnesses. The court decided that the execution was invalid, both because the witness subscribed the will before it was signed by the testator, and because he subscribed it in the absence of the testator, the subsequent acknowledgment in his presence being unavailing. See also *Hindmarsh v. Charlton*, 8 H. L. Cas. 159; *In re Downie's Will*, 42 Wis. 66; *Compton v. Mitton*, 12 N. J. L. 70; *Den ex dem. Mickle v. Matlack*, 17 Id. 86; *Pope's Will*, Roberts's Vt. Dig. 748, 17.

We have treated this case as if the acknowledgment was made in the presence of Otis J. Ballou by both witnesses, or by one of them, the other standing by and assenting. The case has been argued as if such was the acknowledgment. The agreed statement, however, does not show that more than one of the witnesses took part in the acknowledgment. Such an acknowledgment by one of the witnesses only, the other being absent, is not, so far as we know, supported by any authority, and it would be, without question, ineffectual.

Our conclusion is, that the decree of the court of probate of the town of Pawtucket, refusing to admit said paper to probate, must be affirmed.

SUBSCRIBING WILL IN PRESENCE OF TESTATOR, WHAT IS, AND NECESSITY OF: See *Maynard v. Vinton*, 60 Am. Rep. 276, note 285, where these subjects are discussed, and other cases in that series are collected; *Chase v. Kittredge*, 87 Am. Dec. 687, note 699, where other cases in that series are collected.

KENT v. BONGARTZ.

[15 RHODE ISLAND, 72.]

IN ACTION FOR LIBEL, ACTUAL MALICE CANNOT BE INFERRED FROM MERE FALSITY of the following charges made by certain citizens in a petition to a town council for the removal from office of a constable: that he was a man utterly devoid of principle, and used his office more for the purpose of wreaking his personal spite than for the peace and harmony of the community; that he was wholly ignorant of the duties of his office; and that he had at various times maliciously and wickedly assaulted and arrested sundry persons who were entirely innocent of the charges made by him against them. Such a petition is a conditionally privileged communication, and it must therefore be affirmatively shown to be malicious in order to sustain the action.

LIBEL. The opinion states the case.

Puge and Owen, for the plaintiff.

Edward C. Dubois, John H. Bongartz, William B. W. Hallett, Charles F. Baldwin, and George N. Bliss, for the defendants.

By Court, DUFFEE, C. J. This is an action on the case for libel. The plaintiff is a citizen of the town of East Providence, and was, when the alleged libel was published, a police officer or constable of the town. The alleged libel is a petition which purports to be signed by the defendants as citizens of East Providence, and which is addressed to the town council, the body having power to appoint and remove the town constables. It asks the town council to remove the plaintiff from his office for the following reasons, which are set forth in the petition, and which the plaintiff complains of as false and defamatory, to wit: "Reasons: 1. That said Kent is a man utterly devoid of principle, and uses his office more for the purpose of wreaking his personal spite than for the peace and harmony of the community; 2. That Kent aforesaid is wholly ignorant of the duties of his office; 3. That said Kent has at various times heretofore maliciously and wickedly assaulted and arrested sundry persons who were entirely innocent of the charges charged by him against them."

At the trial, the plaintiff introduced testimony tending to prove that the petition was signed by some of the defendants; that it was published by presentation to the town council; and that the "reasons" were false. It is not claimed that there was any testimony other than that afforded by the charges contained in the "reasons," and the proof of their falsity, to show any actual or express malice toward the plaintiff on the part of the defendants. At the conclusion of the plaintiff's testimony, the defendants moved for a nonsuit, on the ground that the petition was a privileged communication, and that the plaintiff could not maintain his action thereon without proof of express malice. The court granted the motion, and the plaintiff excepted.

The plaintiff admits that the petition is of the class of communications which are conditionally, not absolutely, privileged, and consequently that the burden was on him to show by affirmative evidence that it was malicious. He contends, however, that the question of malice is a question of fact for the jury, and that, if the case had been left to the jury, there was evidence from which they might have found express malice, namely, the grossness of the charges and the testimony

to their falsity. The question then is, whether the charges themselves are of such a character that actual malice can be inferred from them simply on proof of their falsity. It is well settled that falsity alone is not enough. The author or authors of the communication may make it, and press it upon the attention of others, honestly believing it to be true, and acting from the purest and highest motives, when in fact it is false, and therefore actual malice is not to be inferred from mere falsity: *Somerville v. Hawkins*, 10 Com. B. 583; *Harris v. Thompson*, 13 Id. 333; *Hart v. Gumpach*, L. R. 4 P. C. 439; *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495; *Lewis and Herrick v. Chapman*, 16 N. Y. 369; *Fowles v. Bowen*, 30 Id. 20; *Ormsby v. Douglass*, 37 Id. 477; *Shurtleff v. Stevens*, 51 Vt 501; 31 Am. Rep. 698; *Brow v. Hathaway*, 13 Allen, 239. The question then is, Do the charges in the petition bear upon their face the *indicia* of actual malice? In *Laughton v. Bishop of Sodor and Man*, *supra*, the court say that "undoubtedly a privileged communication may be couched in language so much too violent for the occasion as to afford in itself evidence of malice, whereby the privilege is forfeited." The court added, however, that it will not do to hold that "all excess beyond the exigency of the occasion is evidence of malice," and held that though there were some expressions used beyond what was necessary, they did not warrant any inference of express malice. In *Hart v. Gumpach*, *supra*, the same court used the following language: "It is no doubt true that malice may in some cases be inferred from the defamatory statements themselves; but where representations, if *bona fide*, are privileged by the occasion, the mere circumstance that they are defamatory does not furnish that proof; it must be shown, either from the nature of the language employed or by extrinsic evidence, that they were prompted by bad feeling or wrong motives, and it is not sufficient in such cases that the representations are consistent with the existence of malice; they must be inconsistent with *bona fides* and honesty of purpose." The language accords with the decision in *Somerville v. Hawkins*, *supra*, that actual malice cannot be inferred from connect which is as consistent with *bona fides* as with malice. The maintenance of the privilege is regarded as important, not only to the parties immediately protected by it, but also to the public at large. In *Brow v. Hathaway*, 13 Allen, 239, 242, the court say that the mere fact that the statements made are

intemperate or excessive from over-excitement will not defeat it. See also *Wright v. Woodgate*, 2 Crompt. M. & R. 573.

We do not think the charges here complained of are of such a character that a jury without other proof would be justified in finding them malicious. They are severe in substance, but concise in expression. They employ no language which has the appearance of being used only by way of spiteful invective or malignant vituperation. Their chief fault is, that they are vague and inexplicit, but this is a fault which is as likely to have arisen from unskillfulness as from malice. Indeed, the petition is just such a petition as we might expect from persons honest and earnest in purpose, but ignorant of the proper mode of making charges which are to be judicially investigated. It is as consistent on the face of it with good faith as with malice, and therefore, under the rule laid down in the cases above referred to, it was for the plaintiff to show by extrinsic evidence, not only that the charges were false, but also that the defendants had no probable cause for believing them to be true, or that they acted without sincerity, using the occasion as a mask for personal spite and ill will.

Exceptions overruled.

WHEN PROOF OF ACTUAL MALICE MUST BE MADE IN ACTION OF LIBEL: See *Nancy v. Tros*, 44 Am. Rep. 461; *Shurtleff v. Stevens*, 31 Id. 698; *Lansing v. Christy*, 27 Id. 431; *Roche v. Becker*, 19 Id. 598; *Edwards v. Chandler*, 20 Am. Dec. 222, note 251, where other cases in that series are collected.

HILL v. BAIN.

[15 RHODE ISLAND, 75.]

TOWN SUEE FOR INJURIES FROM OBSTRUCTION IN HIGHWAY MAY SET UP, BY WAY OF ESTOPPEL, JUDGMENT in favor of the defendant in a former action brought by the same plaintiff, to recover for the same injuries, against the person alleged to have caused such obstruction.

TRESPASS on the case. The opinion states the facts.

Page and Owen, for the plaintiff.

Nicholas Van Slyck and Ziba O. Slocum, for the defendant.

By Court, DUFFEE, C. J. The case made by the pleadings is this: September 28, 1882, the plaintiff, while driving on the Pontiac road, so called, in the town of Cranston, in the night-time, in the exercise of reasonable care, came into collision

with certain teams or carts placed in the road and left there by James A. Budlong and Frank L. Budlong, copartners, and was badly injured in his person. He sued the Budlongs at the March term of this court, 1883, in a plea of trespass on the case, laying his damages at twenty thousand dollars, for injuries received from said obstruction; but after trial, the jury found a verdict for the Budlongs, as not guilty of causing the injuries, on which verdict the court gave a final judgment for the Budlongs, which judgment still remains in force. At the December term of the court of common pleas, 1883, the plaintiff brought this action against the town of Cranston, which is an action on the case to recover damages for the injuries aforesaid, on the ground that the town neglected to keep said road, the same being a public highway, safe and convenient for travel. The defendant pleads the judgment for the Budlongs in bar by way of estoppel, alleging that the Budlongs were the authors of the obstruction or defect complained of. The plaintiff demurs to the plea. The case is here on appeal. The question is, whether the plea is a good plea by way of estoppel. The defendant contends that it is, because, in the first place, the plaintiff, in order to recover in this action, would have to prove all which it was necessary for him to prove in order to recover in the former action, except the fact that the said teams and carts were placed in said road and left there by the Budlongs, which fact is admitted by the demurrer, and something else besides, namely, that the town, after notice of the alleged nuisance, actual or constructive, neglected to remove or guard against it; and because, in the second place, the town has only to notify the Budlongs of this action, thus giving them an opportunity to defend it, in order, in case of a judgment against the town, to make the Budlongs liable over for the damages recovered; so that, if the plea is not sustained, the Budlongs, after judgment in their favor proving that the plaintiff has no case, may be compelled, in this roundabout way, to compensate the plaintiff for his injuries. The plaintiff, on the other hand, contends that the plea is bad, because the defendants in the two actions are different, and there is no privity between them.

Undoubtedly, the rule as generally laid down is, that judgments avail as estoppels only for or against parties and privies; but nevertheless, the courts allow themselves a good deal of latitude in applying the rule, observing the spirit of it

rather than the letter. Thus it has been held that a judgment in favor of a deputy sheriff, in an action against him for official misfeasance or default, is available by way of estoppel in an action against the sheriff for the same misfeasance or default: *King v. Chase*, 15 N. H. 9. So it has been held that a judgment in favor of a master in an action against him for the act of his servant, rendered in a trial of the case on its merits, is a bar to a suit against the servant for the same act: *Emery v. Fowler*, 39 Me. 326; 63 Am. Dec. 627. So it has been held that a judgment on the ground of payment against one of two joint and several makers of a promissory note is a bar to recovery against the other, whether, as between the makers, the other signed as principal or surety: *Spencer v. Dearth*, 43 Vt. 98. In *Bates v. Stanton*, 1 Duer, 79, 88, the plaintiff, claiming to be the owner of certain goods, delivered them to the defendant by way of bailment; the defendant afterwards surrendered them to the true owner, taking from him an indemnity bond. Thereupon the plaintiff sued him in trover for their conversion, and it was held that a judgment recovered by the true owner, in an action against the plaintiff involving the right to the goods, was conclusive against the plaintiff in his action against the defendant, inasmuch as the parties, though nominally different, were virtually the same on account of the interest which the true owner had in the defense of the later action by reason of the indemnity bond which he had given to the defendant of record. In *Atkinson v. White*, 60 Me. 596, the owner of a lot of logs mortgaged them to A, and then sold them to B. A afterwards sold a portion of them to C, warranting their title. B sued C in trover for a conversion of the logs bought by him, and recovered judgment, C setting up his title under A. In a later suit by C against A, involving the same title, it was held that the judgment recovered by B was a bar to recovery. See also *Durham v. Giles*, 52 Me. 206, and *Freer v. Stotenbur*, 2 Abb. App. 189.

In these cases the defendants were permitted to avail themselves by way of estoppel of judgments to which they were neither parties nor privies. The ground on which this was permitted seems to have been that the defendants, though not parties to the judgments, were so connected in interest or liability with the parties that the judgments when recovered could be regarded as virtually recovered for them, for the purposes of estoppel, as well as by and for the parties of rec-

ord. The supreme court of Maine, in *Atkinson v. White, supra*, express an inclination to go even further, and to hold broadly that "when a party has once tried a question in one suit, he shall not, without regard to mutual estoppel, again try the same question involving the same testimony in another suit." We think, on the authority of these cases, it is competent for the defendant town to set up, by way of estoppel in the case at bar, the judgment recovered by the Budlongs. Certainly, if the town had notified the Budlongs of the pendency of this action, and the Budlongs had, in consequence of the notice, assumed the defense, it would be competent for them, on the authority of these cases, to plead the former judgment in bar; for they would then be the real defendants, though defending in the name of the town, and ought not be required to try over a question which they have already tried, with the result of a final judgment against the plaintiff in their favor. But the Budlongs, if they assumed the defense, would have to make it in the name of the town, and we see no good reason why the town should not be permitted to make, without calling upon them, any defense which they could make, if called upon, in the name of the town.

Demurrer overruled.

WHETHER JUDGMENT CREATES ESTOPPEL IN FAVOR OF ONE WHO WAS NOT A PARTY TO NOR BOUND BY THE PRIOR LITIGATION. — It is a well-established general rule of law that a judgment is not an estoppel in favor of or against one who was not a party to the former action, nor bound by the judgment therein. An adjudication generally binds only the parties to the judgment, and gives no rights either to or against third parties: *Freeman on Judgments*, sec. 154; *Wells on Res Adjudicata*, 13; *Spencer v. Williams*, L. R. 2 Pro. & D. 230; *Chase v. Swain*, 9 Cal. 130; *Mayor v. Wood*, 50 Id. 171; *Samuel v. Agnew*, 80 Ill. 553; *Cole v. Lafontaine*, 84 Ind. 446; *McDonald v. Gregory*, 41 Iowa, 513; *Stoddard v. Burton*, 41 Id. 582; *Hill v. Stevenson*, 63 Mo. 364; 18 Am. Rep. 231; *McKay v. Kilburn*, 42 Mich. 614; *Henry v. Woods*, 77 Mo. 277; *Vaughan v. Morrison*, 55 N. H. 580; *Buckingham v. Ludlum*, 37 N. J. Eq. 137; *Case v. Reeve*, 14 Johns. 79; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Mackey v. Coates*, 70 Pa. St. 350; *Chandler's Appeal*, 100 Id. 262; *Read v. Allen*, 56 Tex. 182. *Spencer, J.*, in delivering the opinion of the court in *Case v. Reeve*, 14 Johns. 81, said: "It is a general if not universal principle that a suit between two persons shall not bind or affect a third person who could not be admitted to make a defense, to examine witnesses, or to appeal from the judgment." The principle under consideration has found expression in the maxims, *Res inter alios acta alteri nocere non debet*, and *Res inter alios acta aliis nec prodest nec nocet*. In speaking of these maxims, *Freeman* says: "This latter maxim is far more applicable to judgments, and to every kind of estoppel, than the former, because it expresses the truth that no person can bind another by any adjudication who was not himself exposed to the peril of being bound in a like manner,

had the judgment resulted the other way": Freeman on Judgments, sec. 154. It has been held, on the principle that estoppels to be binding must be mutual, that no party can take advantage of a judgment or decree if he would not have been prejudiced by it had it been otherwise: Freeman on Judgments, sec. 159; *McDonald v. Gregory*, 41 Iowa, 513; *Chandler's Appeal*, 100 Pa. St. 262; *Spencer v. Williams*, L. R. 2 Pro. & D. 230. If this principle is to govern, it is hard to see how the decision in the principal case can be sustained; for it is evident that the town defendant in this action could not be prejudiced in any way had the judgment in the former suit been in favor of the plaintiff and against the Budlongs. Nor was there any such relation between the Budlongs and the town as would render it responsible for the final result of the litigation in that action. If the town had notified the Budlongs of the pendency of the action, and they had, in consequence of the notice, come in and assumed the defense, no doubt they could have set up the former judgment by way of estoppel. But until they were so brought in, it is not apparent how the town could avail itself of the former judgment by way of estoppel. As the Budlongs were not notified to appear and defend, and took no part in the defense, it seems to us that the town defendant in this action was an entire stranger to the former judgment, in no way interested in it as rendered, and that would not have been either benefited or prejudiced had it resulted the other way. The mistake in applying the principles of estoppel in such a case must arise from confusion of thought.

WHO ARE TO BE CONSIDERED PARTIES. — It is not merely those who are parties to the record that are to be considered parties within the meaning of the rule under consideration. The principle of estoppel by judgment includes all persons who are substantially parties, although not parties to the record. "Parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies": 1 Greenl. Ev., sec. 535; *Cole v. Favorite*, 69 Ill. 457; *Hanna v. Read*, 102 Id. 596; *Bennitt v. Wilmington Star Mining Co.*, 119 Id. 9; 18 Ill. App. 17; *McNamee v. Moreland*, 26 Iowa, 96; *Stoddard v. Thompson*, 31 Id. 80; *French v. Neal*, 24 Pick. 55; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289; 21 Am. Rep. 417; *Wood v. Ensel*, 68 Mo. 194; *Castle v. Noyes*, 14 N. Y. 329; *New York State M. I. Co. v. Protection I. Co.*, 1 Story, 458; *Lovejoy v. Murray*, 3 Wall. 1; *Robbins v. City of Chicago*, 4 Id. 658; *Herman on Estoppel*, sec. 135. In the case of *Robbins v. City of Chicago*, 4 Wall. 672, Clifford, J., delivering the opinion of the court, said: "Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having those rights substantially are regarded as strangers to the cause; but all who are directly interested in the suit, and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of those rights, are equally concluded by the proceedings." And Comstock, J., in *Castle v. Noyes*, 14 N. Y. 335, said: "It is by no means true that, in order to constitute an estoppel by judgment, the parties on the record must be the same. The term has a broader meaning. It includes the real and substantial parties who, although not upon the record, had a right to control the proceedings and appeal from the judgment." And in the same case, Hubbard, J., said: "It was, therefore, both the duty and the right of the plaintiffs to appear and defend Ronk in the action against him for the alleged trespass. In so doing, they were substantially defending their own act, and in this sense should be regarded as substantially parties to the action in

the place of Ronk. They have, therefore, the same right to use the judgment as an estoppel against the adverse party that Ronk would have."

It is, however, only those who have enjoyed all the privileges above enumerated, collectively, that are concluded by the judgment or decree: *Cecil v. Cecil*, 19 Md. 72; 81 Am. Dec. 626; Wells on Res Adjudicata, sec. 18; Herman on Estoppel, sec. 135. And in *Schroeder v. Lahrman*, 26 Minn. 87, it was decided that a party seeking to avail himself of a judgment as an estoppel, on the ground that he in fact defended the action resulting in the judgment, must not only have defended that action, but must have done so openly to the knowledge of the opposite party, and for the defense of his own interests. The fact that he employed an attorney who appeared for the defendant of record, and that he appeared as a witness for the defendant, was held not to be sufficient. But generally one who, though not a party to the record, defends or prosecutes an action by employing counsel, paying costs, and doing those things that are generally done by a party, will be bound by the judgment rendered therein: *McNamee v. Moreland*, 26 Iowa, 96; *Stoddard v. Thompson*, 31 Id. 80; *Wood v. Ensel*, 63 Mo. 194; 1 Greenl. Ev., sec. 123.

PERSONS IN PRIVITIES WITH PARTIES TO ACTION ARE EQUALLY CONCLUDED by the judgment rendered therein. Privies are those who claim under or in right of parties, or who stand in mutual or successive relationship to the same rights of property. A man may become a privy by being made responsible over to another by positive law, or he may make himself a privy by covenanting for the results or consequences of a suit between other parties; and in either case the judgment will be conclusive against him, provided he be notified of the pendency of the suit, and called upon to defend the same. A judgment obtained in good faith is as conclusive upon privies as upon the parties themselves: *Tarleton v. Tarleton*, 4 Maule & S. 20; *Second National Bank of Erie v. Ocean National Bank*, 11 Blatchf. 362; *Clark v. Carrington*, 7 Cranch, 308; *Murray v. Lovejoy*, 2 Cliff. 191; *Lovejoy v. Murray*, 3 Wall. 1; *Robbins v. Chicago City*, 4 Id. 657; *Salle v. Light*, 4 Ala. 700; 39 Am. Dec. 317; *Belden v. Seymour*, 8 Conn. 304; 21 Am. Dec. 661; *City of Bloomington v. Roush*, 13 Ill. App. 339; *Davenport v. Barnett*, 51 Ind. 329; *Warfield v. Davis*, 14 B. Mon. 33; *Emery v. Fowler*, 39 Me. 326; 63 Am. Dec. 627; *Durham v. Giles*, 52 Me. 206; *Atkinson v. White*, 60 Id. 396; *Weld v. Nichols*, 17 Pick. 538; *Lipscomb v. Postell*, 38 Miss. 476; 77 Am. Dec. 651; *State v. Coste*, 36 Mo. 437; *King v. Chase*, 15 N. H. 9; 41 Am. Dec. 675; *Littleton v. Richardson*, 34 N. H. 179; 66 Am. Dec. 759; *Kip v. Brigham*, 7 Johns. 168; *Lawrence v. Hunt*, 10 Wend. 80; 25 Am. Dec. 539; *Beers v. Pinney*, 12 Wend. 309; *Rapelye v. Prince*, 4 Hill, 119; 40 Am. Dec. 267; *Craig v. Ward*, 1 Abb. App. 454; 3 Keyes, 387; *Freer v. Stodenbur*, 2 Abb. App. 189; *Calkins v. Allerton*, 3 Barb. 171; *Ehke v. Bingham*, 7 Id. 494; *Monroe v. Delavan*, 26 Id. 16; *Jarvis v. Sewall*, 40 Id. 449; *Bates v. Stanton*, 1 Duer, 79; *Catlin v. Hansen*, 1 Id. 309; *Mayor v. Troy & L. R. R. Co.*, 3 Lana. 270; *Castle v. Noyes*, 14 N. Y. 329; *Thomas v. Hubbell*, 15 Id. 405; *Methodist Churches of New York v. Barker*, 18 Id. 463; *Bridgeport Ins. Co. v. Wilson*, 34 Id. 275; *Binsse v. Wood*, 37 Id. 526; *Krekeler v. Ritter*, 62 Id. 372; *Thompson v. McGregor*, 81 Id. 592; *Masser v. Strickland*, 17 Serg. & R. 354; *Evans v. Commonwealth*, 8 Watts, 398; *Garber v. Commonwealth*, 7 Pa. St. 265; *Girardin v. Dean*, 49 Tex. 243; *Walker v. Ferrin*, 4 Vt. 523; *Spencer v. Dearth*, 43 Id. 98; *Krall v. Libbey*, 53 Wis. 292; Herman on Estoppel, sec. 139; Wells on Res Adjudicata, sec. 87.

JUDGMENT, WHEN CONCLUSIVE AGAINST SURETY OF DEFENDANT, OR AGAINST ONE WHO IS LIABLE OVER TO DEFENDANT. — This subject is discussed at length in the note to *Charles v. Hoskins*, 63 Am. Dec. 380-390.

WHITTIER v. COLLINS.

[15 RHODE ISLAND, 90.]

UNSATISFIED JUDGMENT IN ASSUMPSIT FOR MONEY LOANED IS NOT BAR to an action on the case between the same parties, for deceit on account of false and fraudulent representations made by the defendant in procuring the loan. But the value of the judgment in *assumpsit* should be considered by the jury in assessing the damages in the second action.

WHERE EVIDENCE EXCLUDED IS NOT SET OUT IN RECORD, the appellate court will assume that it was rightly excluded.

ACTION on the case. The opinion states the facts.

Warren R. Perce, for the plaintiff.

Colwell and Barney, for the defendant.

By Court, DUFFEE, C. J. Two questions are raised by the petition. The first is this: The plaintiff lends the defendant money on the faith of the defendant's representation that he has property. The defendant failing to repay the money when due, the plaintiff sues him for it in *assumpsit*, and recovers judgment, which remains unsatisfied. The plaintiff afterwards sues the defendant in case for deceit on account of the representation, alleging it to have been false and fraudulent. The defendant pleads the judgment in *assumpsit* in bar of the action. Is the plea good? We think it is not. The two actions are neither identical nor inconsistent. The plaintiff, when he sues in *assumpsit*, affirms the contract, and sues to recover for a breach of it. The plaintiff, when he sues in case for deceit, also affirms the contract, and sues for damages for the fraud by which he was led to enter into it. The case is clearly distinguishable from the case where A sells goods to B, being induced to sell them by B's false and fraudulent representation that he has property, and suing B for the price, recovers judgment therefor, and then sues B in trover for the conversion of the goods. Here the two actions are inconsistent; for A, when he sues B in *assumpsit*, affirms the contract and treats B as the purchaser; whereas, when he sues B in trover, he is obliged to disaffirm the contract, claiming that the goods were not sold, but fraudulently obtained, the sale being void, and that he is still the owner; and this, after he has prosecuted the contract to judgment, the law will not permit him to do, because the judgment in *assumpsit* conclusively affirms the title of B. In the case at bar, if the false representation, instead of having been made by the defendant, had been made by a third person, the unsatisfied judgment against the de-

fendant would evidently not bar an action on the case for deceit against such third person. But we can see no difference in principle between such a case and a case in which the false representation is made by the defendant himself: *Wanzer v. De Baum*, 1 E. D. Smith, 261. The plaintiff in such case, of course, would not necessarily be entitled to recover the full value of the goods sold, or money lent, but it would be the duty of the jury in assessing the damages to consider the value of the judgment in *assumpsit*, and if the judgment were thought to have any value, to reduce the assessment accordingly.

The second question arises under a special plea in bar pleaded by the defendant, which sets up that the defendant, after the judgment in *assumpsit*, applied to take the poor debtor's oath; that the plaintiff, being cited, appeared and opposed the application, alleging, among other objections, the making of the representation as aforesaid; that issue was joined on said allegation; that the magistrate, after full hearing, decided said allegation in favor of the defendant, and allowed him to take the oath, etc., "as by the record, etc., more fully appears." The plaintiff replied *nul tiel record*. The defendant, in his petition, asks for a new trial, because the court erred in excluding the evidence offered by the defendant under said plea. The petition is accompanied by an agreed statement of facts, which sets forth that the defendant offered evidence in support of the allegations of said plea, and of the decision of the magistrate, which was excluded; but neither the petition nor the statement shows what the evidence was which was offered. We doubt whether an allowance, or a refusal to allow the taking of the poor debtor's oath, is a judgment entitled to effect as such by way of estoppel beyond the effect which the statute gives; but if so, we still think the defendant does not show that he is entitled to a new trial, for we cannot, without knowing what the evidence was which was offered, decide that it was improperly rejected, for it may have been, not record, but merely oral testimony. We must presume that the court decided correctly until the contrary appears.

We do not think the defendant is entitled to a new trial on the other grounds assigned.

Petition dismissed.

454; *Dulaney v. Payne*, 40 Id. 205; *Perry v. Dickerson*, 39 Id. 663; *Resseguie v. Byers*, 38 Id. 775, note 778; *Chrisman v. Harman*, 26 Id. 387; *Malloney v. Horan*, 10 Id. 335; *Simpson v. Pearson*, 99 Am. Dec. 577, note 582, where other cases in that series are collected.

MACKAY v. ST. MARY'S CHURCH

[15 RHODE ISLAND, 121.]

ADMINISTRATOR UNDER LAWS OF ONE STATE CAN INDORSE NOTE so as to enable the indorsee to sue in another state, where there are, in the latter state, no claims against the estate of his intestate.

NOTE GIVEN TO TWO JOINT ADMINISTRATORS MAY BE TRANSFERRED BY ONE OF THEM, where it is given for a debt due to the estate of their intestate.

ADMINISTRATORS APPOINTED IN STATE OF THEIR OWN DOMICILE, AND ALSO IN STATE OF THEIR INTESTATE'S DOMICILE, may transfer, in the former state, a note given to the estate, although they may be liable to account in the latter state for the proceeds of such transfer.

PAYMENT TO PAYEE OF NOTE MADE BY MAKER, AFTER NOTICE OF INDORSEMENT given to the latter by the indorsee, cannot avail as against the indorsee.

PAPER SEAL PASTED ON NOTE OF CORPORATION DOES NOT RENDER IT NON-NEGOTIABLE, where there was no vote of the corporation authorizing the making of a note under seal, the note did not purport to be under seal, the seal was not the corporate seal, and the treasurer, who was a witness, did not testify that it was his seal, or that it was put on by him. The seal, in such case, may be regarded as a mere excess.

DEBT. The opinion states the case.

W. W. and S. T. Douglas, for the plaintiff.

Charles E. Gorman and Ambrose Feeley, for the defendant.

By Court, STINESS, J. The plaintiff sues, as indorsee, upon two notes given by the defendant corporation to William H. Kelly and James Duffy, administrators upon the estate of William E. Duffy. It is admitted that William E. Duffy died in Connecticut; that these persons were appointed administrators in Connecticut, and also in the state of New York, where both of them reside; and that the defendant corporation, by its treasurer duly authorized, gave the notes in the settlement of a debt admitted to be due from the corporation to the estate of William E. Duffy. April 8, 1881, after the notes were due, the defendant paid six hundred dollars on account to James Duffy, one of the administrators, under an arrangement made with him to settle the whole indebtedness at a future time for the face of the notes, without interest. After this, and before

April 23, 1881, William H. Kelly, the other administrator, "for himself and James Duffy, administrators of estate of William E. Duffy, deceased," indorsed one of the notes, and delivered the other, which was made payable to the plaintiff as attorney, and by him indorsed in blank to plaintiff, for his fees for legal service rendered in settlement of the estate, his bill having been subsequently allowed by the surrogate in New York, in Kelly's account, to the amount of three thousand dollars. Thereupon the plaintiff notified the defendant of his ownership of the notes, and demanded payment. April 30, 1881, after such notice, the defendant paid to James Duffy, administrator, nine hundred dollars more, and took from him a general release, under seal, of all claims of the estate of William E. Duffy against the defendant, and particularly of the notes in question; the balance, as agreed, to be paid when Duffy should obtain and surrender the notes.

Upon this state of facts several questions arise.

1. Can an executor or administrator under the laws of one state indorse a note so as to enable the indorsee to sue in another state?

This question was fully examined and discussed in *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298, the court sustaining such an indorsement. So, also, in *Riddick v. Moore*, 65 N. C. 382; *Barrett v. Barrett*, 8 Me. 353; and in *Hutchins v. State Bank*, 12 Met. 421, the same doctrine was sustained.

While there are cases which hold to the contrary, — e. g., *Thompson v. Wilson*, 2 N. H. 291; *Dial v. Gary*, 14 S. C. 573; *Stearns v. Burnham*, 5 Me. 261; 17 Am. Dec. 228, — the underlying considerations on which such decisions rest seem to be that an administrator's authority does not extend beyond the jurisdiction of the state in which he is appointed, and that to give effect to such an indorsement would really amount to administration in another state, to the possible detriment of resident creditors. This last consideration does not apply in the case before us, for it does not appear that there are any creditors of William E. Duffy in this state.

Upon the other grounds, the cases which uphold the transfer seem to us to stand upon the better reason. The title to a negotiable instrument passes by indorsement, and if indorsed by an administrator, who is the representative of the deceased owner in the proper settlement of an estate, and without affecting the rights of other parties, why should its effect be limited to the boundaries of the state where the deceased

lived? Not only would this limit the negotiability of the instrument, but it would cast upon an administrator the unnecessary burden of procuring letters of administration in another state simply to collect an admitted debt. Moreover, suppose the administrator, indorsee, and maker lived in the same state at the time of the indorsement, but that the maker subsequently removed to another state, could it be claimed that the indorsee would be barred from suing in the second state because his title came through an administrator who would himself be incapable of bringing suit in that state? Yet the elements of title in the case supposed would be the same as in the case in question. We see no reason why the residence of the maker should affect or control the plaintiff's title or his right to sue. The right of action is transitory; the holder of a note must collect of the maker where he can find him. If, therefore, as against the maker, the holder's title to a note is good, his right of action should be good also. We therefore hold that, in a case like this, in which no interests but those of the parties to the note are involved,—and we say this without passing upon the effect of a transfer when there are creditors in this state,—an administrator in another state may transfer a note upon which the indorsee may sue in this state.

2. Can a note given to two joint administrators be transferred by one of them? There is no question that one of two executors or administrators may transfer notes held by the deceased, for the reason that the several persons are considered as holding one office, and in the settlement of the estate, the act of one is equivalent to the act of all; the power of the office may be fully exercised by one, for each takes the whole in his representative capacity, and not a moiety: *Stone v. Union Savings Bank*, 13 R. I. 25. When, therefore, administrators, in collecting assets, take a note payable to themselves as administrators, though the form of the obligation be changed, its character is the same; it is still a debt due to the estate, not to them personally, and its proceeds are assets of the estate. We see no reason, therefore, why the same rule should not apply as though the obligation remained in its original form. The case is quite different from the ordinary case of joint payees, who may have adverse interests, and where each is entitled to hold his moiety of the obligation until he sees fit to part with it. In the ordinary cases of joint payees, excepting, of course, copartnerships, neither one represents the other; one alone, therefore, cannot transfer a note without the

other. But where one represents the whole, as a partner or an administrator, the rule should follow the reason. And thus it has been held in *Bogert v. Hertel*, 4 Hill, 492, where the cases upon this point were carefully examined. See also 1 Daniel on Negotiable Instruments, sec. 268; and 1 Parsons on Notes and Bills, 159. Most of the cases to which we have been referred by the defendant are cases of individual joint payees and cases of partners after dissolution. In *Sanders v. Blain's Adm'rs*, 6 J. J. Marsh. 446, 22 Am. Dec. 86, the court said that the administrator and administratrix might have sued jointly or individually, but as the administrator had undertaken to act individually, not as administrator, he could not transfer the note without the other payee. *Smith v. Whiting*, 9 Mass. 334, is commented on in *Bogert v. Hertel*, *supra*. In the present case, the notes were given for different amounts, and in different tenor, for a debt due to the estate represented by the administrators. They were, therefore, assets of the estate, and as such we held that they could be dealt with as other assets of the estate by either administrator.

3. Could the administrators in New York transfer in that state a note on which, by reason of the domicile of the intestate, they were accountable in Connecticut? If the administrators in New York were not the same as the administrators in Connecticut, clearly they could not, for in that case the property in the notes would not have passed to them. But they were the same persons. Under their dual authority they had the whole of the estate. The transfer does not show in which capacity Kelly claimed to act. We do not think that the mere fact that he acted in New York, though he might ultimately be accountable in Connecticut, rendered his act invalid. The validity of an administrator's act depends upon its character rather than upon the locality where it is done. Judge Story, in *Trecothick v. Austin*, 4 Mason, 16, 35, says: "A will bequeathing personal estate conveys that property wherever it may be situated, if the will is made according to the law of the place of the testator's domicile. And it has never been supposed that it was indispensable to the assertion of a title, derived under such will, that there should be a probate in every place where such property was situated." In this case, as also in *Hutchins v. State Bank*, 12 Met. 421, transfers of property by foreign executors were recognized. In *Wilkins v. Ellett*, 9 Wall. 740, a payment to a foreign administrator was held to be good against an administrator

afterwards appointed in the state where the debtor resided. Many cases might be cited where payments of debts outside of the jurisdiction of the court appointing the representative have been upheld.

In *Shakespeare v. Fidelity etc. Co.*, 97 Pa. St. 173, it was held that United States coupon bonds, deposited with the defendant for safe-keeping, were properly delivered, in Philadelphia, to a foreign executor. Very often the powers given to executors by wills are broader than those which the law gives to an administrator, and most of the cases on this point relate to executors. But with reference to the settlement of the estate, their powers and duties are the same. In either case, however, the letters testamentary of an executor have no greater extraterritorial force than letters of administration. What an executor can do as the representative of the deceased, regardless of special powers, an administrator may do. In the recent case of *McCord v. Thompson*, 92 Ind. 565, it was held that a note given to administrators in Illinois, for goods sold, made payable in Indiana, could be collected by the administrators in the latter state, even against the claim of an administrator appointed in Indiana. If an executor or administrator can dispose of property outside of the jurisdiction where he is appointed, there is no good reason why he should be required to be within the limits of the jurisdiction when he makes the transfer. In many cases it may be quite necessary for him to be present at the place where the property is, in order to carry out the transfer.

From this review of the law, it appears that the notes could be legally transferred from Kelly, as administrator, to the plaintiff. From the testimony, it appears that they were transferred for adequate consideration in part payment of a claim, which was subsequently passed upon and allowed, for a larger sum than the amount of the notes, by the surrogate in New York. While the evidence shows that the transfer was made by Kelly as soon as he learned that his co-administrator, Duffy, had taken steps to collect the notes, and that it may have been made to prevent Duffy from getting the proceeds of the notes into his hands, still we cannot, simply from this, infer that it was fraudulent, when it appears to have been made upon good consideration, and with immediate notice to the defendant. The testimony shows that the transfer of the notes to the plaintiff was talked over at the time of the settlement, April 30, 1881. A payment made after such notice

could not avail as against the plaintiff, who then held the notes, and who had demanded payment.

One more question remains. A paper seal was pasted upon one of the notes, and the defendant claims that this made it non-negotiable. The vote of the corporation did not authorize the treasurer to make a note under seal; the note itself does not purport to be under seal; it is not the seal of the corporation; and the treasurer, who has been a witness, did not state that it was his seal, or that he put it on. In other respects, it is in the form of an ordinary negotiable promissory note. We think, therefore, that we must consider the paper, as suggested by plaintiff's counsel, "a piece of unnecessary ornament," or, in the words of *Jones v. Horner*, 60 Pa. St. 214, disregard "the seal as a mere excess."

We conclude, therefore, that the plaintiff is entitled to recover the amount due upon the notes when they came into his hands.

Judgment for plaintiff.

POWER OF FOREIGN ADMINISTRATOR TO SUE IN ANOTHER STATE: See *Derringer v. Derringer*, 1 Am. St. Rep. 150, note 160, where other cases are collected; *Reynolds v. McMullen*, 54 Am. Rep. 386; *Equitable L. A. Society v. Vogel*, 52 Id. 344; *Petersen v. Chemical Bank*, 88 Am. Dec. 298, note 308, where other cases in that series are collected.

RIGHT OF ASSIGNEE OF FOREIGN ADMINISTRATOR TO SUE IN ANOTHER STATE. See note to *Derringer v. Derringer*, 1 Am. St. Rep. 160; *Petersen v. Chemical Bank*, 88 Am. Dec. 298, note 310, where this subject is discussed.

SEAL, EFFECT OF ON NEGOTIABILITY OF INSTRUMENT: See *Omnes v. Junction & B. R. R. Co.*, 89 Am. Dec. 230, note 236; *Glopp v. County of Cedar*, 68 Id. 678.

LIPPITT v. AMERICAN WOOD PAPER COMPANY.

[15 RHODE ISLAND, 141.]

LEGAL TITLE TO SHARES OF CORPORATE STOCK, ASSIGNABLE ONLY ON BOOKS of the corporation, does not pass by an assignment of the shares which is neither made nor recorded on the books of the corporation.

EQUITABLE OR EXECUTORY RIGHT OR INTEREST IN CORPORATE STOCK IS NOT ATTACHABLE under the Rhode Island statute.

TRESPASS on the case.

A. and A. D. Payne and Benjamin Lapham, for the plaintiff.
Charles P. Robinson, for the defendant.

By Court, DUFFEE, C. J. This is an action on the case to recover damages of the defendant corporation for refusing to

the plaintiff the rights of a stockholder in the corporation. The plaintiff claims to be entitled to one hundred shares of stock formerly attached as the property of one Morton C. Fisher, in an action against him, and sold on execution under a judgment recovered against Fisher in said action, the plaintiff being the purchaser. The defendant contests the right of the plaintiff, on the ground, among other grounds, that Fisher had no legal, and therefore no attachable, interest or title. Prior to February 8, 1875, said shares belonged to Isaac Hartshorn, and stood in his name on the corporation books. On February 8, 1875, Isaac Hartshorn, by his attorneys in London, transferred said shares by deed of assignment to Morton C. Fisher, then in London. The shares were attached as aforesaid, as the property of Fisher, February 16, 1875. At that time they stood in the name of Hartshorn on the books of the corporation. They were never afterwards transferred into the name of Fisher on the books; but on September 4, 1876, they were, at the request of Fisher, transferred on the books of the corporation to George Earl Church, the transfer being signed "Morton C. Fisher, by William S. Slater, Treasurer." The sale on execution to the plaintiff took place March 20, 1882. The charter of the corporation provides that the "shares shall be transferred in such manner as shall be prescribed by the by-laws of said corporation." One of the by-laws enacts: "The stock shall be assignable only on the books of the company, by the person in whose name the same appears, or by his legal representative; but no transfer shall be made or certificate issued thereupon until the certificate originally issued be surrendered and canceled." The defendant contends that by force of this provision and by-law, the legal title of the hundred shares was, on February 16, 1875, when the attachment is claimed to have been made, in Hartshorn, and that Fisher had, under the assignment to him, only an equitable or beneficial title, which, however good it may have been between him and Hartshorn, was not attachable. The question therefore is, whether the shares were attachable as the property of Fisher on February 16, 1875.

The plaintiff contends: 1. That Fisher had the legal title; and 2. That the shares were attachable even if he had only an equitable or executory title. We do not think he had the legal title. It seems to us that it is impossible to hold that shares which are "assignable only on the books," can be assigned so as to pass the legal title by an assignment neither

made nor recorded on the books. This is the view which has generally prevailed in the courts where the question has arisen: *Fisher v. Essex Bank*, 5 Gray, 373; *Blanchard v. Dedham Gas Light Co.*, 12 Id. 213; *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Northrop v. Newton etc. Turnpike Co.*, 3 Id. 544; *Shipman v. Etna Ins. Co.*, 29 Id. 245; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529; *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507; *Williams v. Mechanics' Bank of New Haven*, 5 Blatchf. 59; *Brown v. Adams*, 5 Biss. 181; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Black v. Zacharia*, 3 How. 483; *Otis v. Gardner*, 105 Ill. 436; *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600; *Application of Thomas Murphy*, 51 Wis. 519; *Union Bank v. Laird*, 2 Wheat. 390; *Pittsburg etc. R. R. Co. v. Clarke*, 29 Pa. St. 146. Some of these cases hold that an attachment of shares of stock, as the property of the person in whose name they stand, will prevail over a prior *bona fide* transfer for value not made nor recorded on the books, though others hold that the transfer is entitled to priority notwithstanding that it carries only an equitable title. The case of *Fisher v. Essex Bank*, *supra*, is a case in which the attachment was sustained with great force of reasoning, the opinion being delivered by Chief Justice Shaw.

The attachment here, therefore, was not good unless an equitable or executory right or interest in stock is attachable under our statute. At common law, an equitable right or interest in personal property is not attachable: *Freeman on Executions*, sec. 116; and it is natural to suppose that the intention of the statute, in subjecting corporate stock to attachment and levy, was simply to put it on a par with other personal property. This view accords with the language of the statute. It is "the shares of the defendant," or his "stock or shares," and not his right or interest in the stock or shares, which, in the words of the statute, may be attached or levied upon: Gen. Stats. R. I., c. 196, sec. 21; c. 197, sec. 9; c. 212, secs. 18-20; Pub. Stats. R. I., c. 207, sec. 22; c. 208, sec. 9; c. 223, secs. 20-22. The officer with process is authorized to make attachment or levy by leaving a copy of the writ or execution with an officer of the corporation. Evidently the idea is, that the copy shall operate by way of notice or garnishment to designate and hold the stock in the charge of the corporation for the purpose of the attachment or levy; and it can accomplish this effectually only when the stock stands in the name of the defendant on the books of the corporation. If the defendant does not appear

on the books as a stockholder, the copy conveys no knowledge of what stock is intended to be attached, unless the corporation happens to be otherwise informed that the defendant is a transferee by transfer not on the books. The statute, moreover, makes it the duty of an officer of the corporation served with a copy of the writ to render an account on oath of what stock or shares the defendant had in the corporation when the writ was served. It cannot be supposed that it was the intention of the statute to make it the duty of the officer to render this account from information obtained otherwise than officially or from the books. For how can the officer render an account of what stock or shares the defendant had, if by "stock or shares" the statute means not only the stock or shares standing in the name of the defendant on the books, but also stock or shares transferred in any other manner so as to vest in him an equitable or executory title? Certificates of stock are often issued with blank assignments with power printed on their backs. A stockholder, in order to transfer the equitable title to the stock, has only to indorse and deliver such a certificate, leaving the blanks to be filled by the holder. A certificate so indorsed will pass from hand to hand, carrying the equitable title with it, like a note payable to bearer. Now, suppose that A, a stockholder of record, so transfers his shares to B, and that a creditor of B issues a writ against him directing the attachment of the stock or shares of the defendant, which is served by leaving a copy with the corporation. The copy will only inform the corporation that the stock or shares of B are attached, but not what stock or shares B has, if he can have any not shown by the books, nor what stock or shares are intended to be reached by the attachment. But directly B passes the certificate to C, and C, filling the blanks, perfects his title by transfer on the books, the corporation having no knowledge that the shares transferred are the shares intended to be attached. Now, can it be that the corporation is bound by the attachment? It is if the plaintiff's construction is correct. It seems to us that if the general assembly had intended such a construction, it would have shown its intention by providing some surer and more efficient procedure. It seems to us, too, that such a construction is repugnant to the clear indications of the statute. It may be said that the corporation might protect itself by inquiry of the attaching creditor. Sometimes it might, perhaps, but certainly not always; and we see no reason to think that it was ever intended to subject the corporation

to the burden and risk of such an inquiry. An attachment, to be really such, ought to operate as a taking and holding of the thing attached.

The plaintiff cites no case to this point. The only cases bearing upon the point which we have found are *Foster v. Potter*, 37 Mo. 525, and *Middletown Savings Bank v. Jarvis*, 33 Conn. 372. In those cases it was held that an equity of redemption in stock, transferred on the books of the corporation by way of mortgage to the mortgagees, was liable to levy, or to attachment and levy, under the statutes of those states. But the decisions were largely influenced by the language of the statutes, the statutes recognizing the right to take stock under encumbrance, and providing a carefully contrived procedure for the identification of the rights or shares taken and sold, and for the protection of all concerned: See Gen. Stats. Mo., c. 160, secs. 25, 26, 53; Gen. Stats. Conn., c. 2, sec. 19; c. 14, sec. 237. It would seem, moreover, that in both states, certainly in Connecticut, the statutes in express terms extend not only to "stock or shares," but to "rights or shares"; and in the Connecticut case the court say "the language is broad, and expressly includes not only the shares of stock, but the rights in them," as a reason for holding that equitable rights are subject to attachment and levy. We do not think the cases are entitled to much weight here, our statute being so different. The plaintiff directs our attention to the General Statutes of Rhode Island, chapter 212, section 19, which provides that the officer's deed of stock sold on execution "shall vest in the purchaser all the defendant's right, title, and interest in such shares so sold," and contends that the language covers all interests, equitable as well as legal. This argument, it seems to us, involves the fallacy known as arguing in a circle, or begging the question; for it is a deed given in pursuance of a valid levy and sale which is to have this effect; and therefore, unless an equitable right is subject to levy and sale, a deed to carry out such levy and sale is of no avail. It is clear that if such rights were subject to levy and sale, a sale of them without identification or any disclosure in regard to them, as the sale, if authorized, might be made, would generally be nothing but a most unconscionable sacrifice. In *Beckwith v. Burrough*, 14 R. I. 366, 51 Am. Rep. 392, we decided that shares of stock were liable to attachment and execution sale as the property of the defendant, notwithstanding his previous transfer of them on the corporation books, if the transfer

was made in fraud of the attaching creditor. We so decided, not without a good deal of hesitation, being pressed by the language of the statute, on the ground that the transfer, being fraudulent and void as against the creditor, might be treated as to him as a mere nullity. In the case at bar we are asked to go further, and hold that shares which are assignable only on the corporation books are liable to attachment and execution sale, as the property of a defendant, when they have not been so assigned to him and do not stand in his name, if they have been assigned to him by transfer not on the books, so as to vest in him an equitable title. We have come to the conclusion, after a careful study and consideration of the subject under the statute, that we cannot so decide: See also *Beckwith v. Burrough*, 13 R. I. 294, 298.

The circumstances of this particular case are such as appeal to us strongly in favor of the plaintiff, but we do not find that they are such as will entitle us to decide in his favor without holding what we are not prepared to hold, namely, that merely equitable rights in stock are liable to attachment and execution sale. We do not think the corporation is subject to any estoppel; for, though the writ issued against Fisher, directing the attachment of his stock and shares in consequence of information received partly from William S. Slater, who was the treasurer of the corporation, that the shares had been transferred to Fisher, it does not appear that the information was, or was understood to be, that the shares had been transferred upon the corporation books. Whether, if the information given had been that the shares had been transferred upon the books, it could have created an estoppel which would avail the plaintiff, we need not decide.

Judgment for defendant for costs.

ASSIGNMENT OF CORPORATE STOCK WITHOUT ENTRY OF TRANSFER on the books of the corporation, as required by statute, is invalid as against attaching creditors of the assignor without notice: *Fort Madison Lumber Co. v. Batavian Bank*, 60 Am. Rep. 789. No transfer of stock is valid until the same is entered upon the books of the corporation, under the California statute: See *Weston v. Bear River & A. W. & M. Co.*, 63 Am. Dec. 117, note 120, where other cases in that series are collected; *State v. Harris*, 36 Id. 460.

STOCK SOLD BUT NOT LEGALLY TRANSFERRED, WHEN OPEN TO ATTACHMENT BY CREDITORS OF VENDOR: See *Colt v. Ives*, 81 Am. Dec. 161, note 169, where other cases in that series are collected.

ATTACHABILITY OF EQUITABLE INTEREST: See *Thacher v. Chambers*, 42 Am. Dec. 431, note 432; *Reed v. Upton*, 20 Id. 545, note 547; *Badlam v. Tucker* 11 Id. 202.

WINDSOR v. BROWN.

[15 RHODE ISLAND, 182.]

SUMMARY JURISDICTION OF COURT CANNOT BE INVOKED TO COMPEL ATTORNEY to pay over to his client money collected by the former, when the client has obtained a judgment therefor against the attorney, and thereby changed the relation of attorney and client to that of debtor and creditor.

PETITION. The opinion states the case.

Cyrus M. Van Slyck, for the petitioner.

George T. Brown, *pro se ipso*.

By Court, STINESS, J. The petitioner asks for an order of the court requiring the respondent, an attorney at law, to pay over a balance of money due to her upon an execution which she holds against him. It is admitted that he collected a claim for her; that upon a disagreement between them about the amount he was entitled to retain for services, she brought suit against him and recovered judgment; and that he has paid over to her something more than he claimed he ought to pay, but less than the amount of the judgment in her favor. As stated in *Burns v. Allen*, 15 R. I. 32, it is not the province of the court, in a proceeding of this kind, to adjust accounts between counsel and client. Neither does the court undertake to collect disputed claims for clients against attorneys in whom there has been an unfortunate and misplaced confidence. Nevertheless, when an officer of the court withholds funds unconscionably, or to an amount clearly above any legal claim, the court, not undertaking to settle the exact sum that may be due, but to enforce good faith and fair dealing, will require its officer to pay so much as is beyond dispute. In such a case, the question before the court is that of honesty, and the fair performance of official duty. In *Balsbaugh v. Frazer*, 19 Pa. St. 95, Black, C. J., said: "If the client is dissatisfied with the sum retained, he may either bring suit against the attorney, or take a rule upon him. In the latter case, the court will compel immediate justice, or inflict summary punishment on the attorney, if the sum retained be such as to show a fraudulent intent. But if the answer to the rule convinces the court that it was held back in good faith, and believed not to be more than an honest compensation, the rule will be dismissed, and the client committed to a jury trial." See also *In re Harvey*, 14 Phila. 287.

In the case before us the petitioner claims that, as the amount due has been determined by suit and judgment, the

balance is unlawfully detained, and should be subject to the order of the court. But this is not so. The respondent cites authority to the effect that a client in proceeding by one process waives the right to proceed by the other. In *Cottrell v. Finlayson*, 4 How. Pr. 242, the language seems to imply that, as remedies by suit and by summary process are concurrent, the election of one is a waiver of the other, because there should not be two suits to recover the same debt. If this is so, it follows that a petitioner seeking a summary order will be bound by that order as to the amount which may be left to be claimed for fees. Instead, therefore, of saying that one retention is so illegal or unjust as to call for the interference of the court, or that another retention, though possibly too large, is still within the range of reasonable and lawful dispute, the court would become the tribunal to try the question of fees, involving also questions of fact. We do not need to go so far as to decide whether the election of one remedy is a waiver of the other. This involves the question whether an application to compel an attorney to pay over a balance which he has no claim to hold deprives either of the parties of his right to a jury trial as to the amount that may fairly be disputed between them. It is not clear that the disputable and the indisputable claims are one and the same debt. They certainly stand on different grounds. But there can be no question that, where a client has obtained a judgment for the whole amount due him, he has thereby waived his right to summary process, for the parties no longer stand in the simple relation to each other of counsel and client. The respondent is not before the court simply as its officer. He is the petitioner's judgment debtor. The summary jurisdiction of the court cannot be invoked when the relation of attorney and client has been changed to that of debtor and creditor. As stated in *In re Davies*, 15 Week. Rep. 46, "the money owing from Davies, which has been received by him as attorney, has been converted into a judgment debt, and no longer exists as the debt which was due from him as an attorney."

See also *Bohanan v. Peterson*, 9 Wend. 503, where the client had taken a note from the attorney.

The petition must therefore be dismissed.

POWER OF COURTS TO EXERCISE SUMMARY JURISDICTION OVER ATTORNEYS:
See *Burns v. Allen*, *ante*, p. 844, and note where this subject is discussed.

ATTORNEY IS OFFICER OF COURT: *Case of Austin*, 28 Am. Dec. 657.

PEOPLE'S SAVINGS BANK IN PROVIDENCE v. WILCOX.

[15 RHODE ISLAND, 253.]

JURISDICTION OF COURT OF LIMITED JURISDICTION MAY BE QUESTIONED COLLATERALLY and disproved, even though the jurisdictional fact be averred of record, and actually found upon evidence by the court, where the jurisdiction depends on some collateral fact which can be decided without going into the case on its merits. But where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the latter question, the judgment therein is collaterally conclusive.

COURTS OF PROBATE IN RHODE ISLAND are courts of limited jurisdiction.

GRANT OF LETTERS OF ADMINISTRATION ON ESTATE OF ONE WHO DID NOT RESIDE WITHIN JURISDICTION of the court making the grant at the time of his death is void, and may be attacked collaterally.

INTERPLEADER. The opinion states the case.

James Tillinghast, for the complainant.

Edwin D. McGuinness, for respondent Wilcox.

George T. Brown, for the other respondents.

By Court, DUFFEE, C. J. Mary A. Wilcox died November 4, 1882, leaving on deposit, in the People's Savings Bank, in the city of Providence, the sum of about eight hundred dollars. Shortly before her death, she made a gift *causa mortis* of the money to the defendant George A. Sayer, delivering to him the bank-book to that intent, in trust, nevertheless, to pay from said money her debts and funeral expenses, and to pay the residue over to one Emma B. Moshier, her cousin. She was, when she died, and for some time had been, a domiciled inhabitant of the city of Providence, resident therein, though she had at a previous period resided in the town of Tiverton. Shortly after her death, to wit, on December 4, 1882, the defendant Holder N. Wilcox, her uncle, and one of her next of kin, was appointed administrator on her estate by the court of probate of Tiverton, on his application, wherein she was described as "late of Tiverton, deceased." Subsequently, to wit, on March 11, 1885, the defendant George A. Sayer was appointed administrator on her estate by the municipal court of the city of Providence, a court exercising probate jurisdiction in said city. The defendants both claim the deposit, Wilcox as administrator, and Sayer both as administrator and as donee *causa mortis*. The question is, Which of the two is entitled to it?

Sayer contends that the court of probate of Tiverton had no

jurisdiction to appoint Wilcox, and that his appointment is therefore null and void. Wilcox contends that his appointment cannot be questioned collaterally, but must be presumed to be valid until it is set aside in some direct proceeding. There is a diversity of decision upon the question raised by this contention. The conflict is irreconcilable. The reasons are strong on both sides. On the one side it is urged that when a court, even though it be an inferior tribunal, has jurisdiction under particular circumstances, its decision that the circumstances exist ought to be as conclusive, until set aside in some direct proceeding, as its decision on any other question of fact in the case. This is a view which strongly commends itself when the parties have been heard; but the question may be decided by default, though the practice is a bad one, without hearing and without any actual notice, when the notice is by publication or posting, the parties having no reason to be on the lookout for notice from a court which has no jurisdiction. The appointment of Wilcox was made without hearing. Again, it is urged that, for the security of persons dealing with the administrator on the supposition that he had been properly appointed, the appointment ought to be sustained. There is great cogency in point of policy in this argument. We have been greatly inclined to yield to it. But on the other hand, the question arises, How upon principle can a court acquire jurisdiction by simply deciding that it has it, when the circumstances which are necessary to give it do not exist? We have come to the conclusion, after much consideration, that the rule applicable to courts of limited jurisdiction, which is the better established on principle and authority, is this: that where the jurisdiction depends on some collateral fact which can be decided without going into the case on its merits, then the jurisdiction may be questioned collaterally and disproved, even though the jurisdictional fact be averred of record, and was actually found upon evidence by the court rendering the judgment: *Chew v. Holroyd*, 8 Ex. 249; *Bunbury v. Fuller*, 9 Id. 111; *Wanzer v. Howland*, 10 Wis. 8; *Clark v. Holmes*, 1 Doug. (Mich.) 390; *Holyoke v. Haskins*, 5 Pick. 20; 16 Am. Dec. 372; *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87; *Culver's Appeal*, 48 Conn. 165; *Sears v. Terry*, 26 Id. 273, 285; *Fowle v. Coe*, 63 Me. 245; *Salladay v. Bainhill*, 29 Iowa, 555; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510, 520; 68 Am. Dec. 89; *Wilson v. Frazier*, 2 Humph. 30; *Johnson v. Corpenning*, 4 Ired. 216; 44 Am. Dec. 106; *Moore v. Smith*, 11 Rich. 569,

577; 73 Am. Dec. 122; *Burns v. Van Loan*, 29 La. Ann. 560; *Miller v. Jones's Adm'r*, 26 Ala. 247; *Brown v. Foster*, 6 R. I. 584; 1 Smith's Lead. Cas. *820. But on the other hand, where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the latter question, then the judgment is collaterally conclusive, because the question of jurisdiction cannot be retried without partly at least retrying the case on its merits, which is not permissible in a collateral proceeding: *Brittain v. Kinnaird*, 1 Brod. & B. 432; *Regina v. Bolton*, 1 Q. B. 66; *Basten v. Carew*, 3 Barn. & C. 649; *Cave v. Mountain*, 1 Man. & G. 257; *Staples v. Fairchild*, 3 N. Y. 41; *Angell v. Robbins*, 4 R. I. 493. The distinctions recognized in the rule as stated seem to have been observed by this court in deciding the cases of *Brown v. Foster*, 6 Id. 584, and *Angell v. Robbins*, 4 Id. 493, above cited.

We think the courts of probate of this state are technically courts of limited jurisdiction. They seem to be recognized as such in the Public Statutes of Rhode Island, chapter 181, section 5. Similar courts have been treated as, or decided to be, such in other New England states: *Wattles v. Hyde*, 9 Conn. 10; *Sears v. Terry*, 26 Id. 273; *Overseers of Fairfield v. Gullifer*, 49 Me. 360; 77 Am. Dec. 265; *Fowle v. Coe*, 63 Me. 245; *Holden v. Scanlin*, 30 Vt. 177; *Hathaway v. Clark*, 5 Pick. 490; *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87. Mary A. Wilcox, it is admitted, did not reside in Tiverton when she died, though such residence was necessary to give the court of probate of Tiverton jurisdiction. It follows that the grant of letters of administration to the defendant Wilcox was void, and may be treated as a nullity in the present suit; for the question of residence is a collateral question which can be tried by itself. A decree will therefore be entered directing the payment of the deposit to the defendant Sayer, but under the circumstances it will be without costs.

JURISDICTION OF PROBATE COURT, WHETHER AND WHEN MAY BE COLLATERALLY QUESTIONED: See *Johnson v. Beasley*, 27 Am. Rep. 276, note 286; *Roderigas v. East River S. I.*, 20 Id. 555; *Townsend v. Townsend*, 94 Am. Dec. 185, note 194, where other cases are collected.

DETERMINATION OF JURISDICTIONAL FACTS CANNOT BE COLLATERALLY ATTACKED: See *Withers v. Patterson*, 86 Am. Dec. 643, note 654, where other cases in that series are collected.

DOMICILE OF DECEDENT IS PLACE OF PRIMARY AND EXCLUSIVE PROBATE JURISDICTION IN SETTLEMENT OF HIS ESTATE: *Leonard v. Putnam*, 12 Am.

Rep. 106; *Satcher v. Satcher*, 91 Am. Dec. 498, note 506, where other cases in that series are collected.

PROBATE COURT, WHETHER COURT OF LIMITED JURISDICTION: See *Johnson v. Beasley*, 27 Am. Rep. 276; *Roderigas v. East River S. I.*, 20 Id. 555; *Townsend v. Townsend*, 94 Am. Dec. 185, note 194, where other cases in that series are collected.

THE PRINCIPAL CASE IS DISTINGUISHED in *Thornton v. Baker*, *post*, p. 925.

PARKER v. REMINGTON.

[15 RHODE ISLAND, 800.]

ACKNOWLEDGMENT OF DEBT MADE TO STRANGER, and not intended to be communicated to the creditor, will not remove the bar of the statute of limitations.

ASSUMPSIT. The opinion states the case.

Charles H. Page and Franklin P. Owen, for the plaintiff.

Simon S. Lapham and Louis L. Angell, for the defendant.

By the COURT. This is an action of *assumpsit* for compensation for services rendered by the plaintiff to the defendant's intestate. The services were rendered during a period of more than twenty years, extending down to a short time previous to the death of the intestate. The defense was the general issue, and also the statute of limitations, to which the plaintiff set up in reply a new promise. The jury returned a verdict for the plaintiff for two thousand dollars. The damages were clearly excessive, unless there was evidence of a new promise to lift the bar of the statute; for there was no testimony to show that the services were worth more than three dollars per week. The only testimony of a new promise was given by Esek King, a nurse, who took care of the intestate during his last illness. He testified that the deceased told him that he wanted the plaintiff to be well paid for her work. This remark is very general, but perhaps might warrant the finding of a new promise if it had been addressed to the plaintiff herself, or to any person who represented her. It was addressed to a mere stranger. The older cases, both English and American, hold that an acknowledgment of a debt to a stranger is as effectual to remove the bar of the statute as one made to the creditor; but the later cases, both English and American, strongly maintain that an acknowledgment to a mere stranger is ineffectual to remove the bar, unless it was intended to be communicated to the creditor, the reason being

that otherwise no privity is established between the parties in respect to the new promise: Wood on Limitations, sec. 79, p. 193, note; 1 Smith's Lead. Cas. *726; *Bloomfield v. Bloomfield*, 7 Ill. App. 261; *Parker v. Schuford*, 76 N. C. 219; *Backman v. Roller*, 9 Baxt. 409; 40 Am. Rep. 97; *Edwards v. Culley*, 4 Hurl. & N. 377; *Fuller v. Redman*, 26 Beav. 614. We find nothing in the testimony from which the jury could infer that the intestate intended that his remark should be communicated to the plaintiff. We have no reported decision upon this point in this state. We think the later cases rest upon the better reason, and are therefore of the opinion that the defendant is entitled to a new trial, unless the plaintiff will remit one half of the verdict, one half of the verdict being the most she would be entitled to claim if the defense of the statute be allowed.

ACKNOWLEDGMENT SUFFICIENT TO TAKE DEBT OUT OF STATUTE OF LIMITATIONS: See *Manchester v. Braedner*, 1 Am. St. Rep. 829, note 831, where other cases are collected.

WHETHER ACKNOWLEDGMENT MADE TO STRANGER IS SUFFICIENT TO TOLL STATUTE OF LIMITATIONS: See *Stewart v. Garrett*, 57 Am. Rep. 333, and note 334.

AMERICAN SOLID LEATHER BUTTON CO. v. ANTHONY.

[15 RHODE ISLAND, 238.]

NUMBERS ARBITRARILY CHOSEN MAY BE ADOPTED AS TRADE-MARKS by a manufacturer of goods to designate his style, and his quality as well. But he cannot appropriate to his exclusive use numbers already in use, and known to the trade as applied to the same styles of goods.

BILL in equity for an injunction and an account. The opinion states the case.

W. W. and S. T. Douglas, for the complainant.

Warren R. Perce, for the respondent.

By Court, STINESS, J. The complainant is a manufacturer of buttons and nails with solid leather heads. In order to distinguish the different styles which it manufactures, it has assigned certain numerals, arbitrarily chosen,—e. g., 30, 40, 60, 70, 111, etc.,—to designate different styles of heads on its advertising cards and packing-boxes. The several styles made by the complainant have become associated with and known by these numerals in the trade, and the numerals are commonly

made use of in orders and other designations of a style desired to be referred to.

The defendants, Anthony, Cowell, & Co., have procured from other parties nails of different styles, similar to those made by the complainant, and have designated them by the same numerals adopted by the complainant to designate the corresponding styles of its manufacture, whereupon the complainant, claiming the several numerals adopted by it as its trade-mark, brings this bill for an injunction and account. The first question presented for our decision is, whether the use of an arbitrary combination of figures to designate the styles of goods which a person makes is entitled to protection. The defendants claim that no protection can be given, because such figures, by denoting the style or quality simply, and not origin of the goods, deceive nobody, and hence the rights of the complainant are not infringed. There is some diversity in decisions upon this point, arising mainly from different assumptions of fact by the courts. Undoubtedly, if it be assumed that a given mark indicates quality only, and not origin, it will follow that purchasers of goods so marked have not been misled thereby into the supposition that they were buying a complainant's goods, and hence he would show no cause for relief. All of the cases cited by the defendants in support of their claim, that numbers indicating style or quality cannot be protected, are based upon such an assumption. Where the premises are true, no fault can be found with the conclusion. But it by no means follows, as a rule of law, that marks indicating style or quality may not also indicate origin, and thus be a subject of trade-mark. A person has the right to affix to his goods any device, symbol, or name which he may invent, to distinguish such goods from those made by other people. When the symbol becomes known in connection with his name, it serves as a sign and pledge of the origin of the goods. People do not often stop to read all that may be printed on a label; nor do they always know the changes that are made in firms or business names. Hence it is that the sight of a familiar symbol, inducing one to purchase goods to which the symbol does not properly belong, to the injury of him who devised it to mark his own goods, is the *gravamen* of the law of trade-marks.

Within limits which are well defined, a combination of letters or figures, arranged for convenience or to attract attention, may serve the purpose of a trade-mark, as well as a de-

vice invented or arbitrarily selected. So a person may have different symbols for different grades of goods, which in the same way will indicate both quality and origin with respect to the goods so marked.

A manufacturer may adopt such symbols, not simply to mark a style or quality, but his style and his quality as well. He is entitled to have his style and his quality protected from misrepresentation, and to have the benefit of any favorable reputation they may have gained. The doctrine applicable to cases of this character is clearly set forth in *Shaw Stocking Co. v. Mack*, 21 Blatchf. 1, 6, as follows: "It is very clear that no manufacturer would have the right exclusively to appropriate the figures 1, 2, 3, and 4, or the letters A, B, C, and D, to distinguish the first, second, third, and fourth quality of his goods respectively. Why? Because the general significance and common use of these letters and figures are such that no man is permitted to assign a personal and private meaning to that which has, by long usage and universal acceptance, acquired a public and generic meaning. It is equally clear, however, that if, for a long period of time, he had used the same figures in combination, as '3214,' to distinguish his own goods from those of others, so that the public had come to know them by these numerals, he would be protected. The courts of last resort in Connecticut, in Massachusetts, and in New York have distinctly held this doctrine: *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; 95 Am. Dec. 270; *Lawrence Co. v. Lowell Mills*, 129 Mass. 325; 37 Am. Rep. 362; *Gillott v. Esterbrook*, 48 N. Y. 374; 8 Am. Rep. 533; the numerals sustained being respectively '2340,' '523,' and '303.'" In this case the numerals "830" had been adopted to mark a style of hose made by the complainant, viz., a mottled drab; and although the label used by the defendants bore their own and not the complainant's name, an injunction was granted against their use of the numerals, upon the ground "that the complainant had used these numerals long enough to convey to any one versed in the nomenclature of the trade a precise understanding of what goods were intended, when the numerals were used alone, disconnected from any intrinsic information." The defendants in the case last quoted, as in the case before us, were dealers, and not manufacturers.

In *Manufacturing Co. v. Trainer*, 101 U. S. 51, strongly relied on by the defendants, the court based its decision upon the fact that the letters "A. C. A." denoted quality simply,

and not origin. Judge Clifford dissented from this conclusion of fact. If, as stated in that case, indication of origin is "entirely overborne by the patent fact that the label discloses the name in full of the manufacturers," we do not see why any trade-mark, coupled with the name of the real manufacturers, might not be used, for according to the language of the opinion, the indication of origin by the use of the trade-mark would be "overborne" by the disclosure of the maker's name. We do not think the court meant that the case should go to this extent. It simply found that the letters in that case did not indicate origin, and hence dismissed the bill.

Applying the rule which we have here recognized, we come to the questions of fact in this case. It appears from the testimony that the numbers "60" and "70" were used by T. F. N. Finch, and had become known to the trade as applied to the same styles, before the complainant used them. If this be so, the complainant cannot appropriate these numbers to its exclusive use. The only other numbers proved to have been used by the defendants, Anthony, Cowell, & Co., are "30" and "111." We think these numbers indicate origin as well as style. The fact that orders for goods refer to numbers, which have become associated with a particular style of nail only by the complainant's association of the number with the style, raises a natural inference that persons ordering by that number suppose they are ordering both goods and style of complainant's make. We therefore think that in the use of these numbers, as against the defendants, Anthony, Cowell, & Co., the complainant is entitled to protection according to the prayer of the bill. As to the other defendants, in the absence of testimony to show their use of any numbers claimed by the complainants other than "60" and "70," the bill must be dismissed.

NUMBERS MAY BE VALID TRADE-MARK: See *Lawrence Manufacturing Co. v. Lowell Hosiery Co.*, 37 Am. Rep. 362, note 365; *Candee v. Deers*, 5 Id. 125; *Falkinburg v. Lucy*, 95 Am. Dec. 76; *Boardman v. Meriden Britannia Co.*, 95 Id. 270, note 277, where other cases in that series are collected; also 26 Am. Law Reg., N. S., 173.

PERRY v. MOUNT HOPE IRON COMPANY.**[15 RHODE ISLAND, 302.]**

WHERE OFFER IS MADE IN ONE STATE AND ACCEPTED BY TELEGRAPH IN another, the contract is completed in the latter state by sending the telegram, notwithstanding it is to be performed in the former state.

WHERE ACCEPTANCE OF OFFER REACHES PERSON WHO MADE OFFER, it is immaterial by what mode the acceptance was sent.

EVIDENCE THAT SCRAP-IRON WAS NOT KIND ADAPTED FOR USE IN DEFENDANT'S WORKS ought not to be excluded, when the question to be determined is whether he offered to buy it without inspecting it.

ACTION for damages for refusal to fulfill a contract. The opinion states the case.

Lemuel H. Foster, for the plaintiff.

Augustus S. Miller and Arthur L. Brown, for the defendant.

By Court, DUFEE, C. J. This is an action to recover damages of the defendant corporation for refusing to receive a cargo of "bolt and nut scrap and boiler-plate" iron, so called, which the plaintiff claims the defendant agreed to buy at the rate of eighty-seven and a half cents per hundred, delivered at its works in Somerset, Massachusetts. Upon trial in the court of common pleas, the jury found a verdict for the plaintiff. The case is before us on the defendant's petition for a new trial for alleged misrulings, and on the ground that the verdict was against the evidence and the weight thereof. The plaintiff lives and does business in Providence. The defendant is a Massachusetts corporation, having its business establishment in Somerset, Massachusetts. Job M. Leonard is treasurer, and has an office in Boston. He makes purchases for the defendant.

On the trial in the court below, the plaintiff put in testimony to show that his agent visited Leonard April 30, 1885, and informed him that the plaintiff had the "nut and bolt shop scrap," and solicited an offer for it; that Leonard offered eighty-seven and a half cents per hundred, delivered at the company's wharf, and the agent asked him to let the offer stand until the next day, which Leonard agreed to do; and that the next day the plaintiff telegraphed from Providence to Leonard in Boston, accepting the offer. The defendant did not admit that the offer was made as stated, and made the point that, if it was so made, the contract was not completed by the acceptance until the acceptance reached him in Boston, and that

consequently the alleged contract was a Massachusetts contract, and not being in writing, was invalid under the Massachusetts statute of frauds, which was put in proof. The court below ruled the point against the defendant, holding that the contract was completed in Rhode Island by sending the telegram. The defendant cites a few cases which support its position: *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278; *British and American Tel. Co. v. Colson*, L. R. 6 Ex. 108; Langdell's Cases on Contracts, secs. 1-18; Langdell's Summary of Contracts, secs. 14-16. But the weight of authority strongly supports the instruction given by the court: 1 Addison on Contracts, *18, note 1, and cases there cited; *Maclay v. Harvey*, 32 Am. Rep. 40, note. This contains a full report of the recent English case, *Household Fire and Carriage Accident Ins. Co. v. Grant*, L. R. 4 Ex. 216. The case was decided in the court of appeal July 1, 1879, by Thesiger and Bagallay, L. JJ., Bramwell, L. J., dissenting. Its doctrine is, that the contract is binding on the proposer as soon as a letter accepting the proposal, properly directed to him, is posted by the recipient, whether it reaches the proposer or not, if posted without unreasonable delay, and the post is the ordinary and natural mode of transmitting the acceptance. In that case, the letter did not reach the proposer, and Bramwell, L. J., who dissented, conceded that "where a posted letter arrives, the contract is complete on posting." In the case at bar, the arrival of the telegram is not disputed. We are of opinion that the contract, if made, was completed in Rhode Island, and is a Rhode Island contract, notwithstanding it was to be performed in Massachusetts: *Hunt v. Jones*, 12 R. I. 265; 34 Am. Rep. 635. If there be any question that the telegraph is a natural and ordinary mode of transmitting such an acceptance, that is a question of fact for the jury; but we are of opinion that, if it be shown that the acceptance duly reached the defendant, the question of the mode—no mode having been specified—is immaterial.

The other alleged misrulings were on the admission of evidence. Evidence was admitted to show that the plaintiff paid eighty cents per hundred for the "nut and bolt shop scrap" when he bought it. We think the evidence was irrelevant. The issue did not turn upon any question of price. The second alleged misruling was a refusal to admit testimony offered by the defendant to show that the scrap tendered by the plaintiff was not the kind of scrap which was adapted for use at the de-

fendant's works. We think the testimony should have been admitted, for reasons which will be clearer after we have considered the second ground for a new trial.

The second ground is, that the verdict was against the evidence and the weight thereof. The defendant denies ever making any offer, as stated by the plaintiff. The offer, if made, was made to the plaintiff's agent, no one being present but the plaintiff's agent and Leonard. The agent testified as follows: "Saw Mr. Leonard in his office, and offered him some nut and bolt shop scrap. He asked me what I asked for it. I told him I wanted him to make me an offer, and he said he would give eighty-five cents a hundred for it. I told him that was too low, but that I could deliver it to his wharf by vessel, I thought. I asked him if he thought he could not give me any more. He said he could give me eighty-seven and a half cents if I could deliver it at his wharf in Somerset, Massachusetts. I asked him to let the offer stand until the next day. He said he would do so." Leonard testified that he had conversation only about "No. 1 iron," which was the kind used at the Somerset works; that he told the plaintiff's agent that he must have it guaranteed No. 1, or must inspect it himself; that the agent agreed to leave the matter open, and give him an opportunity to see it, and that the iron tendered was not No. 1 iron. We think the testimony very clearly shows that it was not No. 1. The defendant adduced several dealers who testified that it was the custom to buy inferior scrap by inspection only, because some has more and some less skeleton or light iron, and it varies in value. Their testimony, taken in connection with the samples exhibited, seems to us very cogent. The plaintiff's agent alone testifies to the contrary of this. We do not think it probable, in view of this testimony, that Leonard would have made his offer at a venture, without seeing the scrap, or a sample of it. The burden of proof is on the plaintiff. We incline to think that the verdict is against the weight of the evidence, as the evidence stands. But this state of the proof makes apparent the value of the testimony ruled out; for it is improbable that Leonard would run the risk of buying, without inspection, scrap which was not adapted to use by the defendant, and therefore the testimony, if admitted, might have been all that was necessary to lead the jury to render a verdict for the defendant.

Exceptions sustained.

CONTRACT BY TELEGRAPH, WHEN COMPLETE: See *Haas v. Myers*, 53 Am. Rep. 634; *Moulton v. Kershaw*, 48 Id. 516, note 519; *Calhoun v. Atchison*, 96 Am. Dec. 299; *Trevor v. Wood*, 93 Id. 511, note 515, where this subject is discussed at length.

DALTON v. THURSTON.

[15 RHODE ISLAND, 418.]

TO MAKE PURCHASE FRAUDULENT, THERE MUST BE FRAUDULENT INTENT.

The mere fact that a purchaser is deeply insolvent does not make his purchase invalid.

PURCHASE MADE BY ONE ACCUSTOMED TO CARRY ON HIS BUSINESS IN SLIPSHOD WAY, and culpably ignorant of the true state of his affairs, although made a short time before executing an assignment for the benefit of his creditors, is not fraudulent, when there is nothing to show that the purchase was out of the usual course, or that it was made in anticipation of failure.

REPLEVIN. The opinion states the case.

Charles A. Wilson and Thomas A. Jenckes, for the plaintiffs.

John D. Thurston, *pro se ipso*.

By Court, DUFFEE, C. J. This is replevin for lumber valued at two thousand five hundred dollars. The writ was served August 6, 1884. The case is tried to the court on law and fact, jury trial being waived. The testimony shows that the defendant's assignor had carried on a lumber business in Wickford, R. I., for about nineteen years prior to July, 1884; that he had traded with the plaintiffs to some extent for about fifteen years; and that the lumber in suit was delivered to him by them early in June, 1884, on an order for it given by him at their solicitation the previous March. On July 17, 1884, he made a general assignment to the defendant for the benefit of his creditors. The immediate cause of his failure was his inability to meet the payment of two notes then falling due, in consequence of the refusal of a person with whom he had an arrangement for advances, from whom he had expected to borrow the money, to lend it. He testified: "I supposed I was all right, and that everything was going along smooth," until then. He also testified that he only kept a book of what he had sold, but not of what he bought or paid out, and that he did not know how much he owed until after the assignment. It appeared that in fact he owed, in addition to ten thousand dollars secured by mortgage of a part of his stock of lumber, something over twenty thousand dollars, and that to pay this

amount he had book-accounts which he considered worth a little more than twelve hundred dollars, and his lumber, which consisted of the portion under mortgage, the cargo replevied by the plaintiffs, a cargo worth about five hundred dollars, also replevied, and a small amount besides. He testified that he had had land to carry along, which he had got clear of by making sacrifices, and this had cramped him; but that he first knew that he should have to make an assignment the day he made it. The plaintiffs claim the right to recover the lumber purchased of them, on the ground that the purchase was fraudulent; but they have introduced no evidence of any misrepresentation or concealment by the purchaser, or which materially contradicts his testimony. They rely upon his testimony, showing that when he purchased of them he was deeply insolvent, to make out their case.

The mere fact that a purchaser is insolvent does not make his purchases invalid. Even the fact that he is deeply insolvent does not have that effect, unless he purchases with no intention or expectation of paying; for if there be no dishonest mind or purpose, there is no fraud. In *Biggs v. Barry*, 2 Curt. 259, the fraud alleged was, that the purchasers were deeply insolvent, and knew they were so when they made the purchases. On the trial, the jury were left to say whether the purchasers had any "reasonable expectation" of paying; but on motion for new trial, the court held that this was error. "This is not a question," said Judge Curtis, "of reasonable expectation, but of fraudulent purpose. It is not a question whether the grounds of their belief that they could and should pay were sound and rational, but whether they did so believe in point of fact." And so in *Commonwealth v. Eastman*, 1 Cush. 189, 221, 48 Am. Dec. 596, the court held that the test of reasonable expectation was too severe. The sanguine, hopeful mind, rashly confident or inconsiderate, disbelieves in failure, and for that very reason sometimes plucks success out of desperate circumstances. The law lets the insolvent keep his own counsels, and struggle with his embarrassments, so long as he has an honest hope of overcoming them. In *Mitchell v. Worden*, 20 Barb. 253, the court held that the law does not make it the duty of the buyer to disclose to the seller his pecuniary circumstances, even though they are desperate, and are known to him to be desperate, and even though there has been a long dealing between him and the seller, in which credit has been given and punctually met, so long as the buyer

continues to carry on his business. In *In re Shackleton*, L. R. 10 Ch. App. 446, it appeared that December 1st, S. committed an act of bankruptcy; that December 3d, a petition of adjudication was filed and served; and that December 5th, he purchased wool at auction, and was allowed to take the wool without paying for it, the seller supposing him to be solvent. December 14th he was adjudicated a bankrupt, and December 21st the seller, who had first heard of the bankruptcy proceedings on December 19th, gave notice that he rescinded the contract on the ground of fraud, and demanded to have the wool returned, but it was held that the trustee in bankruptcy was entitled to it. "It is true," say the court, "that a party must not make any misrepresentation, express or implied, and as at present advised, I think that Shackleton, when he went for the goods, must be taken to have made an implied representation that he intended to pay for them; and if it were thereby made out that at that time he did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown. But I do not think this sufficiently made out." See also *Mulliken v. Miller*, 12 R. I. 296; Benjamin on Sales, sec. 440, note, and cases cited.

Of course, however, the fact that a purchaser is deeply insolvent when he purchases, and knows that he is so, is evidence from which, under some circumstances, it may be inferred that he had no intention or expectation of paying. The question in this case is, then, whether, under the circumstances disclosed, the inference ought to be drawn. We think not. The purchaser, according to his own testimony, carried on his business in a very slipshod way, and was culpably ignorant of the true state of his affairs; but this shows only heedlessness or incapacity. For anything that appears, he had always carried on his business in the same way, and for years had not had the means of paying his debts in full. Nothing shows that the purchase from the plaintiffs was out of the usual course, or that it was made in anticipation of failure. On the contrary, the failure, according to the testimony, was precipitated unexpectedly, as it might have been precipitated long before, by the refusal of the person on whom he was relying for pecuniary accommodation to lend him any longer. We find nothing to show that the purchase was made for any other purpose than the purpose of continuing the business as usual. We must, therefore, render judgment for the defendant.

Judgment for defendant for return and restoration, and costs.

PURCHASE BY ONE INTENDING TO PAY AND HAVING REASONABLE EXPECTATIONS of being able to pay is not fraudulent, although he is at the time insolvent: *Talcott v. Henderson*, 27 Am. Rep. 501, note 504; *Hall v. Naylor*, 75 Am. Dec. 269, note 272, where other cases in that series are collected.

BROWN v. BROWNING.

[15 RHODE ISLAND, 422.]

CONTRACT MADE IN CONNECTICUT AFTER SUNSET ON SUNDAY, being valid in that state, may be enforced in Rhode Island, although the law of the latter state prohibits business in one's ordinary calling during the whole day of Sunday. The enforcement of such a contract does not involve a breach of good morals.

ACTION on a promissory note. The facts are stated in the opinion.

Crafts and Tillinghast, for the plaintiff.

Thomas H. Peabody and Charles Perrin, for the defendant.

By Court, STINESS, J. The only question raised by the bill of exceptions is, whether a suit can be maintained in this state upon a contract made in Connecticut on Sunday after sunset. The statute of Connecticut, as proved in this case, prohibits secular business on Sunday between sunrise and sunset (Gen. Stats. Conn. 1875, p. 521), differing in this respect from our statute, which covers business of one's ordinary calling during the entire day. The plaintiff and defendant exchanged horses and wagons after sunset on Sunday, January 28, 1884, this being in the business of the plaintiff's ordinary calling, and the note in suit was given for "boot money" due to the plaintiff. The general rule is, that a contract which is valid where it is made is valid and may be enforced everywhere. Among the recognized exceptions to this rule, only two need to be considered in this case, viz., when the contract is against good morals, and when its enforcement would violate the law of the place of suit. We do not think the contract in this case falls within these exceptions. The contract was valid in Connecticut, where it was made, because it was not in violation of the law of that state. The making of the contract did not violate the law of this state, because it was not done in this state. Neither does its enforcement conflict with any law of this state in regard to remedy. Was the making of the contract in Connecticut so far against good morals that it ought not to be enforced in this state? We do

not think that it was. The statute of 29 Charles II., c. 7, which has been generally followed in this country, prohibited work of one's ordinary calling on Sunday. The law of Connecticut prohibits travel, sport, and secular business between sunrise and sunset, and concerts and other public diversions in the evening. Whether sunset is fixed as a limit because the Hebrew sabbath, under the Mosaic law, ended at that time, or because such was the custom of the Puritan founders of the state, or because the hours between sunrise and sunset are those to which travel, sport, and secular business are chiefly and almost necessarily confined, we do not need to inquire. Evidently there may be a reasonable answer to an objection that the limit of the law is short of the limit required by good morals. Whatever may be claimed for the observance of the Lord's Day upon the ground of moral obligation, people who believe in keeping it very strictly would no doubt agree that the requirements of the Connecticut law have a tendency to promote, rather than obstruct, good morals. It does not follow, because our law covers all of the first day of the week, that the law of another state, which in one respect covers less, is contrary to good morals. We do not even require the observance of this day from all of our own citizens. Believers in the sabbatarian faith and Jewish religion are allowed to labor in their respective vocations on that day, and in certain places to open stores and carry on mechanical trades: Pub. Stats. R. I., c. 244, sec. 18.

The precise question before us has been passed upon, and so fully considered in *Adams v. Gay*, 19 Vt. 358, and *Swann v. Swann*, 21 Fed. Rep. 299, that a review of the grounds upon which the decisions rest is unnecessary. In both of these cases it was held that a contract made on Sunday, in a state where it was valid, was not against good morals, and could be enforced. The defendant relies on the case of *Hayden v. Stone*, 13 R. I. 106, where it is said "that a contract valid by the laws of one state cannot be enforced in another state unless such a contract made between its own citizens could be enforced there; or in other words, it depends on the *lex fori*." We do not think the court meant to make a rule as broad as this is claimed to be, and as, possibly, the language which is used may imply. The language must be applied to the case. There the suit was against a married woman, upon a note given by her and her husband in Massachusetts, where it was valid against both parties. Under our law a married woman

is incapable of incurring liability upon a promissory note. The plaintiff in that case sought to subject her property here to attachment for the note, contrary to our law. There was no service on the husband. It was held that the wife could not be sued alone, and that her property in this state could not be held upon a contract the enforcement of which would interfere with our law. Our citizens could have no such remedy upon such a contract in this state, and therefore a citizen of another state could not have it here. The case was clearly within the exception we have stated. The reasoning of the court does not go to the validity of the contract, but to the remedy sought, and the remedy is always subject to the *lex fori*. The present suit violates no law of remedy, and hence is not within the decision in *Hayden v. Stone*, *supra*.

Since, then, the contract sued upon was valid where it was made, and its enforcement does not involve a breach of good morals, nor call for any remedy to which our own citizens would not be entitled upon a valid contract, we think the plaintiff should have been allowed to proceed with his suit, and that the nonsuit was erroneous.

Exceptions sustained.

VALIDITY OF CONTRACTS MADE ON SUNDAY DEPENDS UPON LAW OF STATE WHERE THEY ARE MADE: See note to *Coleman v. Henderson*, 12 Am. Dec. 292. But if there be no evidence of the *lex loci contractus*, the law will presume it to be the same as the *lex fori*: *Hill v. Wilker*, 5 Am. Rep. 540.

ANDERSON v. BOSWORTH.

[15 RHODE ISLAND, 442.]

ATTORNEY CANNOT RETAIN HIS FEES OUT OF MONEY LEFT WITH HIM by his client in special deposit for a special purpose, and so received by him. SUMMARY JURISDICTION OF COURT OVER ITS ATTORNEYS EXTENDS TO ANY MATTER in which an attorney has been employed by reason of his professional character.

PETITION for an order requiring the respondent to pay over certain moneys received by him as attorney. The opinion states the facts.

John C. Pegram and George L. Cooke, Jr., for the petitioner.

Orrin L. Bosworth, *pro se ipso*.

By Court, DUFFEE, C. J. The facts stated in the petition for our action are as follows: The petitioner, and two minors

for whom she is guardian, are plaintiffs in an ejectment suit pending in this court, wherein Nathan M. Bunn is nominally defendant, but which is in fact defended by one Samuel J. Allyn, for himself and wife, the parties really interested. A settlement of the suit was recently agreed upon, by the terms of which the suit was to be discontinued without costs, upon conveyance to Allyn's wife of the interest of the minor plaintiffs in the land in suit, leave to make the conveyance being obtained, by the petitioner as guardian, of the court of probate, and upon payment by Allyn to the petitioner as guardian of \$150, together with the expenses of obtaining leave to make the conveyance. Leave was obtained from the court of probate accordingly, and on February 27, 1886, Allyn, with a view to carrying out the settlement, deposited with the respondent, who was his attorney, one hundred dollars of the sum required, and took from him a receipt acknowledging that he had received said one hundred dollars "towards the settlement." Subsequently the petitioner received from Allyn the receipt and the additional fifty dollars, and whatever other amount was necessary to pay for procuring the leave to convey, and, in execution of the settlement, conveyed to Allyn's wife the interest of her wards in the land in suit. She then presented the receipt to the respondent, and demanded the money represented by it, and he refused to deliver it to her. She invokes the summary jurisdiction of the court, and asks that an order may be made directing the respondent to deposit the money with the clerk for her on or before a day to be named. The respondent does not dispute the correctness of the foregoing statement, but avers that when he received the one hundred dollars it was with the understanding that Allyn was to bring him a further sum, sufficient with the one hundred dollars for the purposes of the settlement, and also to pay him for his services as attorney, he to attend to the completion of the settlement. He also avers that Allyn completed the settlement himself without his knowledge, in order to avoid paying for his services as attorney, and contends that the petitioner and her counsel ought to have informed him of their purpose before concluding the settlement, if they intended to look to him for the one hundred dollars in his hands. He professes his readiness to pay to the petitioner what will remain of her one hundred dollars after deduction of his fees.

Two questions are raised. The first is, whether the respond-

ent is entitled to retain his fees out of the one hundred dollars; and if he is not, the second is, whether the petitioner presents a case for the exercise of the summary jurisdiction of the court.

We do not think there is any doubt in regard to the first question. The money was left with the respondent in special deposit for a special purpose. He so received it. He therefore cannot, consistently with his agreement or duty, apply it to any other purpose without leave, which now can be given by no one but the petitioner. The equity of this view is the stronger because the respondent, by giving the receipt, put it in the power of his client to use it in effecting the settlement as so much money in the respondent's hands for the petitioner. We do not think the petitioner, in concluding the settlement with Allyn, was guilty of any such fault toward the respondent as should impair her right. It is not pretended that she had any notice of any claim on his part to participate in the settlement, or that she colluded with Allyn to cheat him out of his fees: And see *Horton v. Champlin*, 12 R. I. 550, 552; 84 Am. Rep. 722. Indeed, we do not see how, even if the respondent had been present, he would have had any right to defeat or embarrass the settlement by withholding the one hundred dollars, since the settlement was simply the execution of an agreement already entered into, and the respondent knew of the agreement, and tacitly assented to it when he received the money.

We pass to the second question. The summary jurisdiction evidently originates in the disciplinary power which the court has over attorneys as officers of the court. The opinion seems to have been prevalent at one time that the jurisdiction extended only to attorneys employed as such in suits depending in court, to hold them to their duty in such suits; but a more liberal view has obtained, and it is now well settled that the jurisdiction extends to any matter in which an attorney has been employed by reason of his professional character: *In re Aitkin*, 4 Barn. & Ald. 47, 49; *Grant's Case*, 8 Abb. Pr. 357; *Ex parte Staats*, 4 Cow. 76; *Ex parte Cripwell*, 5 Dowl. P. C. 689; *De Wolfe v. —*, 2 Chit. 68; *In re Knight*, 1 Bing. 91. In general, the jurisdiction applies only between attorney and client, but it is not confined strictly to that relation: *In re Aitkin*, 4 Barn. & Ald. 47; *Tharratt v. Trevor*, 7 Ex. 161. In *Moulton v. Bennett*, 18 Wend. 586, the respondent, as plaintiff's attorney in a *qui tam* action, claimed and received cer-

tain costs from the petitioner, who was the defendant in said action, in partial settlement of the same. The costs were taken on the mistaken supposition that the petitioner was liable to pay them. The application was preferred nearly four years afterwards, and the court made an order on the respondent to refund. See also *Wilmerdings v. Fowler*, 45 How. Pr. 142.

The petitioner is a suitor in court, and the respondent received the money for her for the purpose of carrying out an agreement for the settlement of the suit. She has fully executed the agreement on her part, except discontinuing. We are of the opinion that it will be an eminently proper exercise of our summary jurisdiction to order the payment as asked for, so that settlement may be completely executed without further obstruction.

POWER OF COURTS TO EXERCISE SUMMARY JURISDICTION OVER ATTORNEYS: See *Burns v. Allen*, *ante*, p. 844, and note, where this subject is discussed; *Windsor v. Brown*, *ante*, p. 892.

KNOWLES v. BLODGETT.

[15 RHODE ISLAND, 462.]

COMMON-LAW RULE THAT DISSEISINER CANNOT CONVEY ESTATE OF WHICH HE IS DISSEISED to a stranger to the title, so as to enable him to sue for it in his own name, has no application to a conveyance by an administrator for the payment of the debts of the deceased.

ADMINISTRATOR'S DEED CONVEYS ALL ESTATE HELD BY DECEASED AT TIME OF HIS DEATH, and passes the title so as to enable the grantee to sue for and recover the estate of a subsequent disseisor.

ADMINISTRATOR HAS NO SEISIN, AND THEREFORE CANNOT BE DISSEISED. He has only a power given him by statute, to be exercised for certain purposes in a certain manner.

TRESPASS and ejectment. The opinion states the case.

Edwin Metcalf and Walter F. Angell, for the plaintiff.

Louis L. Angell and John T. Blodgett, for the defendant.

By Court, DUFFEE, C. J. This is trespass and ejectment for a lot of land. The case is tried to the court, jury trial being waived. The plaintiff submits evidence, documentary and other, to show that the land formerly belonged in fee-simple to the late Edward P. Knowles, who died in the possession of it, and that the plaintiff became a purchaser of it at an ad-

ministrator's sale, receiving from the administrator *cum testamento annexo* a deed purporting to convey to him and his heirs all the right, title, and interest which the said Edward P. had at the time of his decease.

One of the defenses is, that after the decease of Edward P. Knowles, and before the administrator's sale, the defendant became the purchaser, under an execution against one Edward R. Knowles, a son of Edward P., levied on the lot, of all the right, title, and interest of Edward R. in and to the lot, and entered into possession of it under the sheriff's deed, and has remained in possession ever since, claiming it as his own in fee-simple, his contention being that Edward R. became the owner after the death of Edward P., the latter being entitled at most only to a life estate. He cites the cases of *Campbell v. Point Street Iron Works*, 12 R. I. 452, and *Burdick v. Burdick*, 14 Id. 574; and on the authority of them, contends that even if Edward P. was the owner in fee-simple when he died, the administrator's deed was ineffectual to convey any legal estate to the plaintiff. The doctrine of the cases cited is the familiar common-law doctrine, that a disseisee cannot convey the estate of which he is disseised to a stranger to the title, so as to enable him to sue for and recover it in his own name at law. The conveyance by the administrator, however, was not a conveyance at common law, but under the statutes, and we must look to the statutes for its effect.

Under our statutes, the estate of every person deceased is chargeable with his debts and funeral expenses, to be paid by his executor or administrator out of his personal estate, if sufficient, and if not, so far as deficient, out of his real estate, the executor or administrator being required to supply the deficiency, in pursuance of certain prescribed proceedings, by selling the real estate, or some portion of or interest in it; and the statute provides that the deed given by the executor or administrator, in pursuance of such sale, "shall make as good a title to the purchaser, his heirs and assigns, as the testator or intestate, being of full age and of sane mind and memory, in his lifetime might or could have made": Pub. Stats. R. I., c. 179, sec. 18. As we understand this provision, it makes the deed of the administrator on the estate of Edward P. Knowles as effectual to convey the real estate sold, the manner of the sale being unimpeached, as if it were the deed of Edward P. Knowles himself, given immediately before his decease, he being then of sane mind and memory; and of course

his deed so given would have passed the title so as to enable the grantee to sue for and recover the estate of a subsequent disseisor. The reason why a disseisee cannot make an effectual conveyance is because, being dispossessed of the estate by the disseisor, he is deemed to have only a right of entry or of action to recover it, which is not assignable. An administrator, as such, does not have the estate; he has no seisin, and therefore cannot be disseised. He has only a power given him by statute, to be exercised for certain purposes, in a certain manner; and, if the decedent die seised, to hold that the power can be defeated by any subsequent disseisin would be to hold that the statute itself could be so defeated, which, it seems to us, would be not only against public policy, but absurd; and see Pub. Stats. R. I., c. 189, sec. 13. Whether the power would override a disseisin suffered by the decedent in his lifetime is rather a different question, which we express no opinion upon, but leave to be decided when it arises.

The defendant raises several objections to the title of Edward P. Knowles, and contends that, at his decease, he had either no title or only a life estate. We think the objections are untenable, and that they do not raise questions of law which are of enough importance to merit an extended discussion. We are of opinion, on the evidence before us, that Edward P. Knowles died seised of an estate in fee-simple.

Judgment for plaintiff for possession and costs.

CONVEYANCE BY ADMINISTRATOR OUT OF POSSESSION IS VALID WHEN: See *Herbert v. Herbert*, 12 Am. Dec. 192.

ADMINISTRATOR'S DEED CONVEYS TITLE OF DECEDENT: See *Halleck v. Guy*, 70 Am. Dec. 643; *Ewing's Lessee v. Higby*, 28 Id. 633; *Adams v. Cuddy*, 25 Id. 330.

CLAPP v. PAWTUCKET INSTITUTION FOR SAVINGS.

[15 RHODE ISLAND, 489.]

TENANTS IN COMMON OF PERSONALTY MUST JOIN IN ACTION to recover it. WHERE RESERVATION IN POWER OF SALE IN MORTGAGE IS TO MORTGAGORS, their heirs and assigns collectively, and not to them separately, according to their several interests, in an action on the implied promise of the mortgagee to pay over the surplus proceeds of the sale in accordance with the reservation, all the mortgagors must join.

IN ACTIONS EX CONTRACTU, OBJECTION TO NON-JOINDER OF PARTIES PLAINTIFF IS NOT WAIVED by neglecting to plead in abatement.

ASSUMPSIT. The opinion states the case.

John D. Thurston and William H. Clapp, for the plaintiff.

Oscar Lapham and John P. Gregory, for the defendant.

By Court, MATTESON, J. This is an action of *assumpsit* for money had and received. The plea is the general issue. It appeared in evidence at the hearing, jury trial having been waived, that Daniel D. Sweet, Ephraim W. French, and Harrison Howard, copartners in business, as D. D. Sweet & Co., executed and delivered to the defendant a mortgage deed, dated November 1, 1866, conveying certain real estate therein described, owned by the mortgagors, and used by them in carrying on their partnership business. This mortgage contained a power of sale authorizing the mortgagee, in case of a breach of the conditions of the mortgage, to sell at public auction the mortgaged estate, and to receive the proceeds of sale, and requiring it, after payment from such proceeds of the expenses of sale and the mortgage debt, to account to the mortgagors, their heirs and assigns, for the surplus. It also appeared in evidence that, subsequently to the making of this mortgage, Daniel H. Arnold was admitted into the firm of D. D. Sweet & Co., and received from his copartners a conveyance of one fourth of the mortgaged property, which was thenceforth, until the sale thereof by the mortgagee, hereinafter mentioned, held by the owners thereof in fourths; that early in 1870 Daniel D. Sweet withdrew from the partnership, and conveyed his one fourth to Frederick Sherman, who then became a partner with the other persons named above in the place of Sweet; that on May 1, 1879, Daniel H. Arnold also withdrew from the partnership, and conveyed his one fourth to Charles Moies; that on August 30, 1883, Harrison Howard assigned his one fourth to the plaintiff; that on August 9, 1884, the defendant sold the mortgaged property under the power above mentioned, and that, after payment of the expenses of sale and the mortgage debt, there remained in its possession a surplus of \$2,248.75. It further appeared that after the sale, on the same day, the plaintiff demanded from the defendant one fourth of this surplus, and that, payment being refused, he subsequently brought this suit to recover said one fourth, with interest.

The defendant takes the point that the plaintiff cannot recover, because the evidence shows that French, Sherman, Moies, and the plaintiff are equally entitled to the surplus as tenants in common, and that one tenant in common cannot sue separately from his co-tenants. We think the point is well taken.

The Public Statutes of Rhode Island, chapter 230, section 1, relating to suits by tenants in common, extends only to actions of ejectment, or other actions where possession of the estate claimed is the object of the suit, and authorizes the bringing of suits by all, or by any two or more, or by each, for his particular share. At common law, the rule in relation to suits by tenants in common was, that in real actions they should sue separately; the reason being, it is said, that serious embarrassment might otherwise often arise, because, though the possession of tenants in common is joint, they hold by distinct titles, and as in many cases these titles were required to be stated, and were subject to be traversed, it might often happen that numerous issues would be introduced into a suit to which some of the plaintiffs would be strangers, but which they nevertheless would be bound to maintain or fail in the action: *Stevenson v. Cofferin*, 20 N. H. 150. In personal actions, on the other hand, this difficulty did not exist, and hence, in such actions, whether arising *ex delicto* or *ex contractu*, tenants in common were required to join. The purpose of this latter rule is to prevent a multiplicity of suits, and it applies, unless there has been a severance of the claim, as, for instance, where the defendant has previously to the suit promised to settle, or has settled with one of the claimants for his share: *Austin v. Walsh*, 2 Mass. 401, 405; *Baker v. Jewell*, 6 Id. 460, 461; 4 Am. Dec. 162; *Beach v. Hotchkiss*, 2 Conn. 697; *Stedman v. Shelton*, 1 Ala. 86, 87, 88; *Parker v. Elder*, 11 Humph. 546, 547; or where one of the co-tenants has previously brought an action, and the non-joinder of others being waived, the suit has been tried upon its merits, and has resulted in a judgment for the defendant, in which case, as such co-tenant is precluded by the principle of *res adjudicata* from suing again, his co-tenants are permitted to sue without him: *Brizendine and Hawkins v. Frankfort Bridge Co.*, 2 B. Mon. 33; 36 Am. Dec. 587; or where one co-tenant has previously brought suit, and has by the failure of the defendant to take advantage of the non-joinder of the others, recovered judgment for his share, and can therefore maintain no further suit, in which case, also, the others may sue without him: *Sedgworth v. Overend*, 7 Term Rep. 279; *Starnes and Paine v. Quin*, 6 Ga. 84, 87.

Hill v. Gibbs, 5 Hill, 56, was a case very much in point. It was a motion to set aside the report of referees in an action for money received to the plaintiff's use. The facts as they

appeared before the referees were as follows: The plaintiff's wife and her sister, a Mrs. Bennett, as two of the five children and heirs at law of John F. Lossley, claimed each one undivided fifth of a tract of land containing six hundred acres. They, with the consent of their husbands, employed the defendant, an attorney at law, to recover the land. The defendant brought actions of ejectment against the tenants in possession of the land, one of which was tried and resulted in a verdict for the plaintiffs. A compromise was then made, by which the claimants released their interest in the land to the tenants, and the tenants agreed to pay the claimants four thousand dollars and the taxable costs of suit. A part of the money was paid down, and for the residue securities were given, payable in installments. Some of the securities were made payable to the plaintiff and wife, some to Bennett and wife, and others in a different form, but without reference to the respective shares or interests of the two wives. The defendant made this arrangement as the agent of the claimants, and the securities were left in his hands for him to receive the money when it became payable. Out of the first moneys received, the defendant was to be paid his expenses and charges beyond the taxable costs, and these were subsequently adjusted between the parties at \$881.86. The defendant received the money on the securities as it became due, and made remittances to the plaintiff from time to time, amounting in the whole to \$1,250. What payments he made to Bennett did not appear. It was agreed between the parties that Mrs. Bennett was entitled to the larger share of the money, for the reason that the claims of Mrs. Hill to a part of the land had been barred by the statute of limitations, and the arrangement was, that the defendant should decide between the two women, as to their respective shares, when the parties should all be together. The parties, however, lived in another state, and no meeting was had until after the suit was brought, when the plaintiff refused to have the defendant make the division. The whole business with the defendant was conducted by the wives, with the consent of their husbands. Mrs. Bennett testified that the moneys received by the defendant were the joint moneys of herself and Mrs. Hill; that she and her sister were both agreed that she was entitled to the larger share, but could not agree upon the proper division. The referees decided that they could not report any sum for the plaintiff, upon the ground that the deposit of the secu-

rities with the defendant was the joint act of Mrs. Hill and Mrs. Bennett, and no proceedings had been had between the parties to enable the referees to decide what particular sum either party was entitled to receive, or whether the defendant had accounted to the plaintiff for as much of the fund as was his due; and they therefore made a general report that nothing was due the plaintiff. The court denied the motion to set aside the report. Bronson, J., in giving the opinion of the court, says: "As the two wives were tenants in common of the land on account of which the money was received, the plaintiff insists that he may sue for his share without joining Bennett. But the general rule in relation to suits by tenants in common against third persons is this: When the action is in the realty, they must sue separately; when in the personalty, they must join. The action is not in the realty merely because it has some relation to land. Thus debt for rent and covenant for not repairing, upon a joint demise, are personal actions, and tenants in common must join. So, too, they must join in actions for a trespass or nuisance to land. The English cases say they may, ours that they must, join: 1 Inst., secs. 311, 312, 315-317; *Kitchen and Knight v. Buckley*, T. Raym. 80; 1 Lev. 109; *Austin v. Hall*, 13 Johns. 286; 7 Am. Dec. 376; *Decker v. Livingston*, 15 Johns. 479; *Sherman v. Ballou*, 8 Cowp. 304; *Chamier v. Clingo and Willett*, 5 Maule & Sel. 64; 1 Chitty's Pleading, ed. 1837, 13, 75, and cases cited. If the plaintiff sues as a tenant in common, he must fail, because this is a personal action, in which the co-tenant should have been joined as plaintiff." And see also, in addition to the cases cited above, *Brotherson v. Hodges*, 6 Johns. 108; *Bradish v. Schenck*, 8 Id. 151; *Thompson v. Hoskins*, 11 Mass. 419; *May v. Parker*, 12 Pick. 34, 38, 39; 22 Am. Dec. 393; *Lane v. Dobyms*, 11 Mo. 105, 107. So tenants in common must join in trespass or trover for the taking or conversion of a chattel: *Wheelwright v. Depeyster*, 1 Johns. 472, 485; 3 Am. Dec. 345; *Putnam v. Wise*, 1 Hill, 234; 37 Am. Dec. 309; or in case for diverting water: *Rich v. Penfield*, 1 Wend. 380, 385; or for destroying title deeds: *Daniels v. Daniels*, 7 Mass. 135, 137. And so, too, tenants in common must join in an action of *assumpsit* for money had and received, where there has been a conversion of goods and chattels, and the tort is waived: *Gilmore v. Wilbur*, 12 Pick. 120, 124; 22 Am. Dec. 410; *Irwin's Adm'n v. Brown's Ex'rs*, 35 Pa. St. 331, 332; *Putnam v. Wise*, *supra*; *White v. Brooks*, 43 N. H. 402, 408. In 1 Inst., sec. 316, Coke

states the rule in actions of debt for rent as follows: "If two tenants in common make a lease of their tenement to another for a term of years, rendering to them a certain yearly rent during the term, if the rent be behind, etc., the tenants in common shall have their action of debt against the lessee, and not divers actions, for that the action is in the personalty." And see *Decker v. Livingston*, 15 Johns. 479, 482; *Foley v. Addenbrooke*, 12 L. J., N. S., Com. L. 163, 165; *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 64, 71.

But, apart from the consideration that the plaintiff is a tenant in common with others, we think that the form of the defendant's undertaking is such that the plaintiff is not entitled to sue alone. The action is based upon the implied promise of the defendant, arising from its legal duty, to pay over the surplus proceeds of the sale in accordance with the reservation in the power. That reservation is to the mortgagors, their heirs and assigns, collectively, and not to them separately, according to their several interests. The language is, "accounting to us, and our heirs and assigns, for all sums over and above," etc. The undertaking, therefore, was to pay all of the owners of the equity of redemption at the time of the sale jointly, and not severally. In this respect it is different from the statutory power of sale in England, which directs the payment of the surplus to the mortgagor, his heirs, executors, administrators, or assigns, according to their respective rights and interests therein: 2 Jones on Mortgages, sec. 1787, note 1. In *Hill v. Gibbs*, 5 Hill, 56, 59, cited above, the court further says: "But the tenancy in common has little to do with the case, except to make out the plaintiff's title. . . . The securities were placed in the defendant's hands as the joint act of the plaintiff and Bennett, and the defendant was to receive the money on their joint account. The defendant's contract was with both, not with each severally, and he ought not to be subjected to more than one action." Where a covenant is in its terms expressly and positively joint, the covenantees must join in an action upon it, although as between themselves their interest is several: Dicey on Parties to Actions, 113; *Bradburne v. Botfield*, 14 Mees. & W. 559, 563, 564, 572, 573; *Sorsbie v. Park*, 12 Id. 146, 157, 158; *Keightley v. Watson*, 3 Ex. 716, 721; *Capen v. Barrows*, 1 Gray, 376, 379; *Haughton v. Bayley*, 9 Ired. 337; *Sweigart v. Berk*, 8 Serg. & R. 308, 311. A covenant with several persons to pay them a sum of money is a joint covenant with all, in the performance of which they have

a joint interest, so that one of them cannot sue for his particular share or proportion of the money, but all must join in one action for the whole; and even the pointing out of the share which each is to take of the entire amount, it is held, will not create a separation of interest, so as to enable the parties to maintain separate actions: *Lane v. Drinkwater*, 1 Crompt. M. & R. 599, 612; 5 Tyrw. 40; *Byrne v. Fitzhugh*, 1 Crompt. M. & R. 613, note; 5 Tyrw. 54; *English v. Blundell*, 8 Car. & P. 332, 336; *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 64, 71.

In actions *ex contractu*, the objection to the non-joinder of parties plaintiff is not, as in actions *ex delicto*, waived by neglecting to plead in abatement, since, in the former, the objection, if it appear on the face of the pleadings, may be taken by demurrer, on motion in arrest of judgment, or in error; and if the objection do not appear on the face of the pleadings, the defendant may avail himself of it, either by plea in abatement, or as a ground of nonsuit at the trial, or as a variance upon the plea of *non est factum*, if the action be on a specialty, or if upon any other contract, under the plea of the general issue: 1 Chitty's Pleading, *15.

Judgment for defendant for costs.

CO-TENANTS, WHEN MAY SUE SEPARATELY, AND WHEN MUST JOIN: See *Peck v. McLean*, 1 Am. St. Rep. 665, note 669, where other cases are collected.

OBJECTION OF NON-JOINDER OF PARTIES PLAINTIFFS WAIVED if not taken advantage of by demurrer or answer: *Donnell v. Walsh*, 88 Am. Dec. 361.

STATE EX REL. METCALF v. GOFF.

[15 RHODE ISLAND, 505.]

PERSON BY ACCEPTING OFFICE INCOMPATIBLE WITH ONE HE IS HOLDING thereby vacates his former office.

OFFICES OF JUSTICE OF DISTRICT COURT AND OF DEPUTY SHERIFF are incompatible.

QUO WARRANTO. The opinion states the case.

Charles E. Gorman and J. Osfield, Jr., for the relator.

Frederick N. Goff, pro se ipso.

By Court, STINESS, J. The respondent became justice of the district court of the eleventh judicial district, July 1, 1886. He was appointed and qualified as a deputy sheriff in the county of Providence, July 21, 1886. The question before us

is, whether he vacated his office as justice of the district court by accepting the office of deputy sheriff.

It is well settled that when a person accepts an office incompatible with one which he then holds, he thereby impliedly resigns or vacates his former office: *State v. Brown*, 5 R. I. 1; *Cotton v. Phillips*, 56 N. H. 220; *State v. Buttz*, 9 S. C. 156; *People v. Carrigue*, 2 Hill, 93; *Magie v. Stoddard*, 25 Conn. 565; 68 Am. Dec. 375; *Stubbs v. Lee*, 64 Me. 195; 18 Am. Rep. 251; *People v. Nostrand*, 46 N. Y. 375.

We have to inquire, then, whether these two offices are incompatible. Most of the cases cited by the relator upon this point rest upon some constitutional or statutory provision. Thus in Connecticut, a statute declared that no judge or justice of the peace should hold the office of sheriff or constable. In Maine, the constitution provided that no person belonging to either one of the three departments of the government should exercise any of the powers belonging to another. The Opinion of the Justices, 3 Me. 484, 486, held that the offices of justice of the peace and sheriff were incompatible because of this provision; the former office being judicial, the latter executive. In New York the constitution prohibits a sheriff from holding any other office, and upon this rests the case of *People v. Nostrand*, *supra*. In Virginia and Louisiana, also, there are constitutional limitations.

In cases where the question of incompatibility of offices has arisen, independently of statutory or constitutional provision, two rules are generally recognized: 1. That incompatibility does not depend upon the incidents of the offices, as upon physical inability to be engaged in the duties of both at the same time. For example, in *People v. Green*, 5 Daly, 254, it was held that the office of member of the legislature and clerk of the court of special sessions might be held by the same person, even though attendance upon one office prevented for the time being the performance of the duties of the other. This point was approved on appeal: *People v. Green*, 58 N. Y. 295. These opinions contain an elaborate review of the early cases, and clearly point out the tests by which the question of incompatibility is to be determined. So, too, in *Commonwealth v. Kirby*, 2 Cush. 577, 580, the court says: "It has never been supposed that persons holding minor offices appertaining to the executive department of the government, such as deputy sheriffs, constables, or coroners, were thereby disqualified from holding seats in the legislature. The same

was formerly true of the judges of the court of common pleas, who frequently held the office of senator or representative while in commission as judges, and were only disqualified by the statute of 1820, and the eighth article of the amendments of the constitution adopted in 1821."

2. The test of incompatibility is the character and relation of the offices; as where one is subordinate to the other, and subject in some degree to its revisory power; or where the functions of the two offices are inherently inconsistent and repugnant. In such cases, it has uniformly been held that the same person cannot hold both offices. In *Rex v. Pateman*, 2 Term Rep. 777, it was declared that where a town clerk acts ministerially under the aldermen, who are judicial officers, one cannot hold both offices. Much stress is laid upon the fact that the accounts of the clerk were subject to the revision and control of the aldermen. *Rex v. Tizzard*, 9 Barn. & C. 418, is to the same effect. In *Cotton v. Phillips*, 56 N. H. 220, where one was chosen a member of the prudential committee, and also an auditor in a school district, it was held he could not hold both offices. The court says: "If the same person could hold both offices, he would in fact sit in judgment on his own acts."

In England a sheriff's duties are ministerial, and to a limited extent also judicial. While these peculiar functions are recognized, in some cases, as being necessarily imposed upon the office by legislation and custom, no case upholds the propriety of exercising both the ministerial and judicial functions at the same time and in the same case: *Widow v. Clerke*, Cro. Eliz. 76, case 38. See also argument of Shepherd in *Milward v. Thatcher*, 2 Term Rep. 81. Under our law there is no such confusion of duties. In this state, and doubtless in this country generally, a sheriff is simply a ministerial officer. If he performs judicial duties, it is by virtue of another office voluntarily assumed. But the incongruity of such offices in one person is manifest. To say nothing of the breach of dignity and propriety which would result from an attempt to perform the duties of judge and officer together, the power of a judge to pass upon the sufficiency of an officer's return, and to allow or to disallow his fees, are quite sufficient to bring these offices within the recognized rule of incompatibility, by reason of the judicial supervision of one office, and the accountability of the other. Moreover, in this state an officer is required to serve any process duly tendered to him, and thus the judge of

a district court might have the process of his own court tendered to him to be served, and become liable to a penalty if he did not do it. In many cases he is the complaining officer, whose complaint could only be made to himself if he were also judge, unless aided by special legislation.

In *Commonwealth v. Kirby*, *supra*, it is held that the office of justice of the peace and constable are not incompatible. The question is only considered on the ground of constitutional provisions; the revisory relation of the offices is not at all discussed. The defendant was charged with hindering an officer. The defense was, that the process was void because the justice of the peace who issued it had vacated his office by accepting the office of constable. Inasmuch as the court held the process to be good as that of a *de facto* justice, a discussion of the relation of the two offices was probably deemed unnecessary. The court add, however: "A very different case would be presented if the defendant had attempted to exercise the two functions of a justice of the peace in issuing a warrant, and of a constable in serving the same warrant."

It may be said, however, that the respondent need not, and probably will not, undertake to act in both offices at the same time; but in the words of Ames, C. J., in *State v. Brown*, 5 R. I. 1, 11: "The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices," and "the question of incompatibility is to be determined from the nature of the duties of the two offices, and not from a possibility or even a probability that the defendant might duly perform the duties of both."

We think the offices of justice of district court and deputy sheriff are incompatible, and that by accepting the latter the respondent vacated the former.

The answer sets out that the respondent has recently resigned the office of deputy sheriff, but we do not see that this fact affects the case. If the office of justice became vacant, the respondent could not put himself back into it by his own act. The vacancy can only be filled in the way provided by law.

Judgment of ouster.

OFFICE IS VACATED BY ACCEPTING INCOMPATIBLE OFFICE: *Fells v. Kerlin*, 55 Am. Rep. 197; *People v. Common Council*, 33 Id. 659; *In re Corlies*, 23 Id. 538; *Bunting v. Willis*, 21 Id. 338; *Stubbs v. Lee*, 18 Id. 251; note to *State v. Allen*, 83 Am. Dec. 372, where this subject is discussed.

THORNTON v. BAKER.

[15 RHODE ISLAND, 538.]

WHERE JURISDICTION OF COURT DEPENDS ON FINDING OF PARTICULAR ALLEGED FACT, the exercise of jurisdiction implies the finding of that fact.

SUPREME COURT MAY, ON APPEAL FROM PROBATE COURT OF TOWN, ALLOWING OR REFUSING PROBATE of a will, try and determine the question whether the testator was, at the time of his death, a resident of that town, so as to give the court appealed from jurisdiction, and its determination that the testator was a resident of the town, and its decree on the merits affirming the decree of the lower court, are conclusive on the parties to the proceeding in all the courts of the state.

WHERE PERSON PRESENTS WILL TO PROBATE COURT OF TOWN, WHICH REFUSES TO ADMIT IT TO PROBATE, and the supreme court on appeal affirms the decree of the probate court on the merits, the petitioner is concluded by the decree of the supreme court, although it be not formally adjudged therein that the testator was resident in that town at the time of his death, and cannot offer the same will for probate to the probate court of another town.

MOTION. The opinion states the case.

Dexter B. Potter, for the appellant.

John J. Arnold, for the appellee.

By Court, DUFFEE, C. J. Joseph Baker died November 17, 1884, leaving a written instrument, dated March 27, 1883, purporting to be his will. Shortly after his death, Mary Baker, his widow, who was named as executrix in said instrument, offered it for probate in the probate court of Coventry, alleging in her petition for probate that said Joseph, "at the time of his death, was a resident of said Coventry." After hearing, the court entered a decree refusing to admit said instrument to probate, from which decree said Mary took an appeal to this court. This court, after hearing, affirmed the decree of the probate court of Coventry, and likewise expressly adjudged said instrument not to be the will of said Joseph. The decree of this court was entered October 5, 1885. In July, 1886, Mary Baker petitioned the court of probate of Warwick for the probate of said instrument as the will of said Joseph, alleging in her petition that said Joseph, at the time of his death, was a resident of said Warwick. The appellant, Thornton, being present at the Warwick court, brought the decrees of the court of probate of Coventry and of this court to the attention of the Warwick court, but the latter court, nevertheless, took jurisdiction, and, after hearing, entered a decree, in which it adjudged and decreed that said Joseph.

"at the time of his decease, was an inhabitant and resident of said Warwick," and that said instrument was his last will and testament, and that as such it be approved, allowed, and ordered to be recorded. From this decree said Thornton took an appeal to this court, assigning for reasons of appeal, among others, that said instrument and all matters connected with the probate thereof are *res adjudicata*, and that said Mary is estopped, by her previous action in the court of probate of Coventry and in this court, from prosecuting her present petition. The case is before us now upon his motion, based upon said reasons, that her petition be dismissed.

Mary Baker, the appellee, resists the motion, and contends that it cannot be granted consistently with our decision in *People's Savings Bank v. Wilcox*, 15 R. I. 258 [*ante*, p. 894]. In that case, Holder N. Wilcox applied to the court of probate of Tiverton for administration on the estate of his niece, Mary A. Wilcox, describing her as "late of Tiverton, deceased." He was appointed administrator without hearing, no one opposing. Subsequently one George A. Sayer applied to the probate court in Providence for appointment as administrator, alleging that Mary A. Wilcox was a resident of that city when she died, and was appointed. Admittedly she did in fact reside in Providence when she died. The court held the second appointment good, and the first void, because the court of probate of Tiverton had no jurisdiction. The second applicant could not be held to be estopped by the allegation of jurisdictional facts in the first application, because he had nothing to do with making it. The case at bar is different. In the case at bar the two applications were both made by Mary Baker. In the first she alleged that the deceased was resident in Coventry when he died, and thus led the court of probate of Coventry to assume jurisdiction of her application, and try it on its merits. In the second she alleged that the deceased was resident in Warwick, and petitioned the court of Warwick to try the same question which she had previously submitted to the court of probate of Coventry, claiming that the decision of the latter court was void, because the deceased was not, as she had alleged in her application to the latter court, resident in Coventry when he died. No precedent is cited for such a proceeding, and it certainly seems as if a party ought not to be permitted thus to belie himself. And see the following cases cited by the appellant: *Ela v. McConihe*, 35 N. H. 279; *Hines and Bryan v. Mullins*, 25 Ga. 696; *Brown v. Haines*,

12 Ohio, 1; *Mandeville v. Mandeville*, 35 Ga. 243; *Harbin v. Bell*, 54 Ala. 389. "Consent of parties," say the supreme court of the United States in *Railway Co. v. Ramsey*, 22 Wall. 322, 327, "cannot give the courts of the United States jurisdiction, but parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such admission." After a court has acted judicially on such an admission or declaration, it seems as if the party making it should be debarred from denying it for the purpose of attacking any judgment dependent thereon: *Turner v. Billagram*, 2 Cal. 520; *Miltimore v. Miltimore*, 40 Pa. St. 151; *Potter v. Adams's Ex'rs*, 24 Mo. 159; *Lovelady v. Davis*, 33 Miss. 577. We do not find it necessary, however, to determine this point in order to decide this case.

As we have seen, Mary Baker took an appeal from the probate court of Coventry to this court, and here prosecuted her petition to final judgment, wherein the decree of said probate court was affirmed, and the instrument offered for probate was adjudged not to be the will of Joseph Baker. It is true, the decree of this court does not expressly adjudge that Joseph Baker was resident in Coventry at his death, but where jurisdiction depends on the finding of a particular alleged fact, the exercise of jurisdiction implies the finding of that fact: *Erwin v. Lowry*, 7 How. 172; *Wyatt's Adm'r v. Steele*, 26 Ala. 639. The decree, then, which we are asked to disregard, is a decree not simply of the court of probate of Coventry, but also of this court, the court of last resort, the supreme court of this state. The statute (Pub. Stats. R. I., c. 192, sec. 25) declares: "The supreme court shall be the supreme court of probate, and shall have cognizance and jurisdiction of all matters brought before it, by appeal or otherwise, from any court of probate which is or shall be established by law." The statute (Pub. Stats. R. I., c. 181, sec. 5) provides that the supreme court, on appeal from a probate court, "may allow amendments to be made in the papers filed, . . . to supply any deficiency or correct any errors," and that it "may proceed, without reference to the order, judgment, or decree of the court of probate, . . . to execute such judgment as the justice of the case may require." These provisions are exceedingly comprehensive. They evince a purpose to make the supreme court the final arbiter of all probate matters. They confer jurisdiction, not simply over matters which are within the jurisdiction of the court appealed from, but also over "all matters" which may be brought be-

fore the court appealed to, "by appeal or otherwise." Jurisdiction is authority to try and determine, and therefore, if on appeal from the probate court of any town allowing or refusing probate of a will, the question whether the testator was resident in that town at his death, so as to give the court appealed from jurisdiction, is a matter which may be brought before this court on appeal, it is a question which this court may try and determine; and this court being the court of last resort, if it determines that the testator was resident in the town, and enters a decree on the merits, affirming the decree of the lower court, its determination is conclusive on all persons who are parties to it in all the courts of the state, unless it be set aside by the court itself on petition for new trial. Now, we do not suppose there can be any doubt but that said question is a matter which can be brought before this court by appeal. It is one of a class of questions which in practice have always been considered open for trial on appeal and as ground of appeal. The practice is supported by authority: *People v. Ferris*, 36 N. Y. 218; *Hearn v. Cutberth*, 10 Tex. 216; *United States v. Nourse*, 6 Pet. 470.

There is no reason why these provisions should not be broadly construed agreeably to their apparent design, and every reason why they should be so construed; for if there be any matter in which finality of decision is peculiarly important, that matter is the settlement of estates. But if the view contended for by Mary Baker be correct, no such finality is attainable. After our decree affirming that of the court of probate of Coventry disallowing the will of March 27, 1883, Stephen W. Thornton applied to the same court for the probate of an earlier will. Probate was granted, and appeal taken. So that there are now two appeals pending before this court, one from the court of probate of Warwick for admitting the bill of 1883 to probate, and the other from the court of probate of Coventry for admitting the earlier will to probate. And if the view contended for by Mary Baker be correct, both appeals may go to trial before different juries, and result in verdicts and judgments affirming the decrees appealed from. In that event we shall have three decrees entered by the supreme court, to wit, decrees affirming the first and second decrees of the court of probate of Coventry, and a decree affirming the decree of the court of probate of Warwick. Which of the three will it be our duty to treat as authoritative? One reason which weighed heavily with us in *People's Savings Bank v. Wilcox*, *supra*, was

that the courts of probate of the several towns may assume jurisdiction and proceed to exercise it without any actual notice to parties in interest,—the only notice required being notice by publication or posting, which may never come to their knowledge, since they have no reason to be on the lookout for notice from a court having no jurisdiction. This reason does not hold on appeal, for the appellant is required to cite the adverse parties, and if he fails to do so, either from accident or because of their absence from the state, the court is authorized to provide for notice to them; and also, as we have seen, to make such amendments of the papers as may be necessary to a thorough trial of the case.

We decide that Mary Baker is concluded by the decree of this court, entered October 5, 1885, affirming the decree of the court of probate of Coventry disallowing the will of Joseph Baker of March 27, 1883; for though it was not formally adjudged in that decree that Joseph Baker was resident in Coventry at his death, it was virtually so adjudged by the court deciding the case on the merits. The residence was alleged in the petition, and therefore, if not actually proved to the satisfaction of the court, it must have been either expressly or tacitly admitted; and, as we have seen, such admission, as between the parties, is as effectual as positive proof.

A decree may be entered annulling the decree of the court of probate of Warwick, and dismissing the petition.

Motion granted.

JURISDICTION OF PROBATE COURT: See *People's Savings Bank v. Wilcox*, ante, p. 894, and note, where other cases are collected.

WASHINGTON v. BASSETT.

[15 RHODE ISLAND, 532.]

WHERE POWER OF SALE IN MORTGAGE REQUIRES TWENTY DAYS' NOTICE of the sale to be given in a newspaper, the notice must appear daily for twenty days before the day of sale, if the paper selected be a daily paper, and a notice printed in such paper seven times between July 23d and August 12th, the day of sale, is insufficient.

BILL in equity. The opinion states the case.

Charles M. Salisbury and Charles H. Page, for the complainant.

Edward D. Bassett and Frederic Hayes, for the respondents.

By Court, STINNESS, J. The defendant Bassett sold to the defendant Brown a lot of land in Providence, under a power of sale contained in a mortgage deed, of which Bassett was the assignee. After the sale, the complainant, a judgment creditor of the mortgagor, bought the mortgagor's interest in the land at the execution sale, under a levy which had been made before the mortgage sale took place. The complainant brings this bill to redeem, claiming that there has been no valid sale under the power contained in the mortgage, because the requirement of the power, "first giving twenty days' notice of such sale in some one of the public newspapers printed in said city of Providence," has not been complied with. The mortgage sale took place August 12, 1885. The notice was published in the Evening Mail, a daily newspaper printed in Providence, seven times, viz.: July 22d, 25th, 29th, August 1st, 5th, 8th, and 11th. The question is, whether such a publication of the notice satisfies the requirement of the power. We do not think it does. The evident purpose of the requirement is to secure ample notice of the sale, for the mutual advantage of the mortgagor and mortgagee. The mortgagee is allowed to select the newspaper in which he will give the notice; but the extent of the notice is definitely expressed. It must be "twenty days' notice." We think the fair and natural interpretation of that phrase is, that the notice is to be continuous, in the paper selected, for twenty days. The defendants contend that, inasmuch as the notice covered a period of twenty days, it was "twenty days' notice." But if seven insertions in a daily paper, covering the time, is to be held equivalent to twenty days' notice, why would not two, say on the first and last days of a period of twenty days, or even one, twenty days before the sale? If anything less than a continuous notice is sufficient, we do not see why one or the other of these would not also be sufficient. The defendants say that even this complies with the literal construction of the terms of the power; but that is not enough, if the construction be crafty or technical. Such powers should be construed as people generally, who have to do with them, would be likely to understand them; and we think that the use of the word "days" would suggest, to the ordinary mind, a continuous daily notice, if it be in a daily paper. In *Stine v. Wilkeson*, 10 Mo. 75, 96, "twenty days' previous notice" of the time of sale was required. One notice was published in a daily newspaper twenty-one days before the sale, and after

that the notice was published, less than twenty days, in another paper, which was a weekly reprint of the daily. This was held to be insufficient notice. The court says: "Would one publication of a notice by a sheriff of an intended sale of real estate under execution, made in a newspaper twenty days before the day of sale, be held to be a compliance with the requisition of the statute, which directs him to give twenty days' previous notice of the time, etc., by an advertisement in some newspaper printed in the county, etc.? We apprehend that such is not the general understanding nor the practice in the country, but that such notices are continued to be published until the day of sale." This case is cited by the court, with apparent approval, in *German Bank v. Stumpf*, 73 Mo. 311. See also *Leffler v. Armstrong*, 4 Iowa, 482; 68 Am. Dec. 672.

In *Kellogg v. Carrico*, 47 Mo. 157, the deed required thirty days' notice. The publication covered a period of thirty-four days, and appeared in each daily issue of the paper, there being no issue on Sundays. Held, that the Sunday omissions did not vitiate the notice, because it was continuous. See also *Cushman v. Stone*, 69 Ill. 516. In *Weld v. Rees*, 48 Id. 428, where the language of the deed was, "after publishing a notice in a newspaper published in the city of Chicago ten days before the day of such sale," it was held that one insertion, ten days before the sale, was sufficient, because the language seemed to exclude the idea that the notice should be continuous, as only one notice and one paper, and that ten days before the sale, are spoken of. If "notice for ten days" had been required, the court says there might be question as to its sufficiency. *Jenkins v. Pierce*, 98 Ill. 646, was a similar case. In *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio, 120, 42 Am. Dec. 191, it was held that where a law required "at least sixty days' notice" of the time and place of payment of an installment to the stock of a corporation, a single notice given sixty days before the time was sufficient. This interpretation, however, is put by the court upon the grounds that a continuous notice was not intended, because, in other acts, where the legislature meant to require a continuous notice, more explicit terms had been employed, and that the manifest object of the notice was to give stockholders a reasonable time to prepare to meet the demand; hence that it must be a complete notice "at least sixty days" before the payment. *Andrews v. Ohio and Mississippi R. R. Co.*, 14 Ind. 169, is precisely similar.

In *Harris, Petitioner*, 14 R. I. 637, this court held that where

the statute requires a notice to be published "in some public newspaper for four successive weeks," it is enough if the notice be published weekly, even though it be in a daily paper. See also *Thurston v. Miller*, 10 Id. 358. There are numerous cases to this effect, and they proceed upon the principle that, where the period is a certain number of weeks, such a notice is continuous from week to week, which is all that is required. Upon the same principle, we must conclude that, where the period is a certain number of days, the notice must be continued from day to day, upon such days as the paper is published. Of course the selection of the paper must be made in good faith; but if, as in *Leffler v. Armstrong*, *supra*, it be properly made in a weekly or semi-weekly paper, continuously and in every issue, for the designated period, the requirement is fulfilled. Our conclusion is, that the notice of the mortgage sale in this case did not conform to the terms of the power, and that the complainant is entitled to redeem.

NOTICE FOR CERTAIN NUMBER OF DAYS OR WEEKS, WHEN SUFFICIENT:
See note to *Hoffman v. Anthony*, 75 Am. Dec. 708, where this subject is discussed; *Montour v. Purdy*, 88 Id. 88, note 95, where other cases in that series are collected.

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2. ACKNOWLEDGMENT OF DEED IS JUDICIAL ACT, and the certificate of it, in the absence of fraud, is conclusive as to the facts therein stated. *Id.*

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ADVERSE POSSESSION.

1. EACH OF SUBSEQUENT GRANTEES ARE PRESUMED to have entered under their respective deeds with knowledge of the contents of a prior deed to the same land by their grantor. *Schnallbach v. Chicago, M., & St. P. R. R. Co.*, 740.
2. WHEN BOTH PARTIES CLAIM TITLE under the same person, neither of them can deny his right, and as between them the elder is the better title, and must prevail; hence the estoppel of the grantor to deny his grantee's title, arising from his deed, extends to all persons claiming from or under the grantor by title acquired subsequent, whether by deed or otherwise. Any of such subsequent grantees desiring to destroy the presumption that they hold in subordination to the legal title, and take and hold the land by adverse possession to which they have no title by virtue of their deed, though described in it, are bound first to actually and notoriously dispossess the rightful owner before they can set the statute running in their favor. *Id.*
3. ADVERSE POSSESSION IS TAKEN STRICTLY; every presumption is in favor of possession in subordination to the rightful owner. Adverse possession is not to be made out by inference, but by clear and positive proof. *Id.*
4. CONTINUED USE AND OCCUPATION BY GRANTOR OF LAND is not evidence that his possession is adverse to his grantee; on the other hand, his possession is presumed to be under and in subordination to the legal title held by his grantee, for he is estopped by his deed from claiming that his holding is adverse. This rule applies to all subsequent grantees of such grantor. *Id.*
5. WIDOW WHO REMAINS ON HER HUSBAND'S LAND does not hold adversely to the heirs. *Page v. Branch*, 281.

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1. AGENCY TO BIND PRINCIPAL BY INSTRUMENT UNDER SEAL must be created by writing under seal; and a sealed instrument is not binding on the principal when changed by an agent possessing written or oral authority only to act. *Humphreys v. Flach*, 293.
2. PRINCIPAL WHO VERBALLY AUTHORIZES AGENT to fill up a blank in a bond with a specific sum of money, left open and in his hands for that purpose, and then deliver it when completed, is estopped, when this is done and the money is obtained from another acting in good faith and without knowledge, from denying his obligation, and thus perpetrating a fraud upon the holder. Even if the bond is void, still the act of borrowing creates a liability which the principal cannot deny. *Id.*

ANIMALS.

1. BEES ARE FERRE NATURE, and the only ownership in them, until reclaimed and hived, is *ratione soli*. *Rezroth v. Coon*, 863.
2. ACT OF REDUCING THING FERRE NATURE INTO POSSESSION CREATES NO TITLE thereto if such act be wrongful; and therefore a trespasser, who places in a tree on another's land a box for bees to hive in, cannot maintain trover against a third person for taking bees and honey from the box. *Id.*
3. ONE WHO KEEPS DOGS IS BOUND TO HAVE THEM UNDER HIS OBSERVATION AND INSPECTION, or under the observation and inspection of some person selected by him. *Bries v. Bauer*, 454.
4. KNOWLEDGE OF SERVANT OR AGENT THAT DOG IN HIS CARE is dangerous is equivalent to knowledge by his principal. *Id.*
5. IF DOG IS KEPT FOR PROTECTION TO PREMISES, the purpose for which he is kept charges his master with knowledge that he is of fierce and dangerous character. *Id.*
6. MASTER OF DOG IS ANSWERABLE TO PLAINTIFF INJURED BY SUCH DOG on his own premises, where, after being kept chained for the protection of the owner's premises, the dog is suffered to escape therefrom, and to attack and wound the plaintiff. *Id.*

ARBITRATION AND AWARD.

PARTIES TO EXECUTORY CONTRACT WHO AGREE THAT ALL QUESTIONS OF DIFFERENCE or dispute which may arise between them in reference thereto, or that the amount of any claim arising therefrom, shall be first submitted to the arbitrament of a single individual or tribunal named, are bound by their agreement; but where the agreement does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either, and does not oust the jurisdiction of the courts having cognizance of the subject-matter of the dispute; and the applicability of this principle is not disturbed by a provision in the original contract that no action should be brought until after the award is filed, nor by the fact that arbitrators were chosen who failed to agree. *Commercial U. A. Co. v. Hocking*, 562.

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ASSIGNMENTS.

1. **WHERE OWNER OF CHATTEL, ALTHOUGH INDUCED THERETO BY FRAUD, INVESTS ANOTHER WITH APPARENT LEGAL TITLE**, in pursuance of a contract, the person so clothed may transfer an unimpeachable title to a purchaser in good faith, and there is no distinction to be made in this respect between chattels and such instruments as may be assigned by indorsement, so as to give the assignee a complete legal title. *Moore v. Moore*, 170.
2. **WHERE OWNER OF THINGS IN ACTION, ALTHOUGH NOT TECHNICALLY NEGOTIABLE, HAS CLOTHED ANOTHER**, to whom they are delivered in the method common to all mercantile communities, with the usual apparent *indicia* of title, he will be estopped from setting up against a second assignee, to whom the securities have been transferred for value and without notice, that the title of the first assignee was not perfect and absolute. The estoppel thus applied between assignors and assignees in no wise affects the right of the makers of such paper to set up any defenses which the statute makes available to them. The purchaser of such paper cannot affect the makers by an estoppel against any prior assignor as to any defenses or equities between the original parties. *Id.*
3. **ASSIGNMENT OF PART OF CHOSE IN ACTION** for valuable consideration is good in equity, and may be made either by direct transfer, or by an order drawn upon the particular fund. *Contra* at common law, so as to give the assignee a right of action upon it. *Harris Co. v. Campbell*, 467.
4. **ASSIGNMENT OF PART OF CHOSE IN ACTION**, by an order supported by a sufficient consideration, but not drawn against a particular fund, is not enforceable against the debtor, even in equity. *Id.*
5. **ASSIGNMENT OF PART OF DEBT ACQUIRES RIGHT OF ACTION** in equity against the debtor; and not only a lien upon the fund, but a property in the fund itself; and he may bring in all the parties in interest, and force the payment of the obligation, and the distribution of the proceeds among those entitled to it; and the parties who have established claims against the fund are entitled to be paid therefrom in the order of the respective dates at which their rights were respectively fixed. *Id.*

See CORPORATIONS, 19.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. **ACTION RELATIVE TO VOLUNTARY ASSIGNMENTS** by insolvent debtors are remedial statutes, and, as against the assignor and those holding under him, should be construed liberally in favor of creditors. *Turnpseed v. Schaefer*, 17.
2. **ASSIGNMENT FOR CREDITORS**. — Incomplete schedule and no schedule differ in degree only. *Id.*
3. **Id.** — **OMISSION FROM SCHEDULE** of property of little or no value, or of creditors whose claims aggregate but a small amount, may not invalidate assignment; but if such omissions are of large sums from assets and from amount due creditors, the case is otherwise. *Id.*
4. **TO INVALIDATE ASSIGNMENT** for benefit of creditors on account of omissions of creditors from schedule, it is not necessary that there should be a guilty intention to make such omissions. *Id.*
5. **SCHEDULE MUST BE FULL AND COMPLETE** to be valid, as no means are provided for perfecting incomplete schedules, and our courts are not authorized to amend such schedules. *Id.*

6. GENERAL PROVISION IN ASSIGNMENT FOR BENEFIT OF CREDITORS, that the assignee be directed to take possession of any property of assignor that may have been omitted from assets as named in schedule, is against the policy of the law, especially where details are required to be set forth with particularity. *Id.*
7. PREFERENCES IN ASSIGNMENTS FOR BENEFIT OF CREDITORS, although permitted, are not favored. Act of 1895 corroborates sections 1945 and 1946 of the code, and article 1, section 2, paragraph 6, of the constitution of 1877 (code, section 5023), by encouraging all creditors of assignor to use any proper means to detect and defeat any fraudulent concealment or disposition of property of assignor. *Id.*
8. ASSIGNMENT FOR BENEFIT OF CREDITORS IS INVALID, where inventory and schedule in an assignment for the benefit of creditors is not full and complete, and does not contain "all the assets of every kind held, claimed, or owned" by debtor when deed of assignment is executed, and is not verified as required by statute. Omission from schedule of assets by assignor of a right of redemption in certain premises invalidates assignment. *McMillan v. Knapp*, 29.
9. ASSIGNMENT FOR BENEFIT OF CREDITORS. — Affidavit which states that the schedule contains "a true, complete, and perfect" inventory of all the property of which debtor was possessed, both real and personal, including stock in trade, accounts, promissory notes, executions, and real estate, all of which is marked "Exhibit A," and household and kitchen furniture, is defective. Enumeration in schedule of property as of several kinds excludes all property not so enumerated. Oath which states that the property enumerated in schedule is all that the assignor possessed at time assignment is made, is incomplete; the oath must declare that the inventory and schedule is full and complete, and contains all the assets of every kind held, claimed, or owned by assignor when assignment is made. *Id.*
10. ASSIGNMENT FOR CREDITORS. — Failure to substantially comply with all the requirements of the statute is a good cause for setting aside such assignment. *Id.*
11. CORPORATION MAY MAKE ASSIGNMENT FOR BENEFIT OF CREDITORS. *Albany etc. Iron and Steel Co. v. Southern Agricultural Works*, 26.
12. CREDITORS' SUIT. — Unsecured creditors may, in certain cases, apply to a court of equity for relief before their claims are reduced to judgment, as where the debtor is an insolvent, and has assigned his property to one who is conspiring with him to defraud his creditors, or where the property was obtained under false representations of which the assignee was cognizant, or where a large supply of goods was procured with a view of making an assignment, or where property of assignor is being disposed of and wasted, — in which cases equity will interpose, and appoint a receiver. *Id.*
13. FRAUD. — LAYING IN LARGE SUPPLY OF GOODS SHORTLY BEFORE MAKING ASSIGNMENT for the benefit of creditors, for the purpose of enabling the assignee to carry on the business of the assignor, raises a presumption of an intention to delay, hinder, and defraud unpreferred creditors. *Id.*
14. VOID ASSIGNMENT. — Injunction may be issued and receiver appointed to protect from foreclosure mortgages made in aid of a void assignment, at the instance of unsecured creditors, who are not parties to such mortgage. *Id.*

- 1A. ASSIGNMENT FOR BENEFIT OF CREDITORS OF GOODS TO WHICH DEBTOR HAS ACQUIRED NO TITLE passes no title to the assignee as against the true owner thereof. *Milliser v. Erdman*, 334.
- 1B. PURCHASE MADE BY ONE ACCUSTOMED TO CARRY ON HIS BUSINESS IN SLIPSHOD WAY, and culpably ignorant of the true state of his affairs, although made a short time before executing an assignment for the benefit of his creditors, is not fraudulent, when there is nothing to show that the purchase was out of the usual course, or that it was made in anticipation of failure. *Dalton v. Thurston*, 905.

ATTACHMENT AND GARNISHMENT.

1. EQUITABLE OR EXECUTORY RIGHT OR INTEREST IN CORPORATE STOCK IS NOT ATTACHABLE under the Rhode Island statute. *Lippitt v. American Wood Paper Co.*, 886.
2. DEPOSIT OF MONEY IS SUCH AS IS SUBJECT TO ATTACHMENT EXECUTION under the provisions of the Pennsylvania act of June 16, 1836, section 22, where the money is left with another for safe-keeping, to be returned to the owner, not in money of like amount, but in the identical money deposited. *Roselle v. Rhodes*, 591.
3. PENSION MONEY FROM UNITED STATES IS NOT EXEMPT FROM ATTACHMENT EXECUTION, after it is received by the pensioner, and by him deposited in the hands of a third person for safe-keeping. *Id.*
4. WHETHER GARNISHEE PROCESS UNDER THE STATUTE is a purely legal or an equitable action, and if purely equitable it was error to direct all the issues to be tried by a jury, *quære*. *Drake v. Harrison*, 717.
5. IN GARNISHMENT PROCEEDING, EVIDENCE IS ADMISSIBLE to prove that the garnishee has a right and an interest in paying the money in a particular way, which, under his contract with his creditor, he has a right to do. *Id.*
6. GARNISHMENT OF SALARY. — Where the hiring is by the month for a salary to be paid at the end of the month, such salary is not subject to garnishment before the end of the month in which it is to be earned, as it is not then money due or to become due, within the meaning of section 3719 of the Revised Statutes of Wisconsin. *Foster v. Singer*, 745.

See DEBTOR AND CREDITOR.

ATTORNEYS AT LAW.

1. ATTORNEY AT LAW WHO RETAINS OUT OF MONEY COLLECTED BY HIM FOR HIS CLIENT EXCESS so apparent as to amount to misconduct will be required by the order of the court to pay over to his client the amount collected, less a reasonable compensation for his services. In this case, the amount collected being seventy-five dollars, thirty per cent is held to be as much as the attorney had a right to charge. *Burns v. Allen*, 844.
2. ATTORNEY HAS NO RIGHT TO CHARGE FOR SERVICES RENDERED IN OTHER LITIGATION about officers' fees which grows out of the suit in which he is employed, where the client is not interested in such litigation. *Id.*
3. ATTORNEY CANNOT RETAIN HIS FEES OUT OF MONEY LEFT WITH HIM by his client in special deposit for a special purpose, and so received by him. *Anderson v. Bosworth*, 910.
4. SUMMARY JURISDICTION OF COURT OVER ITS ATTORNEYS EXTENDS TO ANY MATTER in which an attorney has been employed by reason of his professional character. *Id.*

5. SUMMARY JURISDICTION OF COURT CANNOT BE INVOKED TO COMPEL ATTORNEY to pay over to his client money collected by the former, when the client has obtained a judgment therefor against the attorney, and thereby changed the relation of attorney and client to that of debtor and creditor. *Windsor v. Brown*, 892.
 6. WHERE ATTORNEY ACTS FOR BOTH PARTIES TO ACTION, AND WHILE PREPARING PAPERS AT INSTANCE OF BOTH COMMUNICATIONS ARE MADE TO HIM by either party in the presence of the other, such communications are not privileged, and the testimony of the attorney is competent in regard thereto. *Goodwin Gas Stove etc. Company's Appeal*, 896.
- See HOMESTEADS, 4; STATUTE OF LIMITATIONS, 1.

BAILMENTS.

1. DEPOSIT, PROPERLY SO CALLED, IS NAKED BAILMENT, AND EXISTS where one of the contracting parties gives something to the other to keep, who is to do so gratuitously, and return it *in individuo*, upon request. *Rosell v. Rhodes*, 591.
2. DEPOSITARY IS HELD TO EXERCISE OF ORDINARY CARE ONLY, but when he becomes the depositary of a fund, he assumes that relation under the law as it exists, and thereby subjects himself to the chances that it may be attached in his hands for the depositor's debts. *Id.*
3. CONTRACT IS ONE OF BAILMENT, AND NOT OF SALE, where a sewing-machine company rented a sewing-machine to a married woman for a definite period at a certain rent, she to become the agent of the company in holding and keeping possession of it, and at the expiration of the term or upon failure to pay the rent, to deliver up the possession to the company, but on payment of the rent for the entire term, to have an option to buy at a nominal price, and where it was further expressly agreed that the contract was one of renting only, and not of sale, and that no payment, except that of the nominal price, should vest any title in her, or prevent the company from reclaiming possession of the machine; and upon failure on her part to comply with the conditions of the contract the company has a right to reclaim the machine, whether such a contract could be made by a married woman or not. *Wheeler & W. M. Co. v. Hell*, 575.
4. FUNDAMENTAL DISTINCTION BETWEEN BAILMENT AND SALE IS, that in the former the subject of the contract, although in an altered form, is to be restored to the owner, whilst in the latter there is no obligation to return the specific article, either in the same or an altered form. In the one case the title is not changed, in the other it is, the parties standing in the relation of debtor and creditor. *Bretz v. Diehl*, 706.
5. WHERE BAILOR OF PROPERTY OF OTHERS SO COMMINGLES IT WITH HIS OWN that its identity cannot be traced, all the inconvenience of the confusion is thrown upon him; but if the owners have consented to the commingling, each remains the owner of his share in the common stock. *Id.*
6. MERE FACT THAT WHEAT, DELIVERED IN PURSUANCE OF CONTRACT OF BAILMENT, IS MIXED with a mass of like quality, with the knowledge of the bailor, does not convert the transaction into a sale; and the bailor of the whole can have no greater control of the mass than if the share of each owner were kept separate. If the commingled mass was received on simple storage, each owner is entitled, on demand, to receive his share; if for conversion into flour, to his proper proportion of the prod

not. And in such case, it makes no difference that the bailee had contributed of his own wheat to the mass, for, still standing as a bailee to the others, he cannot abstract more than his own share from the whole. *Id.*

BANKRUPTCY AND INSOLVENCY.

1. JUDGMENT AGAINST BANKRUPT PENDING PROCEEDINGS IN BANKRUPTCY, or after his discharge, based on a debt existing before his petition was filed, is not a nullity. Discharge in bankruptcy does not release or affect any person liable for the same debt with the bankrupt, either as partner, joint contractor, surety, or otherwise. *Lackey v. Steere*, 135.
2. JUDGMENT AGAINST BANKRUPT DURING PENDENCY OF BANKRUPTCY PROCEEDINGS, but before the entry of a discharge, will be stayed on the application of the judgment debtor upon his producing such discharge; but unless so stayed, an execution sale thereunder is valid, and to the extent of the bid satisfies the debt, and therefore releases other persons who were jointly liable with the bankrupt therefor. The satisfaction thereby produced will not be vacated on motion. *Id.*

BANKS AND BANKING.

1. DIRECTORS OF BANK ARE TRUSTEES FOR DEPOSITORS, as well as stockholders. *Delano v. Case*, 81.
2. DIRECTORS OF BANK ARE ANSWERABLE TO ITS DEPOSITORS for failing to exercise ordinary care and diligence. *Id.*
3. DEPOSITOR IN BANK MAY RECOVER FROM ITS DIRECTORS for damages resulting to him from negligence in permitting it to be held out to the public as solvent, when it was insolvent. *Id.*
4. PRESIDENT OF BANK WHO NEGOTIATES SETTLEMENT WITH INDORSER ON MATURED PAPER HELD BY HIS BANK acts as the bank's agent, and whatever he does within the apparent scope of his authority to obtain the new security binds the bank which accepts and holds the security. *Cabe v. Pottsville Bank*, 600.
5. HOLDER OF BANK CHECK HAS NO RIGHT OF ACTION THEREON AGAINST BANK, when there has been no acceptance by the bank, although there may be funds of the drawer in the hands of the bank sufficient to pay the check at the time of presentment. *First Nat. Bank of Tamaqua v. Shoemaker*, 649.
6. DRAWER OF BANK CHECK PAYABLE TO ORDER OF ANOTHER has no right of action upon the check as an obligation payable to himself, but has a right of action against the bank to recover damages for the dishonor of his check, or specifically to recover the amount of his deposit. *Id.*
7. IN ACTION BY PAYEE OF NON-ACCEPTED BANK CHECK AGAINST BANK, it is error to allow amendment of record substituting the drawer as the legal plaintiff for the use of the payee, particularly when the drawer's rights of action against the bank to recover damages for the dishonor of his check, or to recover the balance of his deposit, are barred by the statute of limitations. *Id.*
8. FACT THAT LOAN MADE BY NATIONAL BANK EXCEEDS LIMIT allowed by law does not defeat the right of the bank to collect such loan. *Mills Co. N. Bank v. Perry*, 228.

BEEES.

See ANIMALS.

BRIDGES.

See COUNTIES.

BUILDING AND LOAN ASSOCIATIONS.

1. PENNSYLVANIA GENERAL LAW, ACT OF 1859, confers no special power upon building association, incorporated thereunder, to impose fines; and the general authority of such association in this respect is limited to such fines as are imposed under by-laws which are reasonable and lawful. *Lynn v. Freemansbury B. & L. Ass'n*, 639.
2. BY-LAW OF BUILDING ASSOCIATION, INCORPORATED UNDER PENNSYLVANIA ACT OF 1859, is oppressive, extortionate, and unreasonable, and is therefore void, in so far as it provides that every stockholder delinquent in the payment of his monthly dues and interest "shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him." *Id.*
3. POLICY OF LAW IN PENNSYLVANIA IS, THAT BUILDING ASSOCIATIONS shall not exact oppressive and extortionate fines from their defaulting members; and in the absence of statutory authority to exact any specified fine, the imposition of fines in excess of two per cent per month is to be deemed oppressive and unreasonable by policy of law. *Id.*
4. BUILDING ASSOCIATION—MEMBER OF NOT ESTOPPED BY PAYING ILLEGAL FINE.—A member of a building association became indebted to it for a loan, to secure the payment of which, with interest, he gave his mortgage, and also deposited his stock as collateral. Becoming delinquent in the payment of his monthly dues and interest, he was charged, under a by-law of the association, with a fine of ten cents monthly on each dollar of his indebtedness at the time the fines were imposed. Under a threat that his mortgage would be foreclosed, and his stock forfeited under the by-laws, he paid the association a sum sufficient to cancel his entire indebtedness for fines, dues, and interest, which payments were made voluntarily for the purpose of squaring his accounts with the association; and they were so applied. He subsequently became delinquent in the payment of his monthly dues and fines, when the association declared his stock forfeited, and proceeded by *scire facias* on the mortgage. *Held*, that the fines having been imposed under an invalid by-law, the defendant was not concluded by his payment of them, and that credit therefor should be given on the amount legally due under the mortgage. *Id.*

BURGLARY.

See CRIMINAL LAW, 14-20.

CHARITIES.

See TRUSTS.

COMMON CARRIERS.

1. RAILROAD COMPANIES ARE COMMON CARRIERS, AND RESPONSIBLE AS SUCH. *Fulvey v. Georgia R. R.*, 58.
2. IN TEXAS A RAILROAD COMPANY MUST RECEIVE AND TRANSPORT LIVE ANIMALS as other property, and after receiving, it becomes an insurer of them, as in case of other property which it is bound to transport, against loss from any cause except the act of God, the public enemy, the act of the owner, or the vicious propensities or inherent character

- of the animals themselves. This liability cannot be limited by special contract, even as to matters to which it might legally contract at common law. *Gulf, C. & S. R. R. Co. v. Trassick*, 494.
2. RAILROAD COMPANY, AS COMMON CARRIER OF ANIMALS, may by contract limit its liability for loss by stipulating that the shipper shall not maintain an action against it for damage after forty days shall have elapsed from the time when the cause of action arose, though such time is shorter than that named in the statute of limitations. Such contract is valid if founded upon sufficient consideration, and reasonable in its terms. *Id.*
 4. WHERE COURT INSTRUCTS JURY THAT IF RAILROAD CAR WAS PUT IN PROPER PLACE FOR UNLOADING, the railroad company was not liable on any ground, either as carrier or warehouseman, the company cannot complain of the failure of the court to submit to the jury the question as to its liability as a warehouseman. *Independence M. Co. v. Burlington etc. R. R. Co.*, 258.
 5. LIABILITY OF RAILROAD COMPANY AS CARRIER OF WHEAT IN BULK does not cease until it has placed the car containing it in such a position at the place of destination that it can with safety and a reasonable degree of convenience be unloaded by the consignee. And if the car containing the wheat be left in a position where it cannot be conveniently unloaded, and while there is destroyed by fire, the company will be liable for the loss, although as a physical fact the car could have been unloaded in such position. *Id.*
 6. TWO RAILROAD COMPANIES ARE JOINTLY LIABLE FOR LOSS OF WHEAT DESTROYED BY FIRE while in transit over the line of one of them, although the contract for its transportation was made with the other company, which agreed to carry it over its line and that of another company, different from the one over which it was actually carried. *Id.*
 7. PETITION IN ACTION AGAINST CARRIER FOR WHEAT DESTROYED WHILE IN TRANSIT, which avers a demand for the wheat, or payment for the same, the number of bushels destroyed, and that the claim is the property of the plaintiff and justly due, demanding judgment for a certain sum, is, in the absence of a motion for a more specific statement, sufficient to support a verdict and judgment for the plaintiff, although it does not in terms aver the value of the wheat. *Id.*
 8. RAILROAD COMPANY, RECEIVING GOODS CONIGNED TO PLACE BEYOND TERMINUS OF ITS OWN LINES, undertakes to convey same safely to point of destination, and will be liable for loss of such goods on connecting lines. *Falvey v. Georgia R. R.*, 58.
 9. CONNECTING RAILROADS SHOULD ARRANGE AMONG THEMSELVES LOSSES occurring on their respective lines, and each should consider the other his agent for the purpose of forwarding goods shipped. Section 2084 of the code, in regard to liability of connecting railroads for goods lost, does not change the liability of such railroads as common carriers which existed at the time such section was adopted, but declares the liability to be the same as it had been where there was no contract by first carrier to convey goods to place of destination. Its effect is to give consignee a cumulative remedy. *Id.*
 10. RAILROADS—CONNECTING LINES.—In determining whether contract was made by first carrier to convey goods to place of destination, the jury may take into consideration the bill of lading, the payment of freight, and the apportionment of the same among the different lines,

- if any, and the routes over which goods are to be transported. Dissenting opinion in *Baugh v. McDaniel*, 42 Ga. 642, adopted. *Id.*
11. CONNECTING RAILROAD IS LIABLE ONLY AS FORWARDING AGENT, and is not responsible for loss of or damage to goods occurring beyond its terminus, in the absence of a special contract, or proof of an association or partnership between it and other connecting lines, by which each of such lines becomes liable for the contracts of the others. *Knot v. Raleigh & G. R. R. Co.*, 321.
 12. EVIDENCE OF CUSTOM OF AGENT OF RECEIVING RAILROAD NOT TO RECEIVE FREIGHT UNLESS IN GOOD CONDITION, and to check it "all right," if in good condition, is admissible to prove that goods were in good condition when received by him. *Id.*
 13. PURCHASE OF SEAT IN DRAWING-ROOM CAR BY ONE who is riding on a free pass does not relieve him from the character of a free passenger. He is therefore precluded from recovering for injuries suffered by him through the negligence of the company or its agents, by a stipulation indorsed on his pass to the effect that the company shall not be liable under any circumstances for the negligence of its servants or otherwise. *Ulrick v. New York Central & H. R. R. Co.*, 369.
 14. THERE IS NO IRREBUTABLE PRESUMPTION THAT ONE WHO TAKES PASSAGE UPON LIMITED RAILROAD TICKET, the limit of which has expired, is informed of the rules and regulations of the company prohibiting the use of such ticket, by his paying to the conductor of the train the difference between the redemption value of the ticket and a full fare, when no such prohibition appears upon the ticket. *Arnold v. Pennsylvania R. R. Co.*, 542.
 15. ONE WHO TAKES PASSAGE UPON LIMITED RAILROAD TICKET, without knowledge that under the rules and regulations of the company the ticket cannot be used, is not to be treated as a trespasser, but as a passenger who, by mistake, has entered a train upon which, by his contract, he is not entitled to ride; and whether he had no such knowledge or not, so as to make him a trespasser or a passenger, is a question of fact for the jury. *Id.*
 16. TRESPASSER UPON RAILROAD TRAIN CANNOT BE EJECTED THEREFROM without a reasonable regard for his safety; and whether he was so ejected or not is a question of fact for the jury. *Id.*
 17. PERSON TAKING PASSAGE ON FREIGHT TRAIN, WITH KNOWLEDGE OF RISKS and inconveniences incidental thereto, is bound to be more careful in guarding against injury than he would be in traveling upon ordinary passenger trains. *Wallace v. Western N. O. R. R. Co.*, 346.
 18. WHERE PASSENGER RIDING ON FREIGHT TRAIN WAS STANDING UP in the caboose, although there were seats for all the passengers, when he was thrown down and received injuries from the sudden starting or jerking of the train, there is some evidence of contributory negligence on his part, which ought to be submitted to the jury. *Id.*
 19. PASSENGERS ON BAGGAGE-WAGON OR FREIGHT-CAR IMPLIEDLY AGREE to accept the conveniences there received, both as to the way in which they are carried, and as to the means of entering and leaving such conveyances, when they are such as are ordinarily used with respect to such wagons or cars, when employed in the transportation of freight or baggage. *Central R. R. v. Smith*, 31.
 20. RAILROAD COMPANIES NEED NOT PROVIDE FOR PASSENGERS ENTERING OR LEAVING CARS AT UNEXPECTED AND UNUSUAL PLACES. *Id.*

1. IN ACTION AGAINST RAILROAD COMPANY FOR INJURIES sustained while riding as a passenger on a hand-car under invitation of an employee of the company, it is error to charge as matter of law, in the face of evidence to the contrary, that the act of the employee was the act of the company. Such question should be left to the jury. *International & G. N. R. R. Co. v. Cook*, 521.
2. IN ACTION AGAINST RAILROAD COMPANY for injuries received while riding on a hand-car as a passenger under invitation of an employee, it is error to charge that the company is liable to a greater degree of care and skill than would be required in carrying passengers on regular trains, or to employ a greater degree of care in proportion to the greater degree of danger, when the hand-car is manned by men employed to work on the track, and run the car for their own convenience, but not accustomed to look after the safety of others, and not employed nor selected for that purpose. *Id.*
3. IF IN ACTION AGAINST RAILROAD COMPANY for damages from an injury sustained while riding as a passenger on a hand-car under invitation of the company's employee, it appears that after the original destination was reached the passenger requested to be carried farther, and the employee voluntarily complied, evidence of all facts occurring after the original destination was reached is admissible. *Id.*
4. WHERE CONDUCTOR OF RAILROAD TRAIN DEMANDS TICKET of passenger who has shown his ticket to the brakeman, and requests the conductor to wait a minute until he finds it, being unable to do so because it has become misplaced in his pocket, whereupon the conductor immediately stops the train, and expels the passenger therefrom, the company is liable for the mortification, pain of mind and body, loss of time, and medical expense to which he was subjected by reason of being ejected, and a verdict of five hundred dollars damages in such case is not excessive. *International & G. N. Co. v. Wilkes*, 515.
5. CONDUCTOR OF RAILROAD TRAIN is bound to wait a reasonable time for a passenger to produce his ticket; what is such reasonable time depends upon the circumstances of each case. But the only fact which authorizes an immediate expulsion of the passenger is his refusal to produce his ticket or to pay fare. *Id.*
6. HOLDER OF TICKET OVER RAILROAD, WHO BY MISTAKE TAKES PASSAGE ON WRONG TRAIN, IS PASSENGER so far as to entitle him to protection against the negligence of the railroad company. *Cincinnati etc. R. R. Co. v. Carper*, 144.
7. OBEDIENCE BY PASSENGER TO DIRECTIONS OF CONDUCTOR OF TRAIN, GIVEN WITHIN SCOPE OF HIS AUTHORITY, WHERE SUCH OBEDIENCE WILL NOT EXPOSE the passenger to known or apparent danger which a prudent man would not incur, is not contributory negligence, although it may result in bringing injury upon him. *Id.*
28. WHERE PASSENGER ENTERS WRONG TRAIN THROUGH HIS OWN MISTAKE, AUTHORITY OF CONDUCTOR, AS REPRESENTATIVE OF CARRIER, TERMINATES when a safe alighting-place is provided, and the passenger has voluntarily left the train in safety. The company is not bound by the general directions of the conductor, in the nature of advice and information, as to what course the passenger shall pursue after he has left the train, and is not liable for an injury received by the passenger while acting upon such directions. *Id.*

COMPROMISE.

CONSIDERATION FOR COMPROMISE.—A doubt as to the ability of one to collect a debt by reason of its being barred by the statute of limitations is not a sufficient consideration for a compromise of such debt, if accompanied with a threat that if the compromise is not effected, the son of the person to whom the debt is owing will be prosecuted for a criminal offence. *Swint v. Carr*, 44.

CONSTITUTIONAL LAW.

1. **OWNER OF PROPERTY HOLDS IT** subject to the implied obligation that he will so use it as not to prevent others from having their property, and enjoying the just use and benefit of it, and so as not to destroy, abridge, or injure the rights of the public. *State v. Yopp*, 305.
2. **LEGISLATURE MAY, SUBJECT TO CONSTITUTIONAL LIMITATIONS,** prescribe just and reasonable regulations and restraints upon the use which an owner makes of his property, so as to protect the rights of the public, and of others, to use their property. *Id.*

See HIGHWAYS, 2.

CONTEMPT.

See RECEIVERS, 4.

CONTRACTS.

1. **AGREEMENT OR CONTRACT NOT BASED UPON CONSIDERATION CANNOT BE ENFORCED.** *Mills County National Bank v. Perry*, 228.
2. **CONSIDERATION TO SUPPORT PROMISE NEED NOT INVOLVE BENEFIT TO PROMISOR,** but is equally sufficient when it consists in a detriment to the person to whom it is made. *New Hanover Bank v. Bridgers*, 317.
3. **WHERE OFFER IS MADE IN ONE STATE AND ACCEPTED BY TELEGRAPH** in another, the contract is completed in the latter state by sending the telegram, notwithstanding it is to be performed in the former state. *Perry v. Mount Hope Iron Company*, 902.
4. **WHERE ACCEPTANCE OF OFFER REACHES PERSON WHO MADE OFFER,** it is immaterial by what mode the acceptance was sent. *Id.*
5. **EVIDENCE THAT SCRAP-IRON WAS NOT KIND ADAPTED FOR USE IN DEFENDANT'S WORKS** ought not to be excluded, when the question to be determined is whether he offered to buy it without inspecting it. *Id.*
6. **CONTRACT MADE IN CONNECTICUT AFTER SUNSET ON SUNDAY,** being valid in that state, may be enforced in Rhode Island, although the law of the latter state prohibits business in one's ordinary calling during the whole day of Sunday. The enforcement of such a contract does not involve a breach of good morals. *Brown v. Browning*, 908.
7. **IN CONSTRUING CONTRACTS,** COURT SHOULD PUT ITSELF, as near as may be, in the situation of the parties, and from a consideration of the surrounding circumstances and the occasion, and apparent object of the parties, determine the meaning and intent of the language used by them in their agreement. *Smith v. Kerr*, 362.
8. **WRITTEN AGREEMENT MAY BE MODIFIED, EXPLAINED, REFORMED, OR SET ASIDE BY PAROL EVIDENCE** of an oral promise or undertaking material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name thereto. *Cake v. Pottsville Bank*, 600.

9. TESTIMONY OF PARTY TO CONTRACT, WHICH TENDS ONLY TO SHOW HIS THOUGHTS AND PURPOSES, not disclosed at the time of making the contract, is inadmissible to show that his agreement meant something else. *Id.*
 10. EVIDENCE REQUISITE TO REFORM WRITTEN INSTRUMENT on ground of fraud, accident, or mistake must be clear, precise, and indubitable. If the evidence, when admitted, is not such as would move a chancellor to reform the contract or deed, the case should not be submitted to the jury without binding instructions as to its insufficiency. *Sylvius v. Keesek*, 645.
 11. WHEN IT IS SOUGHT TO IMPEACH WRITTEN CONTRACT BY DEFENSE PURELY EQUITABLE, opposing testimony of plaintiff to such defense is conclusive, unless contradicted by two witnesses, or one witness and corroborating circumstances equivalent to a second witness. *Id.*
 12. EVIDENCE TO REFORM WRITTEN CONTRACT IS INSUFFICIENT, which only shows that a third person, to whom it was intrusted merely for the purpose of delivery to the defendant, fraudulently misread it to the latter when he signed it. *Id.*
 13. CONTRACT TO ABANDON PUBLIC DUTY, as where a gas company authorized by the legislature to manufacture and sell illuminating gas in a city agrees not to manufacture or sell such gas in a designated part of the city, will not be aided nor enforced in equity. *Chicago G. L. Co. v. People's G. L. Co.*, 124.
 14. CONTRACT AGAINST PUBLIC POLICY WILL NOT BE ENFORCED, nor specific performance thereof decreed in equity. *Id.*
 15. CONTRACT IS AGAINST PUBLIC POLICY which, being entered into between two gas companies, stipulates that one of them shall discontinue for a hundred years the manufacture and sale of illuminating gas in a city in which it had been granted by the legislature the right to manufacture and sell such gas. *Id.*
 16. RULE THAT CONTRACTS IN PARTIAL RESTRAINT OF TRADE are valid does not apply to a contract by a corporation to abandon a part of its duty to the public. *Id.*
 17. THOUGH RESTRAINT OF TRADE IMPOSED BY CONTRACT IS BUT PARTIAL, it will not be enforced if it is unreasonably injurious and oppressive to the public. *Id.*
- See CORPORATIONS, 2-4; JUDGMENTS, 1-3; SPECIFIC PERFORMANCE.

CORPORATIONS.

1. CORPORATIONS HAVE SUCH POWERS ONLY as the act creating them confers, and are confined to the exercise of the powers expressly granted, and such incidental powers as are necessary to carry into effect those specifically conferred. *Chicago G. L. Co. v. People's G. L. Co.*, 124.
2. CORPORATION OWING DUTY TO PUBLIC cannot make a valid contract not to discharge such duty. *Id.*
3. TRANSFERS OF POWERS OF ONE CORPORATION TO ANOTHER, without the authority of the legislature, are against public policy, and the courts will do nothing to promote the transfer. *Id.*
4. ULTRA VIRES. — Contract by a corporation authorized to manufacture and sell illuminating gas in a city, by which it agrees to discontinue such manufacture and sale, is *ultra vires*, and therefore void. *Id.*
5. PAPER SEAL PASTED ON NOTE OF CORPORATION DOES NOT RENDER IT NON-NEGOTIABLE, where there was no vote of the corporation authorizing the

making of a note under seal, the note did not purport to be under seal, the seal was not the corporate seal, and the treasurer, who was a witness, did not testify that it was his seal, or that it was put on by him. The seal, in such case, may be regarded as a mere excess. *Machey v. St. Mary's Church*, 881.

6. CORPORATION IS LIABLE FOR TORTS AND WRONGS COMMITTED ULTRA VIRES, outside and beyond the purpose of its creation and not within the scope of its granted powers and authority. *Hussey v. Norfolk etc. R. R. Co.*, 312.
7. CORPORATION IS LIABLE FOR ACTS OF ITS SERVANTS while engaged in its business, in the same manner and to the same extent that individuals are liable under like circumstances. *Id.*
8. CORPORATION IS LIABLE FOR MALICIOUS PROSECUTION CONDUCTED BY ITS AGENT, and the corporation and its servant may be joined in an action of tort for the injury. *Id.*
9. INDIVIDUAL OR CORPORATION CANNOT EVADE LIABILITY by committing to another the performance of certain duties affecting the public health or the safety of public travel, and expressly assumed by such individual or corporation in consideration of certain powers and privileges conferred by the public for private emolument. *Lancaster Ave. I. Co. v. Rhoads*, 608.
10. CORPORATION MAY PREFER ONE CREDITOR TO ANOTHER, and the fact that the preference is exercised in favor of directors or share-holders of the corporation is immaterial, although such directors and share-holders, and all of them, may have voted for their own preference, and for the execution of the mortgage given to secure the indebtedness to themselves. *Warfield v. Marshall Co. C. Co.*, 263.
11. CORPORATION MAY SELL ITS PROPERTY TO ANOTHER CORPORATION, and if the consideration for the sale is the assumption and payment by the corporation purchasing of mortgage debts of the corporation making the sale, to the full value of all the property conveyed, such sale will not be set aside in favor of other unsecured creditors of the corporation that made the sale; nor will they have any lien on the property for which full value has been paid in good faith. *Id.*
12. MORTGAGE BY CORPORATION TO SECURE DEBT IN EXCESS OF LIMIT allowed by its articles of incorporation is not for that reason invalid, although given to the directors and share-holders as preferred creditors. *Id.*
13. STOCKHOLDER OF CORPORATION IS LIABLE TO ITS CREDITORS ONLY TO EXTENT OF HIS UNPAID SUBSCRIPTION to the capital stock. *Id.*
14. OFFICERS AND SHARE-HOLDERS OF CORPORATION, WHO ARE PREFERRED CREDITORS, ARE NOT ESTOPPED, as against unsecured creditors thereof, to deny that the capital of the corporation was a certain sum, from the fact that the manager of the company used letter-heads on which were printed the word "capital," followed by that sum, where it is not shown that such creditors relied on and extended credit to the corporation on the faith of the representation. *Id.*
15. ONE WHO SUBSCRIBES TO STOCK OF CORPORATION IN VIEW OF AND FOR PURPOSE OF ITS SUBSEQUENT ORGANIZATION, which is effected, and pays in full for one share and transfers other shares, thereby recognizes and affirms his contract of subscription, and cannot be heard to disaffirm it. *Bell's Appeal*, 552.
16. LIABILITY OF SUBSCRIBER TO STOCK OF CORPORATION IS NOT DISCHARGED by an informal *ex parte* transfer of the shares in writing, not entered

on the books of the corporation, or recognized by it, accompanied with a private agreement of the transferee that the transferor should not be liable for anything unpaid on the shares so transferred. *Id.*

17. **BILL FILED BY CREDITOR OF CORPORATION ALLEGED TO BE INSOLVENT, AGAINST STOCKHOLDERS**, to compel payment of unpaid capital stock in discharge of the claims of creditors, is a proceeding to enforce the equitable obligations of the stockholders; and since only so much of the unpaid capital as is necessary for the payment of the debts can be called in, and this only when all the other assets are exhausted, there must be an account of the amount of debts, assets, and unpaid capital, and a decree for an assessment of the amount due by each stockholder. *Id.*
18. **OBIGATION TO MAKE GOOD UNPAID PORTIONS OF CAPITAL STOCK WHEN NECESSITIES OF CREDITORS REQUIRE** It is a charge upon the stock which passes with it to the transferees thereof, subject to exceptional instances where the original subscribers are notwithstanding liable by charters or general statutory provisions. *Id.*
19. **PLEDGER OF CORPORATE STOCK** has right to retain it until the debt for which it was pledged is fully satisfied, but during such time he cannot assert that he holds it adversely, and thereby acquire title under the statute of limitations. *Cross v. Eureka Lake and Yuba Canal Co.*, 808.
20. **AS BETWEEN PLEDGEE AND PLEDGOR** of corporate stock, the general property remains in the latter, and when the debt to secure which the pledge was given is paid, the lien is extinguished. *Id.*
21. **WHERE IN SUIT BY PLEDGEE OF CORPORATE STOCK** to recover dividends against the corporation the latter deposits the money in court, and has the pledgor and his assignee made defendants, and it appears that the debt for which the stock was pledged is liquidated, whereupon judgment is rendered by consent of the pledgor for the assignee for the entire amount sued for, as the pledgee has no interest in the money he cannot complain of the judgment awarding the dividends accruing prior to its rendition. *Id.*
22. **LEGAL TITLE TO SHARES OF CORPORATE STOCK, ASSIGNABLE ONLY ON BOOKS** of the corporation, does not pass by an assignment of the shares which is neither made nor recorded on the books of the corporation. *Lippitt v. American Wood Paper Co.*, 886.

See **BUILDING AND LOAN ASSOCIATIONS; MUNICIPAL CORPORATIONS; NEGLIGENCE; PLEDGE**, 2, 3.

CO-TENANCY.

1. **TENANTS IN COMMON OF PERSONALTY MUST JOIN IN ACTION** to recover it. *Clapp v. Pawtucket Institution for Savings*, 915.
2. **POSSESSION OF ONE CO-TENANT** is the possession of all. *Page v. Branch*, 281.
3. **TENANT IN COMMON CANNOT MAKE HIS POSSESSION ADVERSE** to his co-tenant except by actual ouster; or in the absence of that, it takes twenty years' adverse possession to bar the co-tenant's right of entry. *Id.*
4. **DEED BY CO-TENANT TO STRANGER**, though it purports to convey the entire estate, has no other effect than to invest the vendee with the rights of the vendor, and does not change the relation of co-tenant which has subsisted between the vendor and his co-tenant. This rule extends to the purchaser of the interest of a co-tenant at execution sale, and to the vendee of such purchaser. *Id.*

See **LANDLORD AND TENANT**, 4; **PARTITION**.

COUNTIES.

1. COUNTY IS CORPORATION WITHIN MEANING OF CONSTITUTION OF PENNSYLVANIA, ARTICLE 16, SECTION 8, providing that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements"; and as such corporation, it may be held liable, in an action on the case, for consequential damages to private property injured by the erection of a county bridge. *County of Chester v. Brower*, 713.
2. RECONSIDERATION. — A board of commissioners, or other like body, acting in a ministerial capacity, cannot, by any system of rules of its own making, preclude reconsideration and correction of its erroneous action whether resulting from haste and want of consideration or from intentional wrong. *McCord v. Pike*, 85.
3. ACCEPTANCE OF BID BY COUNTY COMMISSIONERS CONFERS NO VESTED RIGHT on the bidder, and interposes no obstacle to a suit to enjoin them from conveying property pursuant to such bid, if proper grounds for such injunction are shown. *Id.*
4. WHERE COMMISSIONERS OF COUNTY HAVE MAINTAINED BRIDGE IN PROPER REPAIR, as originally planned and erected in a small village, the county is not liable for failure of the commissioners, in the exercise of a proper discretion, to anticipate the growth of the village into a city, or, in the exercise of that discretion, for a like failure to determine the necessity for a new bridge, or for improvements necessary to meet the demands of a greatly increased travel, or to anticipate that horses would become frightened and unmanageable on the wagon road, and that injuries might thereby be inflicted upon foot-passengers. *Lehigh Co. v. Hoffert*, 587.
5. COUNTY IS NOT LIABLE FOR INJURIES resulting from the failure of its county commissioners to exercise discretionary power under the statute which authorized them to make certain improvements at the expense of the county, no time being fixed within which the work was to be performed, nor the method of its performance being in any way prescribed, but leaving the matter wholly to the judgment and discretion of the commissioners. *Id.*
6. MUNICIPAL CORPORATION — NON-LIABILITY FOR UNFORESEEN ACCIDENT. — A foot-passenger, while crossing a long and narrow county bridge in a large city, was caught by the wheel of a wagon drawn by a team of runaway horses, and injured. The injury occurred upon the foot-way, which was narrow, and not separated from the wagon road by any guard or rail. The bridge had been built fifty years, but was in good repair, and in all respects substantial and secure. In an action against the county to recover damages for the injury, *held*, that it was unreasonable to suppose that such an occurrence could be foreseen by the authorities as the result of a failure to erect guards or barriers, and that the county was not liable. *Id.*
7. COUNTY EMPLOYING ONE TO DO CERTAIN WORK, and accepting it, going into possession, and using it after it is finished, is liable for the reasonable value of the work, though not performed strictly according to the contract. *Harris Co. v. Campbell*, 467.

COVENANTS.

COVENANT IN DEED FOR QUIET AND PEACEABLE POSSESSION runs with the land, and is binding upon the grantor and all of his subsequent gran

tees to the same land. *Schwallback v. Chicago, M., & St. P. R. R. Co.*, 740.

CRIMINAL LAW.

1. PROSECUTION IS NOT BOUND TO ESTABLISH GUILT OF ACCUSED CONCLUSIVELY, but only beyond a reasonable doubt. And therefore an instruction whose language implies that the state is bound to prove conclusively the guilt of a defendant is rightly refused. *State v. Hoze*, 838.
2. EVIDENCE OF CRIME DIFFERENT FROM ONE CHARGED is never admissible except for the purpose of showing motive, interest, or guilty knowledge. In rebuttal of evidence of good character, it is not competent to give evidence of specific acts of immorality or crime. *People v. Greenwall*, 416.
3. EVIDENCE OF DEFENDANT'S BAD CHARACTER is not admissible unless he has first offered evidence to show that his character is good. *Id.*
4. ACCUSED, BY VOLUNTARILY OFFERING HIMSELF AS WITNESS IN HIS OWN BEHALF, WAIVES his constitutional privilege of refusing to answer a question because the answer may tend to criminate him. *State v. Thomas*, 351.
5. "SPOTTER," OR PAID INFORMER, IS NOT ACCOMPLICE, in contemplation of law. *State v. Hoze*, 838.
6. UNDER PENAL STATUTE PRESCRIBING PUNISHMENT for crime by fine or imprisonment, the prisoner cannot be both fined and imprisoned. *State v. Walters*, 310.
7. "OR" IN CRIMINAL STATUTE cannot be interpreted to mean "and," when the effect is to aggravate the offense or increase the punishment. *Id.*
8. WHERE PRISONER HAS LOST HIS APPEAL through a failure to perfect it, but has been granted a writ of *certiorari* as a substitute, the effect of granting the writ is to stay the execution and entitle the prisoner to bail. *Id.*
9. PRISONER IN CAPITAL CASES HAS RIGHT TO BE, AND MUST BE, personally present at all times in the course of his trial, when anything is said or done affecting him as to the charge against him, in any material respect. *State v. Kelly*, 299.
10. PRISONER, IN FELONIES LESS THAN CAPITAL, HAS RIGHT to be present at all times during the course of his trial, but it is not essential to conviction that he must be so present at all events. *Id.*
11. IN FELONIES LESS THAN CAPITAL, prisoner may waive the right to be present at his trial, but his counsel cannot waive the right for him. *Id.*
12. GENERALLY, IF NOT IN ALL CASES, PRISONER'S PRESENCE is required when judgment is entered, especially when the punishment to be inflicted requires it. *Id.*
13. PRISONER, IN FELONIES LESS THAN CAPITAL, who is under recognizance for his appearance, and is present when his trial begins, but flees the court while it is pending, waives his right to be present during the remainder of the trial, and is not entitled to be discharged, or to have a new trial, on account of his absence. *Id.*
14. BURGLARY AT COMMON LAW IS OFFENSE against the habitation of man. It might also include the felonious breaking and entering a church. *People v. Richards*, 373.
15. WORD "BUILDING," AS USED IN PENAL CODE defining the crime of burglary, must be regarded as limited to those structures which the common law, as amended and enlarged by our statutes relative to the crime, made capable of being broken and entered burglariously. *Id.*
16. BURGLARY. — BREAKING AND ENTERING BUILDING IN PROCESS OF CONSTRUCTION, and not yet fit for the purpose for which it is being con-

- structed, if with intent to commit a felony, is burglary by the statute of Wisconsin. *Clark v. State*, 732.
17. BUILDING IS A STRUCTURE which has capacity to contain, and is designed for the habitation of, man or animals, or the sheltering of property. It need not be completed, if it is in condition to hold tools or other articles of personal property. *Id.*
 18. BURGLARY.—THE WORD "STABLE," as commonly used and understood, is equivalent to the word "building." *Id.*
 19. WORDS "OTHER ERECTION OR INCLOSURE," employed in the statute defining burglary, must be interpreted as including only things of a similar nature to those already described by the specific words found in the statute. *People v. Richards*, 573.
 20. BREAKING AND ENTERING VAULT, INTENDED AND USED FOR INTERMENT of the dead, cannot constitute the crime of burglary at the common law, nor by the statutes of New York. *Id.*
 21. WHERE HOMICIDE IS SHOWN TO HAVE BEEN COMMITTED WITH DEADLY WEAPON, and intentionally, the court may instruct the jury that if the testimony does not satisfy them that the offense is manslaughter, it is their duty to convict of murder. *State v. Thomas*, 351.
 22. MERE PROOF OF SALE OF INTOXICATING LIQUOR IS SUFFICIENT to justify the jury in finding that the sale was illegal, where the statute provides that evidence of the sale or keeping for sale shall be evidence that the sale or keeping is illegal, since it would be unnatural for the accused not to produce his license if he had one. *State v. Hoazie*, 838.
 23. REQUEST TO CHARGE THAT NOTORIOUS CHARACTER OF DEFENDANT'S PREMISES, or the notoriously bad and intemperate character of persons visiting the same, or the keeping of implements or appurtenances usually appertaining to grog-shops, tippling-shops, and places where intoxicating liquors are sold, is not *prima facie* evidence that such places are nuisances, is properly refused as ambiguous, where the statute makes such matters evidence, but not *prima facie* evidence, of a nuisance. *Id.*
 24. TWO PERSONS MAY BE JOINTLY CONVICTED OF SAME NUISANCE, although one assists the other merely as an agent or clerk. *Id.*
 25. PLACE USED FOR PURPOSE OF SELLING LIQUORS MAY BE LIQUOR NUISANCE, although that be only an incidental or subordinate, and not the main, purpose. *Id.*
 26. WHERE RAPE IS CHARGED, PROSECUTING WITNESS MAY TESTIFY as to her marriage, and such testimony will warrant the jury in finding the fact of marriage, and that such witness is not the wife of defendant. *State v. Hooks*, 728.
 27. DEFENDANT ON TRIAL UPON INFORMATION FOR RAPE cannot be convicted and sentenced for adultery. *Id.*
 28. INFORMATION FOR RAPE IS SUFFICIENT WITHOUT ALLEGING that the female upon whom the offense was committed was a married woman. But if alleged and proved, still a conviction of adultery cannot be sustained upon the charge of rape. *Id.*
 29. PARTY CHARGED WITH ONE CRIME CANNOT BE CONVICTED OF ANOTHER and different, unless the allegations necessary to constitute the greater crime charged in the indictment or information are also sufficient to constitute the lesser crime. *Id.*
 30. TO CONSTITUTE ROBBERY, PROPERTY TAKEN NEED NOT BE ATTACHED TO PERSON of the individual robbed, or in his immediate presence. If a party binds a person in one room, and by violence extorts from him

information of the place where his property is in another room, which he then enters, and from which he takes the property, while his victim remains bound in the adjoining room, this is a sufficient taking from the person, within the meaning of the statute, to constitute the crime of robbery. *State v. Calhoun*, 252.

31. WHETHER CORD USED BY ROBBER TO BIND HIS VICTIM, while he was engaged in robbing the house, is a dangerous weapon or not, is a proper question to submit to the jury. *Id.*

DAMAGES.

1. EXCESSIVE VERDICT. — Where instructions of court are not properly considered by the jury, and where, from the undisputed facts, the negligence of the defendant, if any existed, was slight, while that of the plaintiff seemed greater, a verdict of ten thousand dollars is so excessive that it shows either bias in favor of the plaintiff, or prejudice to defendant, or a misconception of the instructions of the court. *Central R. R. v. Smith*, 31.
2. EVIDENCE OF NATURE OF PLAINTIFF'S BUSINESS, AND VALUE OF HIS PERSONAL SERVICES, is admissible in an action to recover for a personal injury entailing loss of time, as when he has suffered from assault and battery, negligence, or the like, for which defendant is answerable. *Reeves v. Winn*, 287.

See INSANITY.

DEBTOR AND CREDITOR.

WHEN PARTY HAS RESERVED TO HIMSELF BY CONTRACT the right to discharge the obligation in two or more different ways he may elect, at any time before the date of payment has passed, in which way he will discharge it, and when he has a peculiar interest in discharging the obligation in a certain manner, he cannot be deprived of his right to do so, either by the act of his creditor without his consent, or by garnishment in a suit against the creditor. *Drake v. Harrison*, 717.

See CORPORATIONS.

DEEDS.

1. DELIVERY OF DEED IS ALWAYS ESSENTIAL TO ITS OPERATION AND VALIDITY. *Weber v. Christen*, 68.
2. SIMPLEST MODE OF DELIVERING DEED IS MANUAL TRANSFER OF IT by the grantor to the grantee, with intent of transferring title to the property and of relinquishing all control over the instrument. *Id.*
3. DELIVERY OF DEED MAY BE EFFECTED without actually passing the writing from the grantor to the grantee, as where, while the instrument is in the presence of both parties, the grantor directs the grantee to take possession of it, with intent to transfer the property, and the latter expresses his willingness so to do. *Id.*
4. ESCROW. — Deed in the hands of the grantee is never treated as an escrow. *Id.*
5. DELIVERY OF DEED. — Act and intention are two elements essential to the delivery of a deed. *Id.*
6. DELIVERY OF DEED IS NOT EFFECTED BY SIGNING, ACKNOWLEDGING, AND RECORDING IT, without the knowledge or assent of the grantee, if he is an adult, unless it is shown that the grantor intended thereby to give

- effect and operation to, and to relinquish all control over, such deed, and that the grantee, on being informed, assented. *Id.*
7. **ASSENT OF GRANTEE TO DEED NEED NOT BE SHOWN**, if it is a voluntary settlement, or he is not *sui juris*. *Id.*
 8. **DEED SIGNED, ACKNOWLEDGED, AND PLACED ON RECORD**, without any intent to part with the deed or the land (the grantors retaking possession of the deed as soon as recorded, and ever thereafter retaining such possession, and the grantees having no knowledge of the deed at the time, nor any possession or control of the deed at any time), is not delivered, nor is the title of the grantors divested thereby. *Id.*
 9. **DEED WILL BE PRESUMED TO HAVE BEEN MADE ON DAY OF ITS DATE**, when it is found in the hands of the grantee, having on its face the evidence of its regular execution; and this presumption will be greatly strengthened if it is accompanied by an acknowledgment of the same date in proper form before a proper officer. *Cover v. Manaway*, 552.
 10. **PAROL EVIDENCE MAY BE INTRODUCED TO SHOW THAT FRAUD WAS PRACTICED**, not only in the execution of a deed, but in the obtaining of the acknowledgment; but it must be sufficiently explicit in its character to fairly rebut the presumption which the law raises as to the due execution of the deed and its acknowledgment. *Id.*
 11. **WHERE DEED IS EXECUTED IN CONSIDERATION OF PRIOR INDEBTEDNESS**, and left with one in escrow to be delivered to the creditor in thirty days if such debt is not liquidated within that time, and the debt is not paid, the grantor cannot make a second deed to one who has notice of the escrow. *Conneau v. Geis*, 785.
 12. **EQUITY WILL ONLY CORRECT MISTAKE IN DEED SUPPORTED BY VALUABLE OR MERITORIOUS CONSIDERATION**. It will not correct a mistake in a voluntary deed by inserting therein the word "heirs," which was omitted by the inadvertence of the draughtsman. *Powell v. Morisey*, 343.
 13. **VOLUNTARY CONVEYANCE BY GRANDFATHER TO GRANDCHILD** is not proof of his intention to place himself *in loco parentis* to the grantee, and thus render the consideration meritorious. *Id.*
- See **ACKNOWLEDGMENTS; COVENANTS; EXECUTORS AND ADMINISTRATORS**, 5-7.

DIVORCE.

See **MARRIAGE AND DIVORCE**.

DOGS.

See **ANIMALS**.

DOMICILE.

See **EXECUTORS AND ADMINISTRATORS**, 4.

ELECTIONS.

1. **IT WILL BE PRESUMED WITHOUT AVERMENT** that the proper officers performed their duty under a statute requiring ballots to be preserved and disposed of in a particular manner. *State v. Kempf*, 753.
2. **JURISDICTION — ELECTION. — UNLESS STATUTE CONFERRING JURISDICTION** upon the common council to judge of an election and qualification of its members unequivocally excludes, by express provision or necessary implication, the jurisdiction of the courts in that behalf, such jurisdiction remains in the courts, and that conferred upon the council is only concurrent or temporary. *Id.*

- 2. JURISDICTION — ELECTION.** — WHETHER LEGISLATURE HAS POWER to confer the exclusive authority upon a non-judicial tribunal, to determine finally the right to any office, and thus oust the courts of their common-law and statutory jurisdiction, *quere. Id.*
- 4. DECISION OF OFFICERS OF ELECTION** in favor of the right of a party to vote, in the absence of fraud and collusion, secures the voter immunity from criminal liability for illegal voting, even if it should appear afterward that he was not entitled to vote. *State v. Pearson*, 363.
- 5. PERFECT BALLOT IS EXCLUSIVE EVIDENCE OF VOTER'S INTENT**, and extrinsic evidence is inadmissible to show a contrary intent; but where the ballot imperfectly expresses his intent, as when it does not certainly identify the person intended to be voted for, extrinsic evidence is admissible in aid of such imperfection; and the circumstances surrounding the election and the facts of a general public nature connected with it may be considered in connection with the ballot in determining what was the intention of the voter. *Wimmer v. Eaton*, 250.
- 6. WHERE NAME F. WIMMER IS PRINTED ON SOME BALLOTS CAST AT ELECTION**, evidence is admissible to show that E. Wimmer was the candidate of his party for the office; that there was no person named F. Wimmer eligible to the office; that that name was printed on the ballots in the belief that it was E. Wimmer's name; and that the electors who cast the ballots bearing the name F. Wimmer supposed at the time that it was the name of E. Wimmer; and those facts being proved, the ballots should be counted for E. Wimmer. *Id.*

EMINENT DOMAIN.

- 1. WHERE RAILROAD COMPANY TAKES, BY RIGHT OF EMINENT DOMAIN**, part of tract of land, and damage to balance is to be measured by the advantage over the disadvantage resulting from the company's works, contingent and even imaginary damages may be considered by way of offset to the alleged advantages; but such damages cannot be taken into account as a substantive claim for damage. *Pennsylvania R. R. Co. v. Lipincott*, 618.
- 2. LAWFUL USE BY RAILROAD COMPANY OF LAWFUL ERECTION**, on its own ground, cannot be subject of damage except on proof of negligence, even under the constitutional provision (Penn. Const., art. 16, sec. 8) that corporations "invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed in the construction or enlargement of their works," etc. *Id.*
- 3. RAILROAD COMPANY — LIABILITY FOR CONSEQUENTIAL DAMAGES ARISING FROM OPERATION OF ITS ROAD.** — A railroad company erected upon property owned by it in fee, and fronting on one side of a street, a viaduct, or elevated roadway, and railroad thereon, and operated it for the transportation of passengers and freight by steam. In consequence of the noise, smoke, and dust arising from the use of the engines and cars, and necessarily incident to the use of the property as a steam railway, injury was done to the plaintiff's property on the opposite side of the street, no part of which property, or any right of way, or other appurtenance thereunto belonging, had been taken or used in the erection or construction of the road. In an action on the case to recover damages for such injuries, *held*, that the court's instruction to the jury, that the plaintiff was entitled to recover, and that the legal measure of damages was the difference between the market value of the property before the

railroad was built and its market value after the completion of the structure, was erroneous. *Id.*

EQUITY.

1. **EVASIVE AND DISINGENUOUS ANSWER TO BILL IN EQUITY**, taken in connection with facts admitted, may entitle complainant to the relief prayed for. *Allen v. Elder*, 63.
2. **MISTAKE, RELIEVABLE IN EQUITY**, is defined by the code of Georgia to be some unintentional act, omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence. It may be either of law or of fact. *Id.*
3. **EVIDENCE TO JUSTIFY RELIEF ON GROUND OF MISTAKE** must be clear, unequivocal, and decisive as to the mistake. *Id.*
4. **MISTAKE OF LAW IS NO GROUND FOR RELIEF**, under the code of Georgia, if it consists of mere ignorance of law on the part of complainant. It is otherwise, if there is an honest mistake of law on the part of both parties respecting the effect of an instrument, whereby the one suffers a gross injustice, and the other gains an unconscientious advantage. *Id.*
5. **EQUITY HAVING TAKEN JURISDICTION FOR ONE PURPOSE** will retain it for others necessary to the final settlement of all matters involved in the litigation between the parties, growing out of and connected with the subject-matter of the suit. *Id.*
6. **PLAINTIFF SEEKING TO QUIET TITLE TO LAND**, upon specific claim that he is absolute owner of it, cannot succeed by showing that he is entitled to partition, or to some relief of an entirely different character. *Johnson v. Murray*, 174.
7. **PARTY SUING TO QUIET TITLE TO LAND** must show title in himself, and that the defendant has none, or at least not such as he asserts. *Id.*
8. **WHILE TO REFORM WRITTEN INSTRUMENT** on the ground of mistake, the mistake must be established in a clear and convincing manner, and to the entire satisfaction of the court, still relief will not be denied because the testimony is conflicting. *Hutchinson v. Ainsworth*, 823.
9. **ONE WHO IS MADE DEFENDANT TO CREDITOR'S BILL BY AMENDMENT WAIVES OBJECTION TO FAILURE TO SERVE NOTICE** of the amendment upon him by entering an appearance and making defense. *Bell's Appeal*, 532.
10. **EQUITY WILL NOT INTERFERE WHERE TRESPASS IN CONTINUING ONE**, and a multiplicity of actions is involved in the legal remedy. *Wheelock v. Noonan*, 405.
11. **EQUITY WILL NOT REQUIRE RIGHT OF PLAINTIFF TO BE ESTABLISHED AT LAW** as a condition precedent to granting relief, if the facts are not in doubt, and his right is clear. *Id.*
12. **LACHES AND NEGLECT ARE ALWAYS DISCOURTEAGED IN EQUITY**, which always refuses relief to stale demands. When a party has slept upon his rights for a great length of time, nothing will call the court into activity but conscience, good faith, and reasonable diligence. *Walt v. Haskins*, 501.

See **CONTRACTS**, 10-12; **DEEDS**; **MORTGAGES**, 8; **SPECIFIC PERFORMANCE**; **STATUTE OF LIMITATIONS**.

ESTATES OF DECEDENTS.

1. **SALE OF LAND OF DECEDENT TO MAKE ASSETS FOR PAYMENT OF HIS DEBTS** IS VOID, and passes no title as against his heirs or devisees not made

parties in some sufficient way to the proceeding in which the order directing such sale was made. *Perry v. Adams*, 326.

2. **CASES WHERE NO SERVICE AT ALL HAS BEEN MADE ARE NOT EMBRACED IN CURATIVE ACT**, — section 387, code of North Carolina, — making valid judgments and other proceedings against infants and certain other classes of persons in certain cases. The object of that statute is to cure the judgment or proceeding when personal service upon an infant was omitted. *Id.*
3. **PURCHASER AT INVALID SALE OF DECEDENT'S LAND FOR PAYMENT OF DEBTS IS ENTITLED TO BE SUBROGATED**, to the extent that the money paid by him was applied to the payment of such debts, to the rights of the creditors of the decedent, and to have the amount due him charged upon the land. *Id.*
4. **DECREE FOR AMOUNT OF INDEBTEDNESS DUE ESTATE BY DECEASED EXECUTRIX**, made on conclusion of proceedings on accounting by her executor after her death, being unreversed and unappealed from, is a final decree, having the legal effect of a decree for a debt due by her at the time of her death. *Smith v. Seaton*, 668.
5. **LANDS OF DECEDENT ARE NOT DISCHARGED OF HIS DEBTS** because certain personal property which came into the hands of his executor was wasted. *Id.*

See **EXECUTORS AND ADMINISTRATORS; STATUTE OF LIMITATIONS, 2, 3; WILLS.**

ESTOPPEL.

WHENEVER ACT IS DONE OR STATEMENT MADE BY PARTY which cannot be contradicted without fraud on his part, and injury to others, whose conduct has been influenced by such act or admission, an estoppel will attach to what otherwise would be mere matter of evidence. *Humphreys v. Finch*, 293.

EVIDENCE.

1. **EVIDENCE OF DOUBTFUL CHARACTER**, as a statement made by plaintiff seeking to recover damages for an injury, "that if he did not get better, he would commit suicide," may be submitted to the jury, under proper instructions from the court as to its competency. *Central R. R. v. Smith*, 31.
2. **EVIDENCE.—REPRESENTATIONS OF SICK PERSONS**, of the nature, symptoms, and effects of the malady under which they are laboring, are admissible as original evidence, though not made to a medical attendant. This rule must be restricted and carefully guarded when the declarations are no part of the *res gestæ*. *Id.*
3. **EVIDENCE.—ADMISSION OF DECLARATIONS OF SICK PERSONS IS RESTRICTED** to "exclamations of present pain or statements of present symptoms," and does not include statements relating to past occurrences and forming no part of the *res gestæ*. *Id.*
4. **JURY SHOULD BE INSTRUCTED TO WEIGH LIGHTLY DECLARATIONS OF SICK PERSON**, where they are doubtful, particularly when made at some period subsequent to time of injury, with a probable view of increasing damages in some suit which may be started. *Id.*
5. **EVIDENCE.—CONVERSATION BETWEEN PLAINTIFF AND DEFENDANT**, wherein latter offered and former declined a sum of money as

- compensation for injuries inflicted on him by defendant's dog, is admissible in evidence in favor of the plaintiff. *Brice v. Bauer*, 454.
6. EVIDENCE THAT SUM OF MONEY WAS OFFERED AS COMPROMISE is admissible as evidence in favor of the plaintiff, unless the offer, when made, was stated to be confidential or without prejudice. *Id.*
 7. RULE FORBIDDING USE OF PAROL EVIDENCE TO CONTRADICT a writing does not apply to a third person whose rights are paramount to such writing. *Tyson v. Post*, 410.
 8. TESTIMONY OF PRACTICAL RAILROAD MEN, called as experts, is admissible as to what is or is not good "railroading," in respect to the moles of passing trains on a single-track road. *Lewis v. Seiffert*, 631.
 9. RECORD OF STATE OF WEATHER, MADE BY PERSON APPOINTED BY CHIEF OF SIGNAL SERVICE BUREAU of the United States, in the course of his public duty, is in itself evidence of the condition of the weather at a particular period embraced in it. *Knott v. Raleigh & G. R. R. Co.*, 321.
- See CONTRACTS, 8-12; CRIMINAL LAW, 1-13; DAMAGES, 2; ELECTIONS; MORTGAGES, 1; SALES, 2; SLANDER; WITNESSES

EXECUTIONS.

1. EXECUTION ISSUED UPON JUDGMENT obtained against two, but docketed only against one, is not absolutely void so long as it is outstanding, and is sufficient basis for garnishee process. Even if it were necessary to have the judgment docketed against the other defendant in order to validate the execution, the court has power to order it so docketed *nunc pro tunc*. *Drake v. Harrison*, 717.
2. EXECUTION SALE OF DEBTOR'S LAND WITHOUT HAVING HOMESTEAD THEREIN LAID OFF to him by the sheriff is void, and the purchaser thereof acquires no title, whether he be the plaintiff in the execution or a stranger. *McCracken v. Adler*, 340.
3. SHERIFF AND HIS SURETIES ARE NOT LIABLE FOR VALUE OF HOMESTEAD LOST, but only for all costs and damages which the owner thereof may sustain by reason of the sheriff's neglect to lay off to him his homestead. *Id.*
4. DEBTOR'S RIGHT TO HAVE HIS HOMESTEAD SET OFF TO HIM by the sheriff is not impaired by mere fact that some of the buildings thereon are separated from others by the county line. *Id.*
5. LACHES. — ONE WHO HAS KNOWLEDGE of the facts, and waits ten or eleven years to begin an action to set aside a sheriff's deed to his land, cannot excuse his laches by showing that he was in possession a part of the time, as the suit could be brought as well when he was in possession as when he was not. Possession does not give him any better standing than if he had been ousted by the adverse party. The laches affects him in the one case as much as in the other, and while his possession gives notice to his adversary that he claims the land, it does not give notice that he will assert the claim by suit to cancel an interfering deed. *Walt v. Haskins*, 591.
6. LACHES. — ONE WHO IS CHARGEABLE WITH NOTICE of all the facts, and waits eleven years to begin his action to cancel a sheriff's deed to his land, executed under a judgment claimed to be voidable, cannot excuse his laches on the ground that four years were spent in diligent search for the title deeds, as they are not necessary to the maintenance of the suit. He need not establish his title in the proceeding, as the adverse

party claims under him and through the deed which he seeks to cancel.
Id.

7. ONE IS GUILTY OF LACHES, and cannot maintain an equitable action to cancel a sheriff's deed to his land executed under an alleged voidable judgment against him, when he has waited eleven years to begin his action, during which time the courts were open to him, he was chargeable with notice of the deed, and in possession of all the evidence relied upon to support the action. *Id.*
8. SALE OF LAND UNDER ALIAS WRIT OF EXECUTION will not be set aside as void because the writ was improvidently issued by the clerk without the order of the judgment plaintiff. *Johnson v. Murray*, 174.
9. PERSON CLAIMING IN CHARACTER OF JUDGMENT CREDITOR cannot avail himself of a mere irregularity to defeat a consummated sale. As a general rule, it is only the execution defendant who can avail himself of an irregularity, even by a proceeding instituted before the sale is made. *Id.*
10. AFFIDAVIT UPON WHICH PROCEEDINGS SUPPLEMENTARY TO EXECUTION ARE BASED NEED NOT SPECIFY PROPERTY owned by the debtor which he refuses to apply to the satisfaction of the judgment. *Magruder v. Shelton*, 349.
11. TO OBTAIN ORDER REQUIRING JUDGMENT DEFENDANT TO ANSWER CONCERNING HIS PROPERTY, three facts must be made to appear by affidavit or otherwise: 1. The want of known property liable to execution; 2. The non-existence of any equitable estate in land subject to the lien of the judgment; 3. The existence of property unaffected by any lien, and incapable of levy. *Id.*

See EXEMPTIONS; INJUNCTIONS, 4; PARTNERSHIP, 12, 13; RECEIVERS, 1, 2.

EXECUTORS AND ADMINISTRATORS.

1. GRANT OF LETTERS OF ADMINISTRATION ON ESTATE OF ONE WHO DID NOT RESIDE WITHIN JURISDICTION of the court making the grant at the time of his death is void, and may be attacked collaterally. *People's Savings Bank in Providence v. Wilcox*, 894.
2. ADMINISTRATOR UNDER LAWS OF ONE STATE CAN INDORSE NOTE so as to enable the indorsee to sue in another state, where there are, in the latter state, no claims against the estate of his intestate. *Mackay v. St. Mary's Church*, 881.
3. NOTE GIVEN TO TWO JOINT ADMINISTRATORS MAY BE TRANSFERRED BY ONE OF THEM, where it is given for a debt due to the estate of their intestate. *Id.*
4. ADMINISTRATORS APPOINTED IN STATE OF THEIR OWN DOMICILE, AND ALSO IN STATE OF THEIR INTESTATE'S DOMICILE, may transfer, in the former state, a note given to the estate, although they may be liable to account in the latter state for the proceeds of such transfer. *Id.*
5. COMMON-LAW RULE THAT DISSEISOR CANNOT CONVEY ESTATE OF WHICH HE IS DISSEISED to a stranger to the title, so as to enable him to sue for it in his own name, has no application to a conveyance by an administrator for the payment of the debts of the deceased. *Knowles v. Blodgett*, 913.
6. ADMINISTRATOR'S DEED CONVEYS ALL ESTATE HELD BY DECEASED AT TIME OF HIS DEATH, and passes the title so as to enable the grantee to sue for and recover the estate of a subsequent disseisor. *Id.*

7. **ADMINISTRATOR HAS NO SKIN, AND THEREFORE CANNOT BE DISEMPOWERED.** He has only a power given him by statute, to be exercised for certain purposes in a certain manner. *Id.*

See **ESTATES OF DECEDENTS; STATUTE OF LIMITATIONS; WILLS.**

EXEMPTIONS.

1. **PERSONAL PROPERTY EXEMPTION CANNOT BE CLAIMED OUT OF MONEY THAT HAS BEEN INVESTED** in the purchase of land. *Dorch v. Benton*, 331.
2. **PERSON WHO EARNS HIS LIVING BY FARMING IS FARMER**, within the meaning of the exemption laws, although he does not own a farm nor have one leased, and is not doing any specific thing as a farmer on the particular day on which an execution is levied upon his property. *Hickman v. Cruise*, 256.
3. **WHERE RESIDENT OF IOWA TAKES PROPERTY THERE EXEMPT FROM EXECUTION TO ANOTHER STATE** for a temporary purpose, a creditor of his, who is also a resident of Iowa, will be restrained by the courts of the latter state from enforcing against the property a judgment obtained by him in such other state. *Mumper v. Wilson*, 238.

EXPERTS.

See **EVIDENCE**, 8, 9.

FALSE IMPRISONMENT.

1. **STATEMENTS MADE TO JUSTICE BY PROSECUTOR, BY WHICH JUSTICE WAS INDUCED TO ISSUE WARRANT FOR ARREST, ARE ADMISSIBLE**, in an action for false imprisonment against the prosecutor and the justice, to show probable cause, and in the absence of probable cause, to disprove malice in fact, in mitigation of damages. *Neall v. Hart*, 559.
2. **JUSTICE IS JUSTIFIED IN ISSUING WARRANT FOR ARREST**, upon a charge by the prosecutor that the defendant, by misrepresentation and trickery, had defrauded the prosecutor in the sale of goods, and had appropriated the same to his own use. *Id.*
3. **PROBABLE, IF NOT ACTUAL, CAUSE FOR ARREST EXISTS**, which will defeat an action for false imprisonment against the prosecutor and the justice who issued the warrant for arrest, where the defendant obtained goods from the prosecutor under the pretense of a contract, and through a lie, although perhaps the defendant was not technically guilty of obtaining goods under false pretenses, or of embezzlement. *Id.*

FIXTURES.

1. **FIXTURES. — MACHINERY, SHAFTING, ROLLERS, AND OTHER ARTICLES CONSTITUTING a marine railway**, are parts of the realty, as between vendor and vendee, or mortgagor and mortgagee, in the absence of any agreement to the contrary. *Tyson v. Post*, 410.
2. **FIXTURES. — OWNER OF LAND MAY, BY CONVENTION**, reimpress the character of personalty on chattels which have become fixtures according to the ordinary rules of law, if they have not become so incorporated into the realty as to lose their identity, and the reconversion does not prejudice the right of creditors or third persons. *Id.*
3. **PAROL AGREEMENT THAT CERTAIN FIXTURES MAY BE TREATED AS CHATTELS**, and removed by one of the contracting parties, is not invalid because by parol, nor because inconsistent with the terms of a mortgage to which he was not a party. *Id.*

FRANCHISES.

1. **MANUFACTURE AND DISTRIBUTION OF ILLUMINATING GAS**, under legislative authority, in the streets of a town or city, is the exercise of a franchise belonging to the state. This franchise is conferred for the benefit of the public as well as of the company. *Chicago G. L. Co. v. People's G. L. Co.*, 124.
2. **GAS COMPANY HAVING EXCLUSIVE RIGHT TO MANUFACTURE AND SELL ILLUMINATING GAS** in a city may make a valid contract to permit another company to compete with it in such manufacture and sale. *Id.*

FRAUD.

1. **GREAT LATITUDE IS ALLOWED ON QUESTION OF FRAUD**, and every fact or circumstance from which a legal inference of fraud may be drawn is admissible. *Cover v. Manaway*, 552.
2. **EVIDENCE OF FRAUD SHOULD BE SUBMITTED TO JURY**, if from it the jury can properly find the question for the party on whom the burden of proof rests; but if not, it should be withdrawn from the jury. *Id.*
3. **TO MAKE PURCHASE FRAUDULENT, THERE MUST BE FRAUDULENT INTENT**. The mere fact that a purchaser is deeply insolvent does not make his purchase invalid. *Dalton v. Thurston*, 905.
4. **UNDUE INFLUENCE**. — If an antecedent fiduciary relation exists, a court of equity will presume confidence placed and influence exerted. This rule is not limited to the relation of attorney and client, guardian and ward, trustee and *cestui que trust*, or other similar relations, but holds good wherever fiduciary relations exist, and there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding. *Fisher v. Bishop*, 357.
5. **BURDEN OF PROOF RESTS ON PERSON OCCUPYING FIDUCIARY RELATION** to show that a transaction entered into between him and the person trusting him is just and fair, and that no unfair advantage was derived from the fiduciary relation. *Id.*
6. **PERSON HOLDS CONFIDENTIAL RELATION TO ANOTHER** when the latter employs him, because of his supposed ability and integrity, as a confidential adviser to transact business, and he is precluded from taking advantage of his situation, and from using information thus acquired, to the detriment of his employer. *Id.*
7. **MORTGAGE OBTAINED BY REPRESENTATIONS OF MORTGAGOR'S LEGAL ADVISER**, to the effect that a previous transfer to the mortgagor could and would be set aside as fraudulent, unless he made such mortgage, and thereby secured certain creditors of his grantor, will be vacated in equity as procured by the undue influence of such legal adviser. It is immaterial that he was not a regular attorney, if he was employed and trusted as such by the mortgagor and others. *Id.*

See CONTRACTS, 10; DEEDS; EVIDENCE, 7.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT.

GAS.

See CONTRACTS, 13-17; FRANCHISES.

GIFTS.

1. GIFT OF PERSONAL PROPERTY, made with intent to take effect immediately and irrevocably, and is fully executed by complete and unconditional delivery, is binding upon the donor as a gift *inter vivos*, even if he is at the time *in extremis*, and dies soon after. *Henschel v. Meurer*, 757.
2. WHERE MORTGAGEE IN EXTREMIS delivered a mortgage note and satisfaction to the mortgagor personally as a gift, but afterwards directed the mortgagor to deliver them to a relative, that the latter might ascertain the value of the land conveyed, and thus determine the difference in value between two gifts, and then divide the personal property so as to make the gifts equal, the transaction is an absolute gift *in present*. Even if there was no intent to make a then present, unconditional gift, yet, as the delivery was complete, and as the donor was at the time in his last sickness, and died soon after without revoking the gift, it was binding as a valid gift *causa mortis*. *Id.*

GUARDIAN AND WARD.

See RECEIVERS.

HABEAS CORPUS.

See PARENT AND CHILD.

HIGHWAYS.

1. PERSON ON FOOT HAS RIGHT TO CROSS STREET wherever he pleases. *Moebius v. Herrmann*, 440.
2. LEGISLATURE HAS COMPLETE POWER to provide proper and reasonable police regulations in respect to highways, persons going upon and over them with vehicles, horses, and other motive power, to protect the roads, and the safety and comfort of passengers going over them. *State v. Foot*, 305.
3. OWNER OF PARTICULAR KIND OF VEHICLE, as a bicycle, which, from its peculiar form or appearance, or from the unusual manner of its use, frightens horses, or otherwise impairs passengers over a road, or their property, has no right to use such vehicle on the road, and the legislature may regulate the use of it. *Id.*
4. STATUTE FORBIDDING USE OF ANY BICYCLE, tricycle, or other non-horse vehicle upon a road, without the express permission of the superintendent of such road, is not unconstitutional, as tending to destroy property, or deprive the owner of the proper and reasonable use of it. *Id.*
5. COURTS CANNOT DECLARE STATUTES REGULATING USE OF HIGHWAYS VOID, or interfere with their operation, unless they are so manifestly unjust and unreasonable as to destroy the lawful use of property. *Id.*
6. DRIVER OF CARRIAGE MUST BE WATCHFUL not to injure persons on foot, elsewhere as well as at the cross-walks. *Moebius v. Herrmann*, 440.
7. NEGLIGENCE.—PERSON HAS RIGHT TO ASSUME THE SAFETY OF A SIDE-WALK, though he knows that vaults and coal-chutes are common, under and adjoining such walks; and he is not called upon to give attention to his steps, until in some manner warned of danger. He has a right to assume that such vaults and chutes are either covered or guarded. *Jennings v. Van Schaick*, 459.
8. ACT OF PERSON ERECTING BARBED-WIRE FENCE on his own land, along line of highway, does not in itself render him liable to one who thereby

sustains an injury; but the rule is otherwise if the fence is constructed and maintained in such a manner as to make the person erecting and maintaining it guilty of negligence. *Sisk v. Crump*, 213.

9. ONE WHO NEGLIGENTLY CONSTRUCTS AND KNOWINGLY MAINTAINS BARBED-WIRE FENCE in dangerous condition, between his land and the adjacent highway, is liable for an injury thereby occasioned to domestic animals lawfully running at large, and which are attracted within the inclosure by the presence of other animals and growing pasture. *Id.*
10. TOWNSHIP OWES DUTY TO PUBLIC TO KEEP HIGHWAY IN REASONABLY SAFE CONDITION, and is responsible in damages to one injured in consequence of its neglect to do so; and it is no defense that the negligent act of a third party contributed to the injury sustained. *Burrell Township v. Uncapher*, 664.
11. IT IS COMPETENT FOR PLAINTIFF TO PROVE, IN ACTION TO RECOVER DAMAGES for injury sustained by reason of the alleged negligence of a township in failing to keep a highway in repair, that notice of the dangerous character of the highway, without limit to any particular part, was given to one of the supervisors. *Id.*
12. WHETHER IT IS NEGLIGENCE ON PART OF TOWNSHIP TO MAINTAIN HIGHWAY at a particular place, in a condition unguarded by a barrier, is a question of pure fact for the jury to determine. *Id.*
13. MUNICIPAL CORPORATION IS REQUIRED TO EXERCISE VIGILANCE in keeping its streets and sidewalks in reasonably safe condition for public travel, by night as well as by day, but it is not an insurer against accidents; nor is it required to maintain the surface of its sidewalks free from all inequalities, and from every possible obstruction to mere convenient travel. *Gosport v. Evans*, 164.
14. MUNICIPAL CORPORATION DOES NOT NECESSARILY BECOME INVOLVED IN LIABILITY from fact that a pavement may have become uneven from use, or that the material of a sidewalk may have become loose or displaced by the action of the elements, so that persons are liable to stumble or be otherwise inconvenienced in passing, so long as the defect can be readily discovered and easily avoided by persons exercising due care, or if the defect be of such a nature as not of itself to be dangerous to persons so using the sidewalk. *Id.*
15. PERSON TAKES RISK UPON HIMSELF, WHO, SEEING OBSTRUCTION IN STREET OR SIDEWALK, and knowing its dangerous character, deliberately goes into or upon it when he was under no compulsion to do so, or might have avoided it by going around, and if injured thereby, he is without remedy, because of contributory negligence. *Id.*
16. ACTS OF LOT-OWNER IN IMPROVING SIDEWALK, LIABILITY OF TOWN FOR. — The Revised Statutes of Indiana, 1881, section 3357, authorizes the board of trustees of any incorporated town to compel abutting lot-owners to improve the sidewalks: *held*, that the acts of a lot-owner who improves a sidewalk, under an ordinance adopted in pursuance of the statute, cannot be deemed the acts of the town in such a sense as to charge it with his negligence; that in order to charge the corporation, evidence of the negligence of the lot-owner must be supplemented by evidence that the town authorities were negligent, or that the work directed to be done was intrinsically dangerous. *Dooley v. Sullivan*, 209.
17. LIABILITY OF TOWN FOR NEGLIGENCE — UNGUARDED EXCAVATION IN SIDEWALK. — A complaint against a town alleged that the corporation caused an excavation to be made in a sidewalk, which was left unguarded, and

that the plaintiff, without his negligence, fell into the excavation in the night-time, and was greatly injured. The answer averred that the excavation was made by the owner of a lot abutting on the street, in accordance with an ordinance requiring him to improve the sidewalk; and that when the work was left, on the night the plaintiff was injured, such lot-owner, using all care and diligence, placed near the excavation a good and sufficient danger-signal, which the plaintiff carelessly and wholly disregarded. *Held*, that the answer was unquestionably good. *Id.*

18. ONLY ORDINARY CARE IS REQUIRED OF MUNICIPAL CORPORATION, its agents, and contractors; and such care does not require that a watch be kept during the night over an excavation, unless there are circumstances peculiar to the particular case making it necessary. It is sufficient, as a general rule, to show that proper signals or secure guards were placed about an excavation on quitting work, and no liability attaches if a wrong-doer removes the signals during the night. *Id.*
19. TOWN SUED FOR INJURIES FROM OBSTRUCTION IN HIGHWAY MAY SET UP, BY WAY OF ESTOPPEL, JUDGMENT in favor of the defendant in a former action brought by the same plaintiff, to recover for the same injuries, against the person alleged to have caused such obstruction. *Hill v. Bain*, 873.

See COUNTIES; NEGLIGENCE, 7; NUISANCES; RAILROADS

HOMESTEADS.

1. CLAIMANT OF HOMESTEAD DOES NOT FORFEIT HIS RIGHT THERETO by making a conveyance thereof with intent to defraud his creditors. *Dortch v. Benton*, 331.
2. ONE WHO PURCHASES LAND, AND PAYS PORTION OF PRICE, BECOMES AT ONCE ENTITLED TO HOMESTEAD therein, subject to the lien for the unpaid purchase-money. *Id.*
3. LAND ASSIGNED TO BANKRUPT AS HOMESTEAD is exempt from execution for a definite period, against the subsisting and unsatisfied portion of a fiduciary debt which has shared in the distribution of the estate, and the same immunity follows the land into the hands of a mortgagee of the homestead owner, whether his wife joined in the transfer or not. *Simpson v. Houston*, 297.
4. HOMESTEAD.—Attorney has lien of homestead for services rendered in protecting it against creditors. Such services are in the nature of labor done, or purchase-money paid on such homestead. *Strohecker v. Irvine*, 62.
5. ORDER OF COURT REFUSING TO SET APART HOMESTEAD will not be reversed because the court did not find upon the issues made by the pleadings, when the bill of exceptions fails to show that the findings were not waived. *Estate of Noah*, 834.
6. COURT CANNOT SET APART AS HOMESTEAD to surviving husband or wife property of the estate which could not have been selected as a homestead during the continuance of the marriage. *Id.*
7. COURT CANNOT SET APART HOMESTEAD to the value of five thousand dollars to the surviving husband or wife, out of an estate consisting of a lot and four-storied brick building, erected and used exclusively for business purposes, and valued at twenty-five thousand dollars, and which cannot be divided without material injury. *Id.*
8. WHERE NO HOMESTEAD HAS BEEN SELECTED during the lifetime of the husband or wife, and there is no property out of which the survivor may

select a homestead, the court cannot order a sum of money paid to such survivor in lieu of a homestead. *Id.*

9. WHERE HOMESTEAD SELECTED DURING LIFETIME OF HUSBAND OR WIFE is inventoried at more than five thousand dollars, and a homestead to that amount cannot be carved out of it, the court may order the sale of the homestead as selected, and pay to the survivor that amount of the proceeds. *Id.*

See EXERCUTIONS, 2-4.

HOMICIDE.

See CRIMINAL LAW, 21.

HUSBAND AND WIFE.

1. HUSBAND IS FORMAL, AND NOT REAL, PARTY TO RECORD, in an action brought by husband and wife, in the right of the wife, to recover damages for injury sustained by her; and the defendant is not entitled to call him for cross-examination, to testify adversely to his wife's claim. *Burrell Township v. Uncapher*, 664.
2. HUSBAND IS NOT LIABLE TO VENDOR FOR GOODS, NOT NECESSARIES, SOLD TO HIS WIFE ON HIS CREDIT, after an express notice from him to the vendor not to so sell to her without his authority, and the fact that the husband suffers the goods to remain in his house, where the vendor placed them, and does not offer to return them or notify the vendor that he may remove them, does not amount to such a ratification of the unauthorized purchase as will render him liable. *Segelbaum v. Ensminger*, 662.
3. HUSBAND MAY DISPOSE OF PERSONAL PROPERTY IN GOOD FAITH, BY GIFT OR OTHERWISE, DURING COVERTURE, free from all *post-mortem* claims thereon by his widow. *Dickerson's Appeal*, 547.
4. WIFE IS PERSONALLY LIABLE FOR TORT COMMITTED BY HER, unless her husband was both present and directed the doing of it at the time. His presence furnishes evidence, and raises a presumption of his direction, but it is not conclusive, and the truth may be established by competent evidence. *Franklin's Appeal*, 583.
5. WIFE IS PERSONALLY LIABLE FOR TORT COMMITTED BY HER, unless her husband was both present and directed the doing of it at the time, when he alone is liable. If the husband was present during the commission of the tort, whether actively participating in it or not, *prima facie* the wrong is deemed his alone; but this presumption may be rebutted, and each of the two may be shown to be the doer of the wrong, the same as though unmarried. *Wheeler & W. M. Co. v. Hell*, 575.
6. WHERE WIFE VOLUNTARILY AGREES WITH HER HUSBAND for separation, and for a money consideration releases all her marital claims, and receives and enjoys the benefits of the money paid for her support during the separation, and voluntarily continues to live apart from him, without any attempt to set aside the agreement or to again assume the marital relation or to demand further means for her separate support, she does not thereafter constitute a member of the immediate family of the husband, and upon his death is not entitled to an allowance for her maintenance out of his estate, under sections 1466 and 1467, California Code of Civil Procedure. *Estate of Noah*, 829.

See HOMESTEADS; MARRIED WOMEN.

INDEX.

INFANTS.

See NEGLIGENCE, 6; PARENT AND CHILD; STATUTE OF LIMITATIONS, 4.

INJUNCTIONS.

1. TAX-PAYER MAY SUSTAIN BILL TO ENJOIN the imposition of an unjust and illegal burden on the municipality, or to prevent its property from being wasted and squandered: *Chicago v. Building Association*, 102 Ill. 379, explained, and shown not to conflict with this rule. *McCord v. Pike*, 85.
2. INJUNCTION AT SUIT OF TAX-PAYER will issue to prevent the officers of a county from selling its lands for a less sum than was offered therefor by another bidder, especially if it appears that their action is collusive and for the purpose of defrauding the county. *Id.*
3. MANDATORY INJUNCTION WILL BE GRANTED to compel the removal from plaintiff's premises of a large quantity of stone, placed there by the defendant pursuant to a license which he has abused, and which has, moreover, expired by lapse of time. *Whelock v. Noonan*, 405.
4. INJUNCTION WILL NOT LIE TO RESTRAIN the sale of goods on execution issued on a justice's judgment rendered by default, but void because the court never acquired jurisdiction of the person of defendant. The remedy is by motion to set the execution aside. *Luco v. Brown*, 772.

See TRADE-MARKS.

INSANITY.

1. LUNATIC IS LIABLE IN CIVIL ACTION FOR ANY TORT HE MAY COMMIT. *McIntyre v. Sholly*, 140.
2. PROPER MEASURE OF DAMAGES IN ACTION AGAINST LUNATIC for a tort committed by him is mere compensation for the injury sustained. It cannot include punitive damages. *Id.*

INTOXICATING LIQUORS.

See CRIMINAL LAW, 22-25.

INSURANCE.

1. INSURABLE INTEREST IN LIFE OF ANOTHER, SUCH AS WILL TAKE CONTRACT OUT OF WAGER CLASS, MUST ARISE from the relation of the party taking the insurance to the insured, either as surety or debtor, or from the ties of blood or marriage, so that from the relation thus established there may be some expectation of benefit or advantage in the continuance of the insured life. *Keystone M. B. Ass'n v. Morris*, 572.
2. POLICY OF INSURANCE ON LIFE OF ANOTHER, TAKEN BY ONE WHO HAD INSURABLE INTEREST IN IT, for the purpose of assigning it to a third person who had no such insurable interest, is void as a wagering policy in the hands of the assignee. *Id.*
3. CONDITION IN POLICY OF LIFE INSURANCE PROVIDING THAT NO ACTION SHALL BE BROUGHT THEREON, unless within one year from the death of the insured, is not suspended by an action brought within the year in a court which had no jurisdiction of the defendant. *Id.*
4. MORTGAGEE, MERELY AS SUCH, HAS NO INTEREST, either in law or equity, in policy of insurance effected by the mortgagor upon the mortgaged premises for his own benefit, in the absence of any covenant or agreement requiring the latter to insure for the benefit of the former. *Nordyke and Marmon Company v. Gery*, 219.

5. **GENERAL RULE IS THAT, BETWEEN INSURER AND INSURED**, policy of fire insurance is purely personal contract, by which the former agrees to indemnify the latter against any loss he may sustain by the destruction of his interest in the property insured. *Id.*
6. **WHERE MORTGAGOR HAS COVENANTED TO KEEP MORTGAGED PREMISES INSURED FOR BENEFIT OF MORTGAGEE**, and either has effected, or thereafter effects, insurance in his own name, though without the mortgagee's knowledge, or without any intent to perform the agreement, equity will treat the insurance as effected under the agreement, and will give the mortgagee his equitable lien accordingly. *Id.*
7. **MORTGAGOR HAS DONE THAT WHICH HE OUGHT TO HAVE DONE** where, having covenanted to insure mortgaged premises for benefit of mortgagee, he has effected solvent insurance, in good faith, in the name and to the acceptance of the mortgagee, to an amount adequate to secure the debt. Having kept the policies alive until the mortgage debt is paid, or a loss occurs, he is not in default, and will be responsible thereafter only for such infirmities as existed and were inherent in the insurance at the time the policies were accepted, or such as may have resulted from his own subsequent conduct. *Id.*
8. **PURCHASER OF LAND UNDER ARTICLES OF AGREEMENT; THOUGH PURCHASE-MONEY IS UNPAID, HAS INSURABLE INTEREST** in buildings on the land, within the contemplation of a policy containing a condition that it should be void "if the interest of the assured be other than the entire, unconditional, and sole ownership, or if the property insured be a building standing on ground not owned by the assured in fee-simple." In respect to the insurance, such purchaser is to be regarded as the entire, unconditional, and sole owner. *Imperial F. Ins. Co. v. Dunham*, 686.
9. **WHERE INSURANCE COMPANY IS, FROM ANY CAUSE, DISCHARGED FROM LIABILITY, RESPONSIBILITY FOR LOSS WILL NOT REATTACH** by waiver without proof of authority in the party whose act of waiver is relied upon, or without a new consideration to sustain it; but where the act of the agent executing the waiver is contemplated in the contract, and the power is expressly conferred upon him in writing, no new consideration is required. *Id.*
10. **INSURANCE — WAIVER OF FORFEITURE OF POLICY.** — A policy of fire insurance contained a provision that it should be void, if assigned before a loss, and without permission of the company therefor indorsed on the policy, and further provided that "no agent has power to waive any condition of this contract." The policy was assigned before a loss, without the assent of the company, but the company's agent, having power to "renew and consent to the transfer of policies," subsequently approved the assignment, and the company silently acquiesced in the act of the agent. *Held*, that the forfeiture of the policy was thereby waived, and the operative force of the policy revived in the hands of the assignee. *Id.*
11. **ID. — ACTION ON POLICY — PAROL EVIDENCE.** — In an action by the assignee of the policy against the insurance company, it appeared that the assured assigned and transferred by articles in writing all his interest in the insured property, and assigned the policy to the vendee: *held*, that it was competent for the plaintiff to show by parol what the contract was with reference to the existing insurance at the time of the transfer of the property to him, in order to explain the subsequent act of the parties in making the assignment of the policy, to exhibit their good

- faith in so doing, and to fix the admitted consideration therefor; especially as it appeared that the parol understanding was soon afterwards communicated to the company's agent, and met with his approval, which he subsequently entered in due form on the policy. *Id.*
12. APPLICATION FOR INSURANCE CONSTITUTES NO PART OF POLICY OR OF CONTRACT between the parties, and is therefore not receivable in evidence, unless a copy is attached to the policy as required by statute, Pennsylvania act of May 11, 1831. *Id.*
 13. WHERE INSURANCE COMPANY RECEIVES PAYMENTS ON ASSESSMENTS on a policy when they are overdue, and when it might refuse payment and declare the policy forfeited under its by-laws, it cannot accept and keep the money, and still insist upon a forfeiture. Nor does the fact that where the money is so received the receipts therefor have a conditional clause of the by-laws appended, to the effect that a physician's certificate of good health may be required in all cases of reinstatement, alter the case, in the absence of fraud in the insured as to his state of health at the time the payments were made. *Stylos v. Wisconsin Odd Fellows M. L. Ins. Co.*, 738.
 14. INSURANCE COMPANY, BY MAKING AN ASSESSMENT AGAINST AN ASSURED after he has failed to pay a previous assessment within the time declared by the by-laws to work a forfeiture, waives the forfeiture of the policy for such failure to pay, and admits him to be a member of the company notwithstanding such failure. *Id.*
 15. INSURANCE COMPANY, HAVING RECEIVED ASSESSMENTS after they were overdue, and when the policy might have been forfeited under the by-laws for non-payment, can only insist upon a forfeiture after having given the assured personal notice that thereafter punctual payment of assessments would be required. *Id.*
 16. IT IS COMPETENT FOR INSURANCE COMPANY TO WAIVE FORFEITURE OF POLICY caused by a sheriff's sale of the property insured, and it is an express waiver in writing of such forfeiture, if the company, having notice of such sale, issues a new policy as an extension of the previous one forfeited. *Elliott v. Ashland M. F. Ins. Co.*, 703.
 17. PURCHASER UNDER CONTRACT FOR SALE OF REAL ESTATE IS EQUITABLE OWNER, and is liable to all loss that may befall the property, including the loss of the buildings by fire. For the purpose of insurance, he may be said to be vested with the entire, unconditional, and sole ownership. *Id.*
 18. INSURED IS BOUND ONLY TO GIVE NOTICE TO COMPANY OF ANY CHANGE of which he has knowledge, and by which he knows the rate of insurance will be increased, where the conditions of the policy require him to give notice to the company of any change in the insured or neighboring premises, or in the use or occupation of the same, whereby the risk is increased, so as to increase the rate of insurance. *Rife v. Lebanon M. I. Co.*, 580.
 19. INSURANCE COMPANY WAIVES COMPLIANCE WITH CONDITIONS OF POLICY requiring proofs of loss to be made within a certain time, by receiving them, referring them to its adjuster, and retaining them, without objection or complaint, for five months. *Commercial U. A. Co. v. Hocking*, 562.
 20. ACTION IS PREMATURELY BROUGHT AGAINST INSURANCE COMPANY, where the policy provides that the company shall have thirty days after the receipt of proofs of loss in which to give notice of its intention to rebuild, and that the loss shall not be payable until sixty days after the

receipt of proofs of loss, and where the insured, having given immediate notice to the company of the total destruction of the property insured, brought an action about four months afterwards, but only twenty days after furnishing proofs of loss. *Id.*

JUDGMENTS.

1. JUDGMENT IS NOT A CONTRACT FOR ALL purposes and under all circumstances. *Gutta Percha & R. Mfg. Co. v. Houston*, 412.
2. JUDGMENT IS A CONTRACT "EXPRESS OR IMPLIED" within the terms of the statute authorizing the issue of attachments on such contracts, whether it was founded on a contract or a tort. The previous cause of action was merged in the judgment which became a debt that the defendant was under obligation to pay, and the law implied a promise or contract on his part to pay it. *Id.*
3. JUDGMENTS ARE TREATED AS CONTRACTS for the purposes of actions and remedies. *Id.*
4. NO JUDGMENT CAN BE ENTERED BY CLERK WHERE ISSUE OF FACT IS RAISED, but the cause must be transferred to the court for trial. It is only upon questions of law that there must be a judgment of the clerk from which an appeal may be taken. *Powell v. Morsey*, 343.
5. UNSATISFIED JUDGMENT IN ASSUMPSIT FOR MONEY LOANED IS NOT BAR to an action on the case between the same parties, for deceit on account of false and fraudulent representations made by the defendant in procuring the loan. But the value of the judgment in *assumpsit* should be considered by the jury in assessing the damages in the second action. *Whittier v. Collins*, 879.
6. JUDGMENT BASED ON COMPLAINT AGAINST BROWN "CIVIL" TOWNSHIP IS NOT VOID because of the inaccuracy in the name of the political corporation. The word "civil" correctly describes the township, and no one could have been misled or prejudiced by its use. *Vogel v. Brown Township*, 187.
7. WHERE WRIT IS SERVED ON PARTY BY WRONG NAME, and he fails to appear and plead misnomer, he is concluded, and in all future proceedings may be connected with the judgment by proper averments. This rule applies to corporations as well as to natural persons. *Id.*
8. FAILURE TO CALL PARTY BEFORE ENTERING DEFAULT is mere irregularity, and is not, even on appeal, considered as a material error. *Id.*
9. SUMMONS ISSUED AGAINST TRUSTEE cannot be regarded as writ against township, and will not sustain a judgment against the township. The people of a locality constitute the political corporation, and not the officers chosen by them, unless it is otherwise expressly declared by law. *Id.*
10. JUDGMENT OF ANOTHER STATE MAY BE IMPRACHED FOR WANT OF JURISDICTION over the person or subject-matter. If rendered without jurisdiction, it is not a judgment. *Jones v. Jones*, 447.
11. WHERE JUDGMENT IS REVERSED, AND CAUSE REMANDED for further proceedings according to the views expressed in the opinion in relation to a particular finding not sustained by the evidence, the trial court need not proceed to try the entire case anew, but may confine the testimony to the issue erroneously decided, and in other respects pass upon the issues in the light of the evidence already before it, or adopt the facts already found upon such testimony. *Chandler v. People's Savings Bank*, 812.

See PARTNERSHIP, 9; RES JUDICATA.

JUDICIAL SALES.

COURT HAVING JURISDICTION OF MATTER IN WHICH JUDICIAL SALE IS ORDERED MAY REQUIRE DEED TO BE EXECUTED TO THE PERSON ENTITLED TO IT, BUT THIS RULE IS WITHOUT FORCE, WHERE THE SALE UPON WHICH A DEED IS DEMANDED HAS BEEN CONCLUSIVELY ADJUDGED INVALID. *Stals v. Brown*, 190.

JURISDICTION.

1. WHERE JURISDICTION OF COURT DEPENDS ON FINDING OF PARTICULAR ALLEGED FACT, the exercise of jurisdiction implies the finding of that fact. *Thornton v. Baker*, 925.
2. JURISDICTION OF COURT OF LIMITED JURISDICTION MAY BE QUESTIONED COLLATERALLY and disproved, even though the jurisdictional fact be averred of record, and actually found upon evidence by the court, where the jurisdiction depends on some collateral fact which can be decided without going into the case on its merits. But where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the latter question, the judgment therein is collaterally conclusive. *People's Savings Bank in Providence v. Wilcox*, 894.

See ELECTIONS; EQUITY; PROBATE COURTS.

JURY AND JURORS.

1. RULE OF COURT REQUIRING PARTY DEMANDING JURY TRIAL to deposit a certain sum with the clerk of court as jury fees before the commencement of the trial is a reasonable regulation of the mode of enjoyment of the right of jury trial, and is not a denial or impairment of the right. *Conneau v. Geis*, 785.
2. FACT THAT JUROR HAS CONTRIBUTED MONEY FOR PROSECUTION OF PERSONS GENERALLY who were charged with keeping liquor nuisances is not ground for challenging him off the jury, on the trial of a person charged with keeping a liquor nuisance. *State v. Hoxie*, 838.
3. VERDICT SHOULD NOT BE DIRECTED FOR DEFENDANT WHEN THERE IS EVIDENCE tending to sustain the plaintiff's cause of action. *Hickman v. Cruise*, 256.
4. VERDICT IS GENERAL WHEN JURY RESPONDS affirmatively or negatively to the issues submitted, and it is special when it finds the facts, and leaves the court to apply the law to them. *Porter v. Western N. C. R. R. Co.*, 272.
5. VERDICT, WHEN MAY BE GENERAL AND WHEN SPECIAL.—In actions for recovery of money only or specific real property, the jury may render a general or special verdict, in their discretion. But in all other cases they may be directed to find a special verdict in writing upon any or all of the issues; and in all cases the court may instruct them, if they find a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon,—this, under section 409, code of North Carolina. *Id.*

See NEGLIGENCE.

LANDLORD AND TENANT.

1. LEASE PURPORTING TO BE FOR YEARS, BUT VOID for defective acknowledgment, constitutes the lessee who has entered under it by consent of the

lessor but a tenant at will, without the right to assign the remainder of the term, and whose holding may be terminated by the lessor at any time. *McLeran v. Benton*, 814.

2. **TENANCY AT WILL IS NOT ASSIGNABLE**, and if the tenant attempt to underlet or surrender, he thereby terminates his will and relinquishes his estate. *Id.*
3. **TENANT AT SUFFERANCE HAS MERELY NAKED POSSESSION**, stands in no privity to the landlord, is not liable for rents unless under the statute, and is not entitled to notice to quit. The landlord may terminate the tenancy when he pleases, and may in some cases treat the tenant as a trespasser. *Id.*
4. **WHERE LESSEE HOLDING UNDER VOID LEASE** from a tenant in common releases to a party who has contracted to purchase from the tenant in common, the purchaser is neither a tenant at will nor sufferance, and a deed to him by the tenant in common, with intention to pass the title, vests in him all the grantor's right of possession, and makes his possession adverse as against the other tenants in common, so as to vest the title under the Van Ness ordinance of San Francisco in him, which relinquishes the city's right in favor of prior possessors. *Id.*
5. **TENANT'S RIGHT OF RENEWAL IS PROPERTY OR ASSET INCIDENT TO EXISTING LEASE**, although it may not be enforceable against the will of the landlord. *Johnson's Appeal*, 539.
6. **NO OBLIGATION TO REBUILD RESTS ON LANDLORD OR TENANT** on the destruction of the leased premises by fire. *Smith v. Kerr*, 362.
7. **TENANT CONTINUES LIABLE FOR RENT OF PREMISES INJURED BY FIRE**, so long as any part thereof remains in existence capable of being occupied or enjoyed by him. This rule has been so modified by statute in New York as to give the tenant the option of surrendering possession of premises destroyed by fire, and declaring his lease at an end. He continues answerable under his lease, however, until he exercises his option and effects a full and absolute surrender of the premises. *Id.*
8. **IF LANDLORD REBUILDS PREMISES AFTER THEIR DESTRUCTION BY FIRE**, the tenant has the right to enter upon the premises and hold them, including the new structures, to the end of the term. *Id.*
9. **LANDLORD HAS NO RIGHT TO ENTER UPON LEASED PREMISES INJURED BY FIRE**, for the purpose of rebuilding, without the assent of the tenant, in the absence of a covenant to rebuild. *Id.*
10. **TO EFFECT SURRENDER OF EXISTING LEASE, BY OPERATION OF LAW**, there must be a new lease, valid in law, to pass an interest according to the contract and intention of the parties. *Id.*
11. **AGREEMENT TO PAY INCREASED RENT IS INOPERATIVE AND VOID, WHEN TENANT** has the right to remain in possession of the premises under an existing lease, for a definite term, although the landlord has erected new buildings in place of those destroyed by fire. Such an agreement is not a surrender of the pre-existing term, and accepting a new term in lieu thereof; and even if construed to operate as such surrender and releasing, it cannot have effect as such, in the present case, because not in writing. *Id.*
12. **LANDLORD AND TENANT OF UPPER FLOORS** of building are joint wrongdoers, and jointly or severally liable for an injury received by the tenant of the lower floors from overloading the upper floors and causing them to fall, when the landlord, knowing that the tenant of the upper floors desired to use them for heavy storage, and knowing that such

floors were not of sufficient strength for such use, leased them to such tenant, assuring him that he could safely use them for the purpose desired, and that such floors were sufficiently strong to sustain such load, and even a much greater one, whereby such tenant was induced to overload the floors on the declaration and assurance of the landlord. In such case it is no objection to a recovery against the tenant that a recovery for the same wrong may be had against the landlord; and a complaint which alleges the facts above set forth is sufficient as against the tenant. *Brunswick-Balke-Collender Co. v. Rees*, 748.

13. TENANT, AND NOT LANDLORD, IS ANSWERABLE, when the latter has safely and properly built a coal-vault under or adjoining the sidewalk, with an opening to the surface by permission of the municipality, and the former, while in the exclusive occupation of the property, carelessly leaves the coal-hole open, whereby some one is injured. *Jennings v. Van Schaick*, 459.
14. LANDLORD IS ANSWERABLE WHERE OPENING IN SIDEWALK IS LEFT UNGUARDED BY JANITOR in his employ, who has general charge of the premises, and of such opening, though the building was rented to tenant in flats and apartments, and the janitor was also employed by them to deliver coal to their rooms. *Id.*

See RES JUDICATA.

LIBEL.

1. IN ACTION FOR LIBEL, ACTUAL MALICE CANNOT BE INFERRED FROM MERE FALSITY of the following charges made by certain citizens in a petition to a town council for the removal from office of a constable: that he was a man utterly devoid of principle, and used his office more for the purpose of wreaking his personal spite than for the peace and harmony of the community; that he was wholly ignorant of the duties of his office; and that he had at various times maliciously and wickedly assaulted and arrested sundry persons who were entirely innocent of the charges made by him against them. Such a petition is a conditionally privileged communication, and it must therefore be affirmatively shown to be malicious in order to sustain the action. *Kent v. Bongartz*, 870.
2. PUBLICATION IS DEFAMATORY AND LIBELOUS which has a tendency to subject a person to contempt or ridicule. Making public a statement as being voluntarily given to a reporter by plaintiff, wherein the latter is said to have represented that her mother had been bitten by a cat, and would purr and mew, and get down on the floor to catch rats, like a cat, and would hate the sight of water, and that her mother had been cured by a certain medicine sold by the defendant, called "S. S. S.," is a defamatory and libelous publication of such person, and may support an action by plaintiff for such libel. *Stewart v. Swift Specific Co.*, 40.

LICENSE.

1. LICENSE CANNOT JUSTIFY ACTS unless they are within its terms; and those terms will not be strained beyond a fair and reasonable interpretation. *Wheeler v. Noonan*, 405.
2. LICENSE TO PLACE "A FEW STONE" on a lot does not justify the covering it with boulders several feet in depth. *Id.*
3. PAROL LICENSE, GRANTED WITHOUT CONSIDERATION, IS REVOCABLE AT PLEASURE. *Id.*

See NEGLIGENCE, 7.

LIENS.

1. **MECHANIC'S LIEN.** — **FACT THAT STATEMENT** appended to bill of particulars of material furnished, and both recorded, embraces another lot than that on which the buildings are erected, does not affect the material-man's lien on the lot on which the building is erected, and which is embraced in the statement. *Lyon v. Logan*, 511.
2. **MECHANIC'S LIEN WILL BE RESTRICTED** to the property on which he has the right to a lien, though he may assert a claim to a lien on other property. *Id.*
3. **CLAIMING MECHANIC'S LIEN ON MORE LAND** than it can lawfully attach to will not vitiate the lien on so much land as it can cover, if that is embraced in the description of the land on which the lien is claimed, unless the claim is intentionally and fraudulently made, and will in some way operate to the injury of the owner or a third person. *Id.*
4. **PURPOSE OF RECORD OF MECHANIC'S LIEN** is to give notice to third persons, and it is only required that the contract recorded shall be accompanied by a description of the lands, lots, houses, and improvements made, against which the lien is claimed. *Id.*
5. **WHERE STATUTE REQUIRES MECHANIC'S LIEN** to be filed and recorded in a book to be kept for that purpose by the county clerk, the fact that the book in which the lien is recorded has been used to record bills of sale does not affect the validity of the record of the lien, if, in fact, the book was the one kept for the purpose of recording all mechanic's liens. *Id.*
6. **MECHANIC'S LIEN WILL ATTACH** to all the lots, when materials have been furnished under a single contract for buildings erected on two or more contiguous lots owned by the person to whom the materials were furnished. If the owner does not see fit to make separate contracts for the material to be used on each lot, he cannot deny that the lien attaches to all the lots upon which the material was used. *Id.*
7. **MECHANIC'S LIEN IS NOT DEFEATED** when delivery of the material at the building is defeated by the act or direction of the owner. If he directs that the material be delivered at some other place, or after it is prepared, and nothing remains to be done by the material-man but to take it to the building, the owner violates his contract and refuses to receive it, he cannot thus defeat the lien. *Trammell v. Mount*, 479.
8. **MECHANIC'S LIEN, THOUGH NOT FIXED BEFORE RECORD** of the contract or bill of particulars, when it is fixed, relates back to the time when the work was performed or the material furnished, and takes precedence of all claims to the property improved which have fastened upon it since that time. *Id.*
9. **WHERE PROPERTY SUBJECT TO MECHANIC'S LIEN** is sold under attachment, after which the lien is foreclosed, the surplus, if any, after satisfying the lien, should be paid to the purchaser under attachment, and not to the original owners. *Id.*

MALICIOUS PROSECUTION.

See CORPORATIONS, 8.

MANDAMUS.

1. **MANDAMUS WILL NOT LIE** TO REVIEW the act of an officer, when the duty he is called upon to perform requires the exercise of an act of judgment on his part. *Sansom v. Mercer*, 505.

2. **MANDAMUS.** — UNDER TEXAS STATUTE, PROVIDING MANNER in which the territorial limits of an incorporated city may be diminished by election upon application of the mayor, he is required to determine two facts in order to justify him in making the order for the election: 1. That there is a surplus of territory over the limit prescribed by the statute; 2. That at least fifty qualified voters of that territory have signed that petition. If there is any dispute as to the existence of these facts, his function is discretionary, and he cannot be compelled by *mandamus* to order the election. But if no such controversy exists, or these facts are admitted in any way, his discretion ceases, his act is purely ministerial, his duty becomes absolute, and he can be compelled by *mandamus* to perform it. *Id.*
3. **MANDAMUS.** — UNDER TEXAS STATUTE, PROVIDING that the limits of an incorporated city may be diminished by election, upon proper petition to the mayor, the qualified voters and petitioners of the territory sought to be excluded have a direct interest, and may maintain *mandamus* against the mayor to compel the performance of a purely ministerial act on his part. *Id.*
4. **GENERAL DENIAL IN MANDAMUS PROCEEDINGS** should be treated as a nullity, and entitles plaintiff to judgment on his pleadings, without proof. Defendant must plead either a special denial to the allegations of the writ, or by way of confession and avoidance. *Id.*
5. **SPECIAL ANSWER IN MANDAMUS PROCEEDING IS INSUFFICIENT**, should be treated as a nullity with or without demurrer, and entitles plaintiff to judgment on the pleadings without proof, when it sets up no fact constituting any legal excuse on the part of defendant for a failure to perform a ministerial act, but merely states that he refused to perform it upon full consideration and advice of counsel. *Id.*

MARRIAGE AND DIVORCE

1. **MARRIAGE IS VOID, AND NO DECREE IS REQUIRED TO AVOID IT**, if either of the contracting parties has a husband or wife then living and undivorced. *Cartwright v. McGee*, 105.
2. **VOID MARRIAGE IS GOOD FOR NO LEGAL PURPOSE**. Its invalidity may be proved at any time, in any court, and by any person. *Id.*
3. **MARRIAGE OF ZERELDAY CASEY IS PROVED BY CERTIFICATE** of the marriage in which the woman's name is spelled "Serelda," and a license in which it is written "Seralda," accompanied by evidence showing the assumption of marital rights and obligations by the parties, although the marriage, if celebrated at the time named in the certificate, must be held void because the husband had a prior wife then living and undivorced. *Id.*
4. **FROM CELEBRATION OF MARRIAGE, LAW PRESUMES CONTRACT OF MARRIAGE**, the capacity of the parties, and everything essential to a valid marriage. This presumption is overcome by proof that one of the parties had no capacity to contract marriage, because he had living and undivorced a wife by a prior marriage. *Id.*
5. **MARRIAGE.** — **SEXUAL INTERCOURSE**, which the parties know to be contrary to law, forms no element of marriage. *Id.*
6. **MARRIAGE IS NOT VOID BECAUSE FORMALITIES PRESCRIBED BY STATUTE HAVE NOT BEEN OBSERVED**; nor because solemnized without a license, when such solemnization is forbidden. *Id.*

7. **MARRIAGE IS CIVIL CONTRACT, MADE IN DUE FORM**, by which a man and woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge towards each other the duties imposed by law upon such relation. No solemnization or other formality, apart from the agreement itself, is necessary; nor need there be any witnesses. *Id.*
8. **MARRIAGE. — AGREEMENT FOR PRESENT COHABITATION**, and for a marriage to be celebrated at some future time, is not marriage. *Id.*
9. **MARRIAGE IS PRESUMED WHERE PARTIES HAVE AGREED TO MARRY AT SOME FUTURE TIME**, and then have had *copula*, which is lawful only in the married state. In such cases the copulation is presumed to have been allowed on the faith of the marriage promise, and to have been coincident with the acceptance by the parties of each other as husband and wife. This presumption is not indulged when a previous illicit intercourse is shown. *Id.*
10. **MARRIAGE. — COHABITATION AND REPUTE OF BEING MARRIED**, having their inception in a solemnization of marriage which was void for want of capacity of one of the parties to contract marriage at the time, known only by him, will, though continued after such incapacity was removed, be referred to the previous void marriage, and hence will not create a presumption that the parties contracted another and valid marriage, after they both had capacity so to do, when it is not shown that either ever knew of the removal of the incapacity, or that the woman ever knew of its existence. *Id.*
11. **MARRIAGE. — COHABITATION ILLICIT IN ITS INCEPTION IS PRESUMED** to so continue. *Id.*
12. **IF MARRIAGE IS SOLEMNIZED IN HONEST THOUGH MISTAKEN BELIEF BY BOTH PARTIES** that both were capable at the time of contracting marriage, and they continue, after the impediment to their marriage is removed, to cohabit as husband and wife, the law will presume that they have contracted a common-law marriage, in the absence of evidence to the contrary. *Id.*
13. **PRESUMPTION IN FAVOR OF INNOCENCE** will not give rise to a presumption of marriage, if it will involve one of the parties in guilt. *Id.*
14. **PRESUMPTION OF DEATH OR DIVORCE FROM PRIOR HUSBAND OR WIFE** may be indulged to sustain a second marriage. There is, however, no room for such presumption when the first spouse is shown to be living, and the time between deserting her and contracting the second marriage is only three years, and the records of the only courts in which a divorce could have been lawfully procured are accessible and easily examined. *Id.*
15. **DE FACTO MARRIAGE MAY BE DECLARED VOID AB INITIO**, by our courts, for want of mental capacity on the part of one of the contracting parties; but a judgment declaring such marriage void does not render the issue of the marriage illegitimate. *State v. Setser*, 290.
16. **QUESTION AS TO WHETHER DE FACTO MARRIAGE IS VOID AB INITIO** for want of mental capacity in the husband must be tried directly, and cannot be raised in a collateral proceeding to render illegitimate the issue of such marriage, claiming as heirs or next of kin to the parties to it. *Id.*
17. **DIVORCE CANNOT BE GRANTED IF PARTIES HAVE CEASED TO BE HUSBAND AND WIFE**, though they were such at the commencement of the suit. *Jones v. Jones*, 447.

18. DECREE OF DIVORCE IS BAR TO FURTHER PROCEEDINGS TO DISSOLVE SAME MARRIAGE, though in a suit commenced prior to that in which the divorce was granted. *Id.*
19. DIVORCE WILL NOT BE GRANTED FOR HUSBAND'S FAILURE TO PROVIDE necessaries for his wife, when he was unable to do so, though such inability resulted from his imprisonment as a punishment for crime by him committed. *Hammond v. Hammond*, 867.
20. DECREE OF DIVORCE AGAINST NON-RESIDENT IS VOID IF BASED ON SERVICE or process on defendant made beyond the state in which the decree is entered. The contract of marriage cannot be annulled by judicial sanction without jurisdiction over the person of the defendant. *Jones v. Jones*, 447.
21. DIVORCE. — MARRIAGE RELATION IS NOT RES WITHIN STATE of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending. *Id.*

See HUSBAND AND WIFE, 6.

MARRIED WOMEN.

1. MARRIED WOMAN, OR HER ESTATE, IS LIABLE FOR WRONGFUL CONVERSION OF GOVERNMENT BONDS, constituting a trust fund, to the interest of which she was entitled during her life, where the bonds were delivered to her by the trustees, who took a receipt from her by which the interest was to be retained by her, and the bonds returned, and where, afterwards, she converted them into money, and gave another receipt, in which her husband joined, acknowledging their conversion, and promising that the proceeds should be returned at her death. *Franklin's Appeal*, 583.
2. MARRIED WOMAN BY SIGNING NOTE WITH HER HUSBAND INCURS NO OBLIGATION which can be legally enforced against her, where the consideration therefor did not inure to the benefit of her separate estate. But if, after her disability of coverture ceases, she executes a new note in renewal of one signed by her and her husband, whereby an extension of the time of payment is obtained, such extension is a sufficient consideration to render her liable. *New Hanover Bank v. Bridgers*, 317.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. MASTER AND SERVANT — NOTICE TO QUIT SERVICE. — The plaintiff was employed to work for the defendant by the week, at a fixed rate, but no definite time of employment was fixed. When the first payment was made, the plaintiff signed a receipt providing as follows: "Employees must give fourteen days' notice when they wish to leave our employ. If they do not give the notice required, it is agreed and understood that they forfeit all that is due them at the time they so quit work without the required fourteen days' notice." The plaintiff quit work upon a notice of a day and a half. *Held*, that the terms of the first engagement did not necessarily extend beyond the time of the first payment, and that the plaintiff was bound by the rule embodied in the receipt signed by him. *Pottsville I. & S. Co. v. Good*, 614.

- A. EMPLOYER NOT NEGLIGENT IN HIS SELECTION is not liable to third persons for contractor's want of care in the performance of work of which he takes entire control, the employer having no right of supervision or of interference, and this rule is applicable alike to individuals and corporations. *Lancaster Av. I. Co. v. Rhoads*, 608.
- K. WHETHER SERVANT DID TORTIOUS ACT WITH VIEW TO HIS MASTER'S SERVICE, or to serve a purpose of his own, is a question of fact for the jury. *Hussey v. Norfolk & S. R. R. Co.*, 312.
- a. ONE WHO ENTERS UPON SERVICE OF ANOTHER takes on himself all ordinary risks of the employment in which he engages, and the negligent acts of his fellow-workmen, in the general course of the employment, are within such ordinary risks. *Lewis v. Seiffert*, 631.
- l. TO CONSTITUTE FELLOW-SERVANTS, employees need not be at the same time engaged in the same particular work. It is sufficient that they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose, although one injured may be inferior in grade, and is subject to the direction and control of a superior, whose act caused the injury. *Id.*
- i. MASTER OWES TO EVERY EMPLOYEE duty to provide reasonably safe place in which to work, and reasonably safe instruments, tools, and machinery; and when these duties are delegated to an agent, such agent stands in the place of the principal, and the latter is responsible for his acts. *Id.*
7. MASTER OR SUPERIOR IS LIABLE FOR NEGLIGENCE OF AGENT OR SUBORDINATE to whom he intrusts the entire charge of his business, or a distinct branch of it, exercising no discretion or oversight of his own. *Id.*
- b. GENERAL TRAIN DISPATCHER, wielding power and authority of railroad company in moving trains, and who has the absolute control of all the trains upon the road, is not the fellow-servant of the engineer of a train, or other train employee, and the company is liable for his negligence, which is the approximate cause of an injury to such employee. *Id.*
- A. FELLOW-SERVANTS. — A foreman in charge of a wrecking-train is not a fellow-servant of the members of the crew who are under his orders and control. *Wabash etc. R'y Co. v. Hawk*, 82.
- (c). LIABILITY OF MASTER TO ONE EMPLOYEE FOR NEGLIGENCE OF ANOTHER. — If a railway company confers authority on one of its employees to take charge of a gang of men in carrying on some branch of its business, he, in governing and directing the movements of the men under his charge, is the direct representative of such company. They are bound to obey any order given by him, which is within the scope of his authority and not manifestly unreasonable, and although he may have an immediate superior standing between him and the company, yet his commands are the commands of the company, for which it is answerable. The company is therefore liable for the negligence of such employee when it results in the injury of another employee acting under his command. *Id.*
11. SERVANT KNOWING HIS FELLOW-SERVANT TO BE NEGLIGENT, and unfit for the common service, who continues in such service, will be held, in the absence of anything to the contrary, to have assumed the extra hazard as to his fellow-servant to be guilty of contributory negligence, and to have waived his right to redress against the master in case of injury arising to him from that servant's reckless act. *Porter v. Western N. C. R. R. Co.*, 272.

MECHANICS' LIENS.

See LIENS.

MISTAKE.

See EQUITY.

MORTGAGES.

1. **ORAL AGREEMENT IS NOT ADMISSIBLE TO CONTRADICT OR VARY WRITTEN CONTRACT** expressed in note and mortgage; and in an action to foreclose the mortgage, allegations in the answer, setting up as a defense matters contradictory of the note and mortgage, and based upon oral agreements, should be stricken out. *Mills Co. N. Bank v. Perry*, 228.
2. **MORTGAGE PROPERLY EXECUTED AND ACKNOWLEDGED**, though the certificate of acknowledgment is defective, is valid as against a subsequent purchaser without notice of the mortgage as recorded, though without notice that it was properly acknowledged, where he gives no value therefor, and incurred no liability except a contingent one, for which he never became liable. *Hutchinson v. Ainsworth*, 823.
3. **PURCHASER OF LAND UPON WHICH RECORD SHOWED MORTGAGE**, executed by one in whom the record showed no title to the person in whom the title stood of record, is affected with notice that at the time of the execution of the mortgage the mortgagor was the equitable owner of the property, and will take the land subject to the lien of the mortgage, where he knew of the record of the mortgage, and had heard it read, at least in part, before he purchased. *Clark v. Holland*, 230.
4. **VENDOR OR MORTGAGOR WHO SELLS OR MORTGAGES LAND WHICH HE DOES NOT OWN WILL NOT BE PERMITTED TO SET UP AFTER-ACQUIRED TITLE THEREIN**, to defeat his previous grant or mortgage, for this would be to permit him to perpetrate a fraud on his grantee or creditor. *Rauch v. Dech*, 598.
5. **ID.—BUT THIS RULE DOES NOT APPLY** where the lien of a mortgage is discharged by a judicial sale, and the mortgagor, having been discharged in bankruptcy, reacquires title to the mortgaged premises through the purchaser at such sale. The purchase by the mortgagor in such case does not work a revival of the discharged mortgage lien. *Id.*
6. **WHERE POWER OF SALE IN MORTGAGE REQUIRES TWENTY DAYS' NOTICE** of the sale to be given in a newspaper, the notice must appear daily for twenty days before the day of sale, if the paper selected be a daily paper, and a notice printed in such paper seven times between July 22d and August 12th, the day of sale, is insufficient. *Washington v. Bassett*, 929.
7. **WHERE RESERVATION IN POWER OF SALE IN MORTGAGE IS TO MORTGAGORS**, their heirs and assigns collectively, and not to them separately, according to their several interests, in an action on the implied promise of the mortgagee to pay over the surplus proceeds of the sale in accordance with the reservation, all the mortgagors must join. *Clapp v. Pawtucket Institution for Savings*, 915.
8. **BILL TO REFORM MORTGAGE BY ADDING SCROLL OR SEAL OF MORTGAGORS**, and to foreclose it as reformed, may be sustained, though the statute of limitations have run against the mortgage, if it be regarded as a simple contract, and not as a specialty. *Allen v. Elder*, 63.
9. **NOTARY IS NOT NECESSARY PARTY DEFENDANT** to action to foreclose the mortgage of a married woman, and to reform the notary's certificate before whom the mortgage was acknowledged. *Hutchinson v. Ainsworth*, 823.

10. COMPLAINT IN ACTION TO FORECLOSE MORTGAGE and to reform the certificate of acknowledgment of a notary thereto states but one cause of action. *Id.*
11. NOTE AND MORTGAGE WERE EXECUTED September 3, 1878, and suit to foreclose was brought March 25, 1890. Plaintiff asked to amend the complaint August 19, 1890, so as to obtain reformation of the notary's certificate of acknowledgment to the mortgage. This was denied, but the judgment was reversed March 28, 1893, and the following May 11th an amended complaint was filed. *Held*, that the statute of limitations did not run against the right to have the mortgage reformed pending the appeal, and that the amended complaint should be deemed and treated as having been filed as of the date of application therefor and refusal. *Id.*

See CORPORATIONS, 12; GIFTS; INSURANCE, 4-7; PLEDGE, 1

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATION IS NOT LIABLE FOR LEGISLATIVE OR JUDICIAL ACTS, and can only be held liable for negligence where it performs ministerial acts. *Dooley v. Sullivan*, 209.
2. MUNICIPAL CORPORATION IS NOT LIABLE TO ACTION FOR DAMAGES, EITHER FOR NON-EXERCISE of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character. *McDade v. Chester City*, 681.
3. CONSTITUTIONAL LAW. — TEXAS STATUTE, PROVIDING MANNER in which the territorial limits of an incorporation may be diminished by election, is not invalid because it does not direct the manner in which the election shall be held; for as it is made a part of the title of the Revised Statutes relating to elections, it will be presumed that it was intended that the election should be held in the same manner as other elections provided for in that title. *Sansom v. Mercer*, 505.
4. AS IT RESPECTS DUTY OF MUNICIPAL CORPORATION, general rule is, that where any person has a right to demand the exercise of a public function, and there is an officer or set of officers authorized to exercise that function, there the right and the authority give rise to the duty; but when the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed. *Lehigh Co. v. Hoffsfort*, 587.
5. MUNICIPAL CORPORATION — LIABILITY FOR FAILURE TO REMOVE NUISANCE. — The corporate authorities of a city were authorized by its charter to cause the removal of any nuisance, and to limit or prohibit altogether the manufacture, sale, or exposure of fire-works within the corporate limits, and to provide such safeguards for the security of the citizens as in their judgment might be necessary. A fire occurred in a manufactory of fire-works, operated in the city on private premises, and the plaintiff was injured while assisting to extinguish the fire. In an action against the city for the recovery of damages, *held*, that the authority given to the city was essentially discretionary, not giving rise to an absolute duty, and that the plaintiff was not entitled to recover. *McDade v. Chester City*, 681.

See COUNTIES; HIGHWAYS; NEGLIGENCE.

NAVIGABLE STREAMS.

See WATERS.

NEGLIGENCE.

1. **FAILURE TO PERFORM DUTY WHICH IS WELL DEFINED IS NEGLIGENCE**, and may be so declared by the court; but when the measure of duty is not unvarying, when a higher degree is required under some circumstances than under others, and where both the duty and the extent of performance are to be ascertained as facts, the jury alone can determine what is negligence, and whether it has been proved. *Arnold v. Pennsylvania R. R. Co.*, 542
2. **EVENT, REAL CAUSE OF WHICH CANNOT BE TRACED**, or is at least not apparent, ordinarily belongs to class of occurrences designated as purely accidental, and the party who asserts negligence must show enough to exclude the case from the class so designated. *Wabash, St. L., & P. Ry Co. v. Locke*, 193.
3. **MISCHIEF WHICH COULD BY NO REASONABLE POSSIBILITY HAVE BEEN FORESEEN**, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong. *Id.*
4. **PERSONS WHO ARE CHARGED WITH DUTY IN RELATION TO PARTICULAR MATTER OR THING** have right to rely upon sufficiency of a structure or contrivance, such as is in common use for the purpose, and which has been in fact safely used under such a variety of conditions as to demonstrate its fitness for the purpose. But if the thing which occasioned the accident was inherently dangerous or insecure, the fact that no such occurrence had ever taken place before would not be conclusive evidence that due caution was observed. *Id.*
5. **IN ORDER THAT LIABILITY MAY ATTACH FOR INJURY** occasioned by something not inherently dangerous and defective, which is found upon the grounds of or in use by one who is under a qualified obligation to the injured person, it must be shown that the defendant either knew, or that by the exercise of such reasonable skill, vigilance, and sagacity as are ordinarily possessed and employed by persons experienced in the particular business to which the thing pertains he should have known, of its dangerous and defective condition, and that the natural and probable consequence of its use would be to produce injury to some one. *Id.*
6. **NEGLIGENCE. — CHILD OF IMMATURE YEARS** is not held to any greater degree of care than might reasonably be expected of one of his age. *Moebus v. Herrmann*, 346.
7. **LICENSE TO CONSTRUCT OPENING IN SIDEWALK DOES NOT EXCUSE** the leaving such opening uncovered and unguarded. *Jennings v. Van Schaick*, 459.
8. **IT IS DUTY OF JURY, UNDER PROPER INSTRUCTIONS**, to determine whether or not, upon any given state of facts, negligence ought to be inferred; but it is the duty of the court first to say whether, upon the facts most favorable to the plaintiff, negligence can be inferred. The jury cannot arbitrarily, and without evidence, infer negligence. *Wabash, St. L., & P. Ry Co. v. Locke*, 193.
9. **IN ACTION FOR NEGLIGENCE, IMMEDIATE, AND NOT REMOTE, CAUSE OF INJURY SUSTAINED IS CONSIDERED**; and this rule is not to be controlled by time or distance, but by the succession of events. The question is, Did the cause alleged produce the injury without another cause intervening? or was it to operate through or by means of such intervening cause? *West Mahanoy T. v. Watson*, 604.

10. IN DETERMINING WHAT IS PROXIMITY OF CAUSE, TRUE RULE IS, that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the circumstances of the case, might and ought to have been foreseen by the wrong-doer as likely to flow from his act. *Id.*
 11. IN ACTION FOR NEGLIGENCE, QUESTION OF PROXIMATE CAUSE IS FOR JURY, if the facts are disputed; but if they are undisputed, the question is one for the court. *Id.*
 12. PROXIMATE CAUSE — LIABILITY OF MUNICIPAL CORPORATION. — A pair of horses and sleigh, while being driven along a township road, struck an ash heap negligently left in the highway, overturning the sleigh. The horses became frightened, and ran off the road, and upon a railroad track, where, after being overtaken and driven from the track by one train, they changed their course, and running in the opposite direction, were struck by another moving train and killed. In an action against the township to recover damages, it was held, that the facts not being disputed, the court should have instructed the jury that the negligence of the township in leaving the ash heap on the road was not the proximate, but the remote, cause of the loss of the horses, and that the township was not liable therefor. *Id.*
 13. IT IS DUTY OF COURT TO DETERMINE QUESTION OF REMOTE OR PROXIMATE CAUSE, where, in an action for negligence, the uncontradicted evidence is that the direct and immediate cause of the injury sustained was an intermediate agency, over which the defendant had no control. *South Side Passenger R'y Co. v. Trich*, 672.
 14. WHAT IS CONTRIBUTORY NEGLIGENCE IS QUESTION FOR COURT, when the facts are ascertained. When they are in dispute, the court should explain the law, and direct the jury to apply it to the facts as they find them. *Wallace v. Western N. C. Co.*, 346.
 15. PRIVATE CORPORATION FOR PROFIT cannot avail itself of the rule that, in actions for negligence, a municipal corporation may, in certain cases, cast the responsibility upon an independent contractor whose negligence caused the injury. *Lancaster Av. I. Co. v. Rhoads*, 608.
 16. IT IS DUTY OF INCORPORATED TURNPIKE COMPANY UNDERTAKING REPAIRS OF ITS ROAD, while in receipt of tolls, and the road is open for travel, to guard that part of the road retained for public use, and also to warn travelers of any danger threatened by reason of obstructions in the road, and by suitable devices to direct them in the proper route; and the company cannot divest itself of these duties by shifting the responsibility upon others, and the fact that the person injured by the neglect of the company had paid no toll is immaterial. *Id.*
 17. NEGLIGENCE. — CHARGE TO JURY THAT IF DEFENDANT AND ITS EMPLOYEES USED REASONABLE AND PROPER CARE in providing egress for plaintiff from place where cars stopped, then it would not be guilty of negligence, and that otherwise it would be liable, is correct. *Central R. R. v. Smith*, 31.
- See BAILMENTS; COUNTIES; DAMAGES; EQUITY, 12; HIGHWAYS; LANDLORD AND TENANT; MASTER AND SERVANT; RAILROADS.

NEGOTIABLE INSTRUMENTS.

1. PAYMENT TO PAYEE OF NOTE MADE BY MAKER, AFTER NOTICE OF INDORSEMENT given to the latter by the indorsee, cannot avail as against the indorsee. *Mackay v. St. Mary's Church*, 881.

2. **NEGOTIABLE INSTRUMENT, GIVEN IN RENEWAL OF PREVIOUS ONE, SUFFERS RIGHT OF ACTION** on the debt, during its currency, or until it is dishonored by non-acceptance or non-payment. *New Hanover Bank v. Bridgers*, 314.
3. **IN ACTION BY PAYEE AGAINST INDORSER TO RECOVER AMOUNT OF PROMISSORY NOTE, DEFENDANT MAY SHOW BY PAROL TESTIMONY** that at the time of the execution, indorsement, and delivery of the note, it was agreed by the payee's agent, who conducted the transaction, that the payee would look alone to the maker, and the collateral security agreed to be given by him, and that the defendant should not be held liable upon his indorsement. *Cake v. Pottsville Bank*, 600.
4. **IF ONE WHO INDORSES NOTE AFTER PAYEE PAYS JUDGMENT RENDERED THEREON** against the maker and him, and takes an assignment thereof to himself, he is subrogated to the rights of the judgment creditor, and may enforce the judgment against the property of the maker. *Schlesman v. Kallenberg*, 247.
5. **MERE SUGGESTION OF POSSIBLE EQUITIES BETWEEN INDORSER OF NOTE AND MAKER CANNOT PREVENT RECOVERY** by such indorser in an action to recover land bought in by him at a sale under a judgment rendered against him and the maker, which was paid, and an assignment thereof taken by him, where no such equities are pleaded in the action. *Id.*
6. **ACCEPTANCE. — LETTER TO DRAWER WITHIN REASONABLE TIME** before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the party who subsequently takes the bill on the credit of the letter, a virtual acceptance, binding on the person who makes the promise, though he has none of the drawer's funds, if the bill is payable at a fixed time, and not at or after sight. *Nimocks v. Woody*, 258.
7. **ASSIGNMENT OF FUND IN DRAWER'S HANDS IS EFFECTED** by a sight draft for the whole thereof, of which the drawee has notice while the funds remain in his hands, whether he accepts the draft or not. *Id.*
8. **MERE ABSENCE OR WANT OF CONSIDERATION WILL NOT AVAIL AGAINST INDORSER** for value, before maturity and without notice thereof. It is only in cases where it is shown that the note was made under duress, or a strong suspicion of fraud is raised, that the plaintiff is required to show under what circumstances and for what value he became the holder. *New Hanover Bank v. Bridgers*, 317.
9. **SUCCESSIVE NOTES FOR SAME DEBT, WHEN NOT DIFFERING IN LEGAL EFFECT**, may be deemed cumulative securities for the debt, and the creditor may sue on any preceding one, provided he has the latter in his possession at the trial to surrender. But this rule does not apply where the new and substituted note varies essentially in its terms and protracts the period of payment. *Id.*
10. **INDORSER DISCHARGED. — OPTION CONTAINED IN NOTE**, that the holder thereof may treat the note as due immediately upon default in the payment of an installment of interest when due, must be exercised within a reasonable time. Delay of seven months before attempting to exercise the option is unreasonable, and discharges an indorser. It seems that in such case the holder should wait until the next installment of interest was due and unpaid, and then insist upon his option. *Croesmore v. Page*, 789.

See **BANKS AND BANKING**; **CORPORATIONS**, 5; **EXECUTORS AND ADMINISTRATORS**, 2, 3; **PARTNERSHIP**, 3-5; **PLEDGE**, 1.

NOTARIES.

See MORTGAGES, 9-11.

NUISANCE.

1. **UNGUARDED OPENING IN SIDEWALK IS NUISANCE**, though a license or permission to make the opening may have been granted by the municipality. *Jennings v. Van Schaick*, 459.
2. **WHEN USE OF PROPERTY CONSTITUTES NUISANCE**, the legislature may destroy it. *State v. Yost*, 305.
3. **NO MAN CAN SO USE HIS PROPERTY** as to create a nuisance, or have property which is a nuisance where it is situated. *Id.*

See CRIMINAL LAW, 22-25; MUNICIPAL CORPORATIONS, 5.

OFFICE AND OFFICERS.

1. **PERSON BY ACCEPTING OFFICE INCOMPATIBLE WITH ONE HE IS HOLDING** thereby vacates his former office. *State ex rel. Metcalf v. Goff*, 921.
2. **OFFICES OF JUSTICE OF DISTRICT COURT AND OF DEPUTY SHERIFF** are incompatible. *Id.*

See COUNTIES; ELECTIONS; MANDAMUS.

PARENT AND CHILD.

1. **FATHER HAS RIGHT TO CONTROL OF HIS MINOR CHILD**, and this right can be given up or forfeited only in a manner prescribed by law, as where the father fails or is unable to provide for the support of his child, or abandons or cruelly treats it, or by his immoral character renders himself unfit for the rearing of such child: Code, secs. 1733, 1793, 1794, 1795. *Miller v. Wallace*, 48.
2. **CUSTODY OF CHILD, AWARDING OF, IN DISCRETION OF COURT.** — Where a writ of *habeas corpus* is sued out to obtain the control of a child, it is in the discretion of the court, upon the evidence produced, to award the custody of such child to any proper party, or even to a third person: Code, sec. 4024. *Id.*
3. **DISCRETION OF COURT RESPECTING CUSTODY OF CHILD** is a legal discretion which should be guarded by the principles of law, and not by the notions and fancies of the court. *Id.*
4. **FATHER IS PRIMA FACIE ENTITLED TO CONTROL OF HIS MINOR CHILD**, and before this right can be taken away the sanctity of the paternal relation demands that the reasons for so doing be obvious and satisfactory, and be established beyond doubt. *Id.*
5. **FATHER MAY, BY CONTRACT, RELEASE HIS RIGHT TO CUSTODY OF HIS CHILD**; but the terms of such contract, to be effective, must be shown to be clear, distinct, and definite. *Id.*
6. **PRECAUTION TAKEN BY FATHER OBTAINING POSSESSION OF HIS CHILD** by stratagem, for the purpose of evading an unpleasant controversy, especially when followed by a letter of explanation to his mother-in-law, from whom he had taken his child, should not be so construed as to make it appear that he conceded that he was unlawfully exercising a power that he knew was not his. *Id.*
7. **FATHER MUST SUPPORT HIS MINOR CHILD**; and where he is in a better position to do so than is the grandmother of such child, who is in destitute circumstances, the court will not take such child from him and award it to her. *Id.*

8. PARENT IS NOT ESTOPPED FROM RECLAIMING CUSTODY OF CHILD, where he places it in the care and keeping of another, verbally agreeing that the latter might have its care and custody during minority. *Brooke v. Logan* 177.
9. WHEN FATHER IS SUITABLE PERSON, HE IS ENTITLED TO CUSTODY OF HIS INFANT CHILD, as against its statutory guardian; but if a sufficient reason exists why he should not have its custody, it will be given to others better fitted. *Id.*
10. IN ORDER THAT APPOINTMENT OF STATUTORY GUARDIAN MAY BE CONCLUSIVE as against father's right to custody of his child, it must in some way appear that he was in court in such manner that the court, in appointing the guardian, must have passed upon the question of his fitness to have such custody. *Id.*
11. QUESTION OF CUSTODY OF MINOR CHILD once properly and finally adjudicated, whether in the *habeas corpus* proceeding or otherwise, is settled for all time, unless there be an appeal, and the judgment rendered cannot be collaterally attacked. *Id.*
12. HABEAS CORPUS PROCEEDING BY FATHER TO OBTAIN CUSTODY OF PERSON OF HIS CHILD is not necessarily barred by an adjudication refusing the relief sought on a proceeding by him to have the statutory guardian of his child removed and himself appointed. *Id.*
13. RETURN TO WRIT OF HABEAS CORPUS IS SUFFICIENT, which states in general terms the unfitness of the relator to have the custody, care, training, and education of his child, and it will stand as against a general exception to it. *Id.*

PARTITION.

1. ESTOPPEL. — ONE WHO CONVEYS BY DEED the interest in land allotted to him in partition is not thereby estopped from maintaining repartition proceedings to obtain a larger proportion of the same tract than was set apart to him in the first partition, which was concluded during his infancy, and when his right is based upon a title not adjudicated in the first proceeding. *Grigsby v. Peak*, 484.
2. DOCTRINE OF IMPLIED WARRANTY IN COMPULSORY PARTITION does not apply to one who seeks in repartition to obtain a larger portion of the same tract of land than was set apart to him in the first partition made during his infancy, and when he claims under a title, not adjudicated in the former partition. Such doctrine applies only to the title under which he received his first distributive share. *Id.*
3. IMPLIED WARRANTY IN PARTITION. — Partition is based upon the fact, real or supposed, that the parties between whom it is made own the thing partitioned, and it is to protect those who take that which was not owned in common that the rule of implied warranty in compulsory partition is invoked, and it exists only so far as is necessary to give such protection, which may be affected by repartition of that actually owned in common, or by requiring those who received that to compensate the others for the interest they owned before partition. *Id.*
4. IMPLIED WARRANTY IN COMPULSORY PARTITION does not carry the same obligation and measure of liability which results from general warranty of title by deed, for on failure of title to land conveyed by deed of general warranty, the vendee would be entitled to recover the purchase-money, with interest, but on failure of title to land set apart to one in partition, such would not be the rule, for the value of the interest in the land

owned by such person at the time of partition would compensate him, and would be the measure of recovery. *Id.*

5. **PARTITION IS NOT MEANS FOR ACQUIRING TITLE**, but through it every common owner may seek and acquire the right to the exclusive ownership and possession of a part of that which before was owned by all, and which each co-owner had equal right to own and possess. *Id.*

PARTNERSHIP.

1. **CHANCE OR OPPORTUNITY OF RENEWAL OF LEASE HELD BY PARTNERSHIP** is in itself a distinct asset of the partnership in which all the partners have an interest, and consequently one partner cannot take a new lease in renewal of an existing one of the firm, in his own name, or for his own benefit, without being liable to account for it to the partnership. *Johnson's Appeal*, 539.
2. **DISSOLUTION OF PARTNERSHIP DOES NOT CHANGE RELATIONS OF PARTNERS** in respect to the renewal of a partnership lease. *Id.*
3. **ALL PARTNERS ARE BOUND ON FIRM NOTE**, if a promise to pay, a partial payment, or an acknowledgment of the note is made by one of them, after the dissolution of the firm, but within the period of the statute of limitations, and the holder of the note at the time of its execution has no notice of the dissolution of the firm. This, whether section 4244, Revised Statutes of Wisconsin, is applicable to partnerships, or to partners as joint contractors, or not. *Clement v. Clement*, 760.
4. **NEW NOTE OR CONTRACT MADE BY ONE PARTNER** in the name of the firm, and within the scope of the partnership business, and after dissolution, binds the firm until the payee of such note or contract has notice of the dissolution. *Id.*
5. **PART PAYMENT OF FIRM NOTE** by one of the partners, before the statute of limitations has attached, though after dissolution of the firm, of which the payee has no notice, forms a new point, from which the statute begins to run as to all the partners. *Id.*
6. **IN ACTION FOR PARTNERSHIP ACCOUNTING**, equity will refuse to interfere on the ground that the claim is stale, where plaintiff has allowed twenty-five years to elapse before attempting to enforce his rights, during all of which time he had knowledge of all the facts, and there was no impediment to the prosecution of his claim, nor had he made any demand upon defendant, nor in any way asserted his claim. *Bell v. Hudson*, 791.
7. **IN ACTION FOR PARTNERSHIP ACCOUNTING**, objection that the claim is stale may be raised by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Id.*
8. **IN ACTION FOR PARTNERSHIP ACCOUNTING** between an administrator of one partner and the representatives of the other, if the complaint is insufficient in other respects it is not cured nor made sufficient by an allegation that the real property "has at all times since the same was acquired and still does stand in the names of said partners," for the action cannot be considered as for partition, ejectment, or mesne profits, as the necessary allegations to support either are not made. *Id.*
9. **RIGHT OF PARTY HAVING JUDGMENT AGAINST PARTNERS TO ENFORCE PAYMENT** thereof against them is not affected by his having released lands which at one time belonged to them, and upon which the judgment was a lien. He has the right to enforce such payment to the same extent, and in the same manner, as if no such release had been executed. *Gegner v. Warfield, H., & Co.*, 226.

10. IN CONTEST BETWEEN CREDITOR OF INDIVIDUAL PARTNER and a creditor of the insolvent partnership, the partnership creditor is to be preferred, and his debt first paid, if he shows that he has in any way obtained a lien upon the partnership property before the same has been appropriated to the payment of the debt of the creditor of the individual partner; and it is immaterial that the creditor of the individual partner obtained a lien first, so long as the property has not been sold before the lien of the creditor of the firm attaches. *Powers v. Large*, 767.
11. IN CONTEST BETWEEN CREDITORS OF INDIVIDUAL PARTNERS and the firm creditors as to the distribution of a fund in court, and it appears that no parties are interested except those mentioned and made parties, the fund may be distributed upon petition, without resort to equity, or allegation and proof of fraud. *Id.*
12. PARTNERSHIP IS DISTINCT ENTITY, JOINT EFFECTS OF WHICH BELONG TO IT, and levies upon the partnership effects for the several debts of the individual members of the firm create no lien upon those effects, and are, in fact, as nugatory as though levied upon the property of a stranger. *Richard v. Allen*, 652.
13. LEVY UPON PARTNERSHIP PROPERTY UNDER EXECUTION ISSUED ON JUDGMENT AGAINST FIRM creates valid lien, though made subsequent to a levy on the same property under executions against the several members of the firm, and a sale thereon vests in the vendee the absolute ownership of the property. *Id.*

PLEADING AND PRACTICE.

1. WHEN RIGHT EXISTS, AND NO ADEQUATE REMEDY IS PROVIDED, it may be enforced by an action on the case. *County of Chester v. Brower*, 713.
2. AMENDMENT OF DECLARATION WILL NOT BE ALLOWED if new cause of action is thereby introduced, especially where the new cause of action is so old as to have been barred by the statute of limitations. *First Nat. Bank of Tamaqua v. Shoemaker*, 649.
3. AVERMENTS IN ANSWER WILL COVER WANT of averments in the petition, and on demurrer may be considered. *Lyon v. Logan*, 511.
4. STIPULATION GIVING ADDITIONAL TIME "to serve and file an answer" gives the right to demur within the time specified, for within the meaning of the statute a demurrer is an answer. *Steele v. Moss*, 756.
5. IN ACTIONS EX CONTRACTU, OBJECTION TO NON-JOINDER OF PARTIES PLAINTIFF IS NOT WAIVED by neglecting to plead in abatement. *Clapp v. Passtucket Institution for Savings*, 915.
6. EXERCISE BY COURT OF LEGAL DISCRETION may be reviewed and reversed on appeal. *Miller v. Wallace*, 48.
7. ACTION OF COURT BELOW IN GIVING CONCLUSION OF ARGUMENT TO COUNSEL FOR ONE SIDE OR OTHER is not reviewable on error. *Blume v. Hartman*, 525.
8. GRANTING OF ORDER FOR TRIAL OF CAUSE UPON DEPOSITIONS RESTS IN DISCRETION of the court; and where a party obtains one such order, but takes no depositions, the refusal of the court to make a similar order at a subsequent term will not be interfered with by the supreme court. *Mill County National Bank v. Perry*, 228.
9. REPLY IS NOT NECESSARY TO ALLEGATIONS IN ANSWER which do not set up a counterclaim, nor plead any matter of defense which can only be avoided by new matter to be stated in the reply. *Id.*

10. **ERROR MUST AFFIRMATIVELY APPEAR TO JUSTIFY REVERSAL OF JUDGMENT;** and where an abstract fails to show that the affidavit required by law for the allowance of attorney's fees in a foreclosure suit was not filed, it will be presumed, in support of the order allowing such fees, that such affidavit was filed. *Id.*
11. **INSTRUCTIONS TO COURT.** — Party wishing to obtain the opinion of a trial court upon a question of law, for the purpose of having it reviewed in the appellate court, should submit to the trial court the proposition which he claims to embody the law applicable to his case, and ask for a ruling thereon. *McIntyre v. Sholtz*, 140.
12. **COURT IS NOT BOUND TO INSTRUCT JURY IN LANGUAGE OF REQUEST**, even when the instruction requested is proper. *State v. Hoase*, 838.
13. **COURT'S ANSWERS TO PLAINTIFF'S POINTS ARE NOT TO BE HELD MISLEADING AND ERRONEOUS**, where it appears that the points were based upon an assumption of facts, the truth or falsity of which was properly for the jury, and the law was stated as upon a finding of these facts by the jury. *Brets v. Diehl*, 706.
14. **WHERE ISSUES OF FACT NOT RAISED BY PLEADINGS ARE SUBMITTED** to the jury without objection, the presumption is that they were submitted by consent; and though such submission is irregular, objection cannot be raised for the first time in the appellate court. *Porter v. Western N. C. R. R. Co.*, 272.
15. **WHERE ONLY ISSUE IN CASE IS AS TO THE PRESENCE OF A SEAL** opposite the name of defendant on a note when he signed it, evidence to prove the insertion in the space left open for the purpose of a sum double that agreed upon is not competent. Such evidence is admissible only under a general denial of the execution of the note. *Humphreys v. Finch*, 293.
16. **IF FINDINGS ARE CONTRADICTORY**, no judgment can be rendered on the verdict; and if one is entered, a new trial must be ordered. *Porter v. Western N. C. R. R. Co.*, 272.
17. **WHERE VERDICT DOES NOT CLEARLY APPEAR TO BE EXCESSIVE**, nor the jury actuated by prejudice or passion in finding it, the fact that a remittitur of a portion of the sum found has been entered does not interfere with the right to have judgment entered for a less sum than given by the verdict, nor is it ground for a new trial. *International & G. N. R. R. Co. v. Wilkes*, 515.
18. **WHERE EVIDENCE EXCLUDED IS NOT SET OUT IN RECORD**, the appellate court will assume that it was rightly excluded. *Whittier v. Collins*, 879.
19. **WHERE FACTS FOUND BY COURT BELOW ARE BROUGHT UPON RECORD BY BILL OF EXCEPTIONS**, in a case heard by the court without a jury, both as to law and facts, the supreme court has power to review the rulings of law made by the lower court upon the facts so found. *Reworth v. Coon*, 863.
20. **IN CASES OF IMPORTANCE, INVOLVING LARGE INTERESTS, ORDERLY COURSE OF PROCEDURE REQUIRES** that an opinion of the court be filed explaining the reasoning and principles upon which its conclusions were founded, especially where there are conflicting decrees made by the same court upon the same question. *Jeanes's Appeal*, 624.
21. **IMMATERIAL VARIANCE BETWEEN ALLEGATION AND PROOF** does not require the reversal of a judgment. *Louisville etc. R. R. Co. v. Phillips*, 155.

See CO-TENANCY; JURY AND JURORS; MANDAMUS; MORTGAGES; PARENT AND CHILD.

PLEDGE.

1. **PLEDGER OF NOTE AND MORTGAGE WHO DEPOSITS THEM IN BANK, WHERE THEY ARE SEIZED** and sold under an execution against the pledgor, may become the purchaser thereof at the sale. *Clark v. Holland*, 230.
2. **IN ORDINARY CASE OF PLEDGE, PLEDGER HAS NO RIGHT TO SELL THING PLEDGED AT PRIVATE SALE**, and without notice to the pledgor. He must first give notice to redeem, and if the pledge is not redeemed, and he proposes to sell it, he must sell at public sale, after notice to the pledgor. If this be not done, the pledgor's rights are unaffected by the sale. *Jeanes's Appeal*, 624.
3. **PLEDGER OF STOCK HAS LAWFUL RIGHT TO SELL IT, WITHOUT NOTICE TO REDEEM AND WITHOUT NOTICE OF SALE**, the stock having been pledged to secure the payment of loans on notes authorizing the holder, upon non-payment, to so sell the stock at private or public sale, immediately upon the dishonor of the notes, and the notes having been dishonored. Nor is the right to so sell, under such power of sale, affected by the fact that the company substituted genuine shares of stock for fraudulent ones, constituting a part of the stock originally pledged, and a sale divests the interest of the pledgor therein. *Id.*

See CORPORATIONS, 20-22.

POWERS.

See MORTGAGES, 6, 7.

PRINCIPAL AND AGENT.

See AGENCY.

PROBATE COURTS.

COURTS OF PROBATE IN RHODE ISLAND are courts of limited jurisdiction. *People's Savings Bank in Providence v. Wilcox*, 894.

PROCESS.

1. **WAIVER OF OBJECTION TO VALIDITY OR SERVICE OF PROCESS DOES NOT RESULT** from going to trial on the merits after the objection has been properly made, and has been overruled by the court. *Jones v. Jones*, 447.
2. **DEFENDANT WHO GOES INTO STATE AFTER SERVICE ON HIM OF process in another state in which he resides, and objects to such service on him, and, after such objection is overruled, answers and goes to trial upon the merits, becomes bound by the statute of the first-named state; and where such statute declares that his so answering is equivalent to an appearance in the action, and dispenses with the service of a citation, a judgment against him is valid, both in the state where rendered, and in that in which he resided when the process was served.** *Id.*

PUBLIC POLICY.

See CONTRACTS, 13-18.

RAILROADS.

1. **IT IS DUTY OF RAILROAD COMPANY TO HAVE ITS PREMISES IN REASONABLY SAFE CONDITION**, and to prevent damage to all persons having lawful occasion to transact business with it, from any unseen or unusual

danger of which it had, or of which by the exercise of reasonable vigilance it should have had, knowledge. The company is not, however, bound to keep its grounds absolutely safe, and where the circumstances of the accident suggest, at first blush, that it may have been unavoidable, notwithstanding ordinary care, the plaintiff charging negligence assumes the burden of proving that the defendant has, by some act or omission, violated a duty incumbent on it, from which the injury followed in natural sequence. *Wabash, St. L., & P. R'y Co. v. Locke*, 193.

2. IT IS DUTY OF RAILROAD COMPANY TO FRAME AND PROMULGATE SUCH RULES AND SCHEDULES for the moving of its trains as will afford reasonable safety to the operatives engaged in moving them; and for a failure to perform this duty, it is responsible to any person injured, whether a passenger or an employee. *Lewis v. Seiffert*, 631.
3. RAILWAY COMPANY MUST MAINTAIN STREET OR HIGHWAY CROSSINGS in a reasonably safe condition when it has changed or altered them for its own purpose or convenience. *Louisville etc. R. R. Co. v. Phillips*, 155.
4. IF EMPLOYEES OF RAILWAY SEE PERSON FASTENED ON TRACK, they must use reasonable efforts to stop the train in time to prevent his injury; but if he is fastened upon a portion of the track upon which the public has no rights, the company is not answerable for the failure of its employees to stop the train, unless it appears that they saw him and knew his helpless condition. *Id.*
5. TRESPASSER HAS NO RIGHT TO EXACT CARE OF RAILROAD COMPANY. — ONE WHO ENTERS UPON TRACK OF RAILROAD LAID UPON STREETS OF CITY is not a trespasser, nor is negligence to be imputed to him from the fact of his being upon such track. He has the right to enter upon the track, though his right to its use is subordinate to that of the railroad company. *Id.*
6. ONE WHO WALKS UPON RAILWAY TRACK IN PUBLIC STREET OR HIGHWAY must use reasonable care to discover and avoid danger. *Id.*
7. RAILWAY COMPANY IS ANSWERABLE TO ONE WHO BECOMES FASTENED UPON ITS TRACK in the streets of a city, because of negligence in the construction of such track, and who while so fastened is injured by an approaching train, though the employees of the company did not see him nor know of his helpless condition. *Id.*
8. NEGLIGENCE — DUTY TO LOOK UP AND DOWN A STREET BEFORE ATTEMPTING to cross the track of a railroad does not, as a matter of law, attach to one who is about to pass from one side to another of a city street. *Moebus v. Herrmann*, 440.
9. RAILROAD COMPANY NOT LIABLE FOR UNFORESEEN ACCIDENT. — Telegraph wires extended over the defendant's track, and one of them was broken by coming in contact with a brakeman who was standing erect on a moving freight-car. The wire fell, and in some unaccountable manner coiled around the body of the deceased, who was at work upon a flat-car twenty-five feet from the main track, and, catching at the same time upon a brake-handle of the moving train, it was carried forward, dragging the deceased along, thus causing his death. The freight-car upon which the brakeman stood was above the average height, and the brakeman was very tall, but he had frequently passed under the wires, standing erect on the top of the cars, and had no thought of danger from contact therewith. The wire which was broken had by some means become lowered in the center, of which the defendant was without notice. *Held*, that the accident was one which the defendant was not

- bound to anticipate, and for which it could not be held liable. *Wabash, St. L., & P. Ry Co. v. Locke*, 193.
10. TELEGRAPH WIRE CARRIED FROM ONE POLE TO ANOTHER is not dangerous object in and of itself. And where telegraph wires extend over a railroad track, the railroad company is only bound to anticipate such combinations of circumstances, and accidents and injuries therefrom, as, taking into account its own past experience and the experience and practice of others in similar situations, together with what was inherently probable in the condition of the wires as they related to the conduct of its business, it might reasonably forecast as likely to happen. *Id.*
 11. TEXAS STATUTE IMPOSING LIABILITY UPON RAILROAD COMPANY for injuries done to stock, unless the railway is fenced, does not apply to such places as public necessity or convenience requires should be left unfenced, such as the streets of a city or town, depot or contiguous grounds, crossings of highways, and other such places; but when injury happens at or in such place, the burden of proof is on the company to show that they are relieved of the statutory duty; when this is done, it is only liable for negligence. *International & G. N. R. Co. v. Drakem*, 484.
 12. IN ABSENCE OF PROOF OF NEGLIGENCE OF RAILROAD COMPANY injuring stock running at large at a depot in the settled part of a town where the company could not fence its track, as public necessity required it to be left open, the company is not liable. *Id.*
 13. IN ACTION AGAINST RAILROAD COMPANY FOR INJURY TO STOCK running at large in a town, evidence is admissible to show that the stock, under the law, was not allowed to run at large, as the company may presume a compliance with such law by the owner of the stock, and is excused from exercising such care as is exacted, when animals are permitted to run at large. When no such law exists, the company is liable for want of ordinary care; when such law does exist, it is liable only for gross negligence. *Id.*
 14. WHERE RAILROAD IS OWNED BY ONE COMPANY AND LEASED TO ANOTHER, without authority, both are liable for injury wrongfully committed by the lessee; the one because of its actual operation of the road, and the other because, without legislative permission, it could not transfer its franchise temporarily, so as to release itself from liability for the acts or defaults of its lessee. *Id.*
 15. WHERE EMPLOYEE OF RAILROAD COMPANY USES TELEPHONE, PLACED IN SWITCH-YARD of the company for the purpose of communicating with the office, to communicate the fact that one of the cars is out of order, and receives a reply from some one in the office directing him to send it off if it will hold together, it will be presumed, in the absence of evidence to the contrary, that the communication was sent to and answered by some one having authority to give directions touching the matter inquired about, and such communication is admissible in evidence against the company in an action for injuries subsequently caused by the defective car. *Seever, J., dissenting. Reed v. Burlington etc. R. R. Co.*, 243.
 16. KNOWLEDGE BY SWITCHMAN WHO MAKES UP TRAIN, OF DEFECTIVE CONDITION OF CAR placed therein, is notice to the railroad company; and where there is such additional evidence as to place the fact of notice beyond dispute, it is not necessary that the court should instruct the jury that without such notice the company would not be liable for the injury resulting from the use of the defective car. *Id.*

17. BRAKEMAN'S VIOLATION OF RULE OF RAILROAD COMPANY IN COUPLING CARS will not defeat his right to recover for an injury caused by a defect in one of the cars, where it is manifest that the injury would not have been avoided if he had observed the rule. *Id.*

See COMMON CARRIERS; EMINENT DOMAIN; EVIDENCE, 8; MASTER AND SERVANT.

RAPE.

See CRIMINAL LAW, 26-29.

RECEIVERS.

1. SALE UNDER EXECUTION OF PROPERTY IN CUSTODY OF RECEIVER, though under a levy made prior to his appointment, is void, unless authorized by the court. *Walling v. Miller*, 400.
2. LIEN OF EXECUTION IS NOT DESTROYED BY APPOINTMENT OF RECEIVER, but the lien-holder must seek the enforcement of his lien only by permission of the court appointing the receiver, if he has obtained possession of the property. *Id.*
3. POSSESSION OF RECEIVER MUST NOT BE DISTURBED, except by permission of the court, by persons having adverse though paramount liens. *Id.*
4. IT IS CONTEMPT OF COURT FOR THIRD PERSON to attempt to deprive a receiver of possession, whether by force or by suit. *Id.*
5. RECEIVER CAN NEVER BE TREATED AS TRESPASSER for selling property in his possession pursuant to the order of the court by which he was appointed. Neither can the plaintiff who procured the appointment of such receiver become a trespasser by advising and aiding him to execute such order. *Id.*
6. RECEIVER GENERALLY IS RESPONSIBLE only for the consequences of his own neglect, and is protected when he acts in entire good faith in the management of the estate committed to him; yet when he is appointed and acts as a guardian, and is required to keep the money of his wards safely invested and bearing interest, he is held to the same accountability as an ordinary guardian. *State v. Goeck*, 234.
7. RECEIVER ACTING AS GUARDIAN IS DERELICT IN HIS DUTY when he invests the estate of his ward by deposit in a bank in another state, without security, however solvent the bank may be at the time; and if it afterwards fails, he is liable for the loss. *Id.*
8. RECEIVER ACTING AS GUARDIAN MUST RENDER HIS ANNUAL ACCOUNT and report to the court of the manner and nature of such investment as he may have made of the ward's estate, that the court may sanction his acts; and if he fails in this respect, he is liable for any loss arising through such dereliction of duty. *Id.*

RES JUDICATA.

RES JUDICATA — LAW OF CASE. — Lease which has been treated as valid by the court and all the parties as creating a term for years, on two former appeals, may be introduced at a third trial to show that it creates but a tenancy at will, and held invalid as a lease for years, on account of defective acknowledgment. *McLeran v. Benton*, 814

RESTRAINT OF TRADE.

See CONTRACTS, 16, 17.

ROBBERY.

See CRIMINAL LAW, 30, 31.

SALES.

1. TESTIMONY AS TO PRICE OF GOODS AT DISTANT MARKET OF DEALER whose knowledge is derived in the course of his business, and from prices current sent to him, is admissible upon the trial of an action for the price of such goods, as some evidence of the value thereof at the place of production, making allowance for the expense of transportation and sale. *Suttle v. Falls*, 338.
2. WHERE VENDOR SHIPS GOODS TO BE PAID FOR BY NOTES OF VENDOR, which are to be executed and delivered concurrently with the delivery of the goods, no title passes until the notes are executed and delivered. No sale is consummated if the notes be not delivered, and the statute requiring conditional sales of goods to be reduced to writing and registered does not apply to such a case. *Millhiser v. Erdman*, 334.

See BAILMENTS.

SHERIFFS.

See EXECUTIONS.

SLANDER.

1. SLANDER. — EVIDENCE OF PECUNIARY CONDITION OF DEFENDANT is admissible in action for slander, if the evidence warrants the imposition of vindictive damages. *Reeves v. Winn*, 287.
2. SLANDER. — EVIDENCE OF PECUNIARY CONDITION OF PLAINTIFF is admissible in action for slander for the purpose of showing his actual damages, but not for the purpose of awarding him punitive damages. *Id.*

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE OF ACT WHICH IS "ILLEGAL, HARD, AND UNCONSCIONABLE," will never be decreed. *Swint v. Carr*, 44.
2. DURESS. — Where an illiterate person has entered into a contract, and has subsequently been induced by threats and misrepresentations to surrender part of his rights under the same, a decree enforcing the contract as originally made will not be disturbed. *Id.*
3. SPECIFIC CONTRACT WILL BE DECREED ONLY WHEN CONTRACT IS IN WRITING, and is certain and fair in all its parts, and for an adequate consideration. The description of the subject-matter must be so certain that it may be known therefrom what the purchaser was contracting for and the vendor was selling. *Hamilton v. Harvey*, 118.
4. DESCRIPTION OF LAND as "a one-third interest in five acres near said works" is too uncertain to sustain a decree for specific performance. The following descriptions have also been held fatally defective: "A tract of land lying on the north side of the Watery Branch, containing 150 acres"; "a lot of land joining a small tract now occupied by Michael Micne"; "the houses on Smithfield Street"; "two lots of land situate in Hackensack township, in the county of Bergen"; "one house and lot in the town of Hillsborough, purchased of me"; "the 120 acres of land in Shannon County, Missouri"; and "from twenty-six thousand to twenty-eight thousand feet of land situate on Walden and Vassal Lane,

in Cambridge, when the bounds are fixed and the street laid out, the street to be forty feet wide and two hundred feet long." *Id.*

5. **EQUITY WILL NOT, IN GENERAL, ENFORCE SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF CHATTELS**, but in case of a sale or transfer of stocks in a merely private or business corporation, when from any proper cause it is plain that the remedy at law is inadequate or damages are impracticable, specific relief may be awarded. *Goodwin Gas Store etc. Co.'s Appeal*, 696.
6. **SPECIFIC PERFORMANCE — VENDEE'S LIEN.** — The administrator of the estate of a decedent obtained an order to sell real estate, and sold it accordingly. The purchaser paid the purchase-money in full, and afterwards sold the property to another, who paid the purchase price, but received no deed. After the latter purchase, the administrator's sale was set aside because of some irregularity in the proceedings. *Held*, that the vendee of the purchaser from the administrator could not maintain an action for the specific performance of the contract of sale, but was entitled to a vendee's lien on the land for the amount of the purchase-money paid by him. *Stults v. Brown*, 190.

STATUTES.

1. **RULE OF CONSTRUCTION. — WHEN GENERAL WORDS FOLLOW SPECIFIC WORDS** designating certain specified things, the general words are to be limited to cases of the same general nature as those which are specified. Various instances given of the application of this rule. *People v. Richards*, 373.
2. **STATUTE REQUIRING PARTICULAR THING TO BE OR NOT TO BE DONE**, and leaving its exercise to the judgment and discretion of a designated agent, does not vest an arbitrary discretion in him; it only vests a lawful discretion, which must be exercised in a lawful manner, as he is amenable to the statute for abusing the discretion placed in him. *State v. Foster*, 305.
3. **WHEN POWER IS GIVEN TO DO ACT WHICH CONCERNS PUBLIC INTEREST, ITS EXERCISE**, when applied to a public officer or body, may be insisted upon as a duty, although the phraseology of the statute be permissive only; but when the power is lodged with persons exercising, or to exercise, legislative or judicial functions, and the subject-matter of the statute and its phraseology concur in showing that the authority is essentially discretionary, no absolute duty is imposed. *McDade v. Chester City*, 681.
4. **GENERAL STATUTE DOES NOT, AS GENERAL RULE, REPEAL** a local enactment by mere implication. *Evans v. Phillips*, 655.
5. **PROHIBITIONS IN PENNSYLVANIA CONSTITUTION**, article 3, section 7, against local or special legislation are prospective only, merely imposing restrictions on future legislation, and do not repeal local statutes containing provisions inconsistent therewith, and in force at the time of the adoption of the constitution. Nor was it the intent and meaning of the constitution that all future legislation should be conditioned on the repeal of such local laws. *Id.*
6. **IN ORDER TO GIVE EFFICIENCY TO GENERAL LAW**, legislature is not bound to repeal any and all local statutes which may be supposed to limit its application. *Id.*
7. **PENNSYLVANIA ACT OF JUNE 25, 1885**, regulating collection of taxes in boroughs and townships, is to be regarded as a general law, and is not

rendered local, and obnoxious to the provisions of the state constitution, article 3, section 7, and article 9, section 1, by the provision of its concluding clause, that said "act shall not apply to any taxes the collection of which is regulated by a local law." The act is therefore constitutional, and applicable to the whole state, excepting in so far as its operation is obstructed by existing local statutes, enacted prior to the new constitution of 1874: *Id.*

6. PENNSYLVANIA ACT OF APRIL 21, 1869, providing for collection of school tax, is local statute, inasmuch as its application is restricted to such school districts within certain parts of the state as may formally accept its provisions. *Id.*
9. ONE WHO WAS PRIOR POSSESSOR within the limits embraced in the Van Ness ordinance of San Francisco, which relinquished the city's title in favor of such possessor, but who was ousted before the ordinance went into effect, in order to acquire the ordinance title, must recover possession of the intruder by virtue of his prior possession, in suit commenced before his right of action on his prior possession is barred by the statute of limitations. He cannot recover from the intruder by virtue of any title vested in him by such ordinance. *McLeran v. Benton*, 814.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN AGAINST CLIENT until he discovers his cause of action arising from the conversion by his attorneys of a claim sent by him to them for collection, and which cause of action they conceal from him, when, by virtue of their relation to him, they were under obligation to reveal to him every fact in connection with the claim which might in any manner affect his interest. *Wilder v. Secor*, 236.
2. WHERE RIGHT OF ACTION ACCRUES TO ONE UNDER NO DISABILITY, but who dies without bringing suit, the statute of limitations continues to run, notwithstanding the disability of one claiming under the deceased. *McLeran v. Benton*, 814.
3. WHEN EXECUTOR'S OR ADMINISTRATOR'S RIGHT TO RECOVER PROPERTY of the estate is barred by the statute of limitations, the heir or devisee is also barred, though the latter may be under the disability of infancy at the time the action accrued to the representative. *Id.*
4. STATUTE OF LIMITATIONS. — Infant, though represented by a guardian, when a cause of action accrues, may maintain an action thereon at any time within four years after reaching her majority, as provided in sections 2926 and 2727 of the code. *Grimsby v. Hudnell*, 46.
5. WHERE LEGAL TITLE TO LAND IS VESTED IN TRUSTEES for the benefit of a *cestui que trust*, the statute of limitations will run against the former, and when a complete bar as to him, the *cestui que trust* will be barred, though she labored under the disability of coverture at the time that the adverse possession constituting the bar commenced. This rule does not apply to guardians and administrators, to the prejudice of wards and heirs. *Collins v. McCarty*, 475.
6. STATUTE OF LIMITATIONS DOES NOT RUN AGAINST TRUSTEE, when a claim is set up through him as against the *cestui que trust*; nor can it affect the rights of a person laboring under disability when the action arose, if at that time the legal title was in him, though the control of the property was intrusted to another; nor does it apply to a case where the cause of

action arose from any breach of duty or trust on the part of the trustee, other than the mere failure to sue within the period of limitation. *Id.*

7. **STATUTE OF LIMITATIONS CHASES TO RUN FROM TIME OF AMENDMENT**, as against one who is made a defendant to a bill in equity by amendment. *Bell's Appeal*, 532.
8. **LACHES**. — One who commences an action within the time allowed by the statute of limitations cannot be denied relief on the ground of laches. *Carterright v. McGowan*, 105.
9. **ACKNOWLEDGMENT OF DEBT MADE TO STRANGER**, and not intended to be communicated to the creditor, will not remove the bar of the statute of limitations. *Parker v. Remington*, 897.

SUNDAYS.

See **CONTRACTS**, 6.

SUPPLEMENTARY PROCEEDINGS.

See **EXECUTIONS**, 10, 11.

TAXATION.

See **INJUNCTIONS**, 1, 2.

TELEGRAPHS.

See **CONTRACTS**, 3.

TORTS.

CLASSIFICATION OF ACTS OR OMISSIONS OUT OF WHICH ACTIONS IN TORT, to recover for injury to persons or property, ordinarily arise, or are predicated upon. *Wabash, St. L., & P. R'y Co. v. Locke*, 193.

See **CORPORATIONS**, 6-9; **HUSBAND AND WIFE**, 4, 5; **INSANITY**.

TRADE-MARKS.

1. **NUMBERS ARBITRARILY CHOSEN MAY BE ADOPTED AS TRADE-MARKS** by a manufacturer of goods to designate his style, and his quality as well. But he cannot appropriate to his exclusive use numbers already in use, and known to the trade as applied to the same styles of goods. *American Solid Leather Button Co. v. Anthony*, 898.
2. **TRADE-MARK**. — **GENERALLY ONE**, BY USING HIS OWN NAME as a trade-mark, cannot deprive another having the same name from using it in conducting his business, provided the latter resorts to no device or artifice to create the impression that the goods manufactured or sold by him are manufactured or sold by the former. *Fraser v. Fraser L. Co.*, 73.
3. **ONE MAY GRANT EXCLUSIVE RIGHT TO USE HIS NAME TO ANOTHER** in connection with the manufacture and sale of a product of a certain kind and quality; and if he does so, he will be enjoined from subsequently using his own name in connection with the manufacture and sale of a like product. *Id.*
4. **SELLER OF ESTABLISHED BUSINESS**, with the right to use his name in connection with such business, cannot afterwards resume it in carrying on the same business. *Id.*
5. **IN PROCEEDING TO ENJOIN USE OF TRADE-MARK**, QUESTION IS, whether defendant's symbol or device is calculated to deceive and mislead the pub-

- lic; and if so, it is immaterial that he had no intention or thought of fraud, so far as the law of the case is concerned. *Pratt's Appeal*, 676.
6. **MERE NAME OF PERSON OR PLACE CANNOT, AS GENERAL RULE, BE APPROPRIATED** as a trade-mark, nor can any word, which is generally used to designate the name or quality of an article, be so appropriated. *Id.*
 7. **USE OF DEFENDANT'S NAME ON SPURIOUS TRADE-MARK IS NO DEFENSE** to a bill for an injunction to restrain the piracy. *Id.*
 8. **ONE WHO ADOPTS DEVICE OR SYMBOL TO MARK HIS GOODS ACQUIRES** a property in such device or symbol of which he cannot be deprived by any other person whatever. *Id.*
 9. **BUSINESS AND ITS ACCOMPANYING TRADE-MARK MAY PASS FROM PARENT TO HIS CHILDREN** without administration; and the business may be divided among the children, and each will have the right to the trade-mark to the exclusion of all the world except his co-heirs. *Id.*
 10. **TRADE-MARK, INJUNCTION TO RESTRAIN INFRINGEMENT OF.** — The plaintiffs were engaged in the dairy business, and made butter of superior quality and established reputation. At rare intervals they purchased milk and cream from others to enable them to supply their customers with butter, and in some instances purchased small amounts of butter for the same purpose. *Held*, that this fact was not such a fraud upon the public as would lead a court of equity to refuse an injunction restraining an infringement of the plaintiffs' trade-mark. *Id.*

TRESPASS.

TRESPASS. — REFUSAL TO REMOVE STONE FROM PLAINTIFF'S LAND, by one whose license to keep them there has terminated, is a continuing trespass, for which an action at law can be maintained; but the remedy at law is inadequate, and is not exclusive. *Wheelock v. Noonan*, 405.

See EQUITY, 10, 11; RECEIVERS, 5.

TRUSTS AND TRUSTEES.

1. **OWNER OF PERSONAL PROPERTY MAY IMPRESS UPON IT VALID PRESENT TRUST**, either by a declaration that he holds the property in trust, or by a transfer of the legal title to a third party upon certain specified trusts. *Dickerson's Appeal*, 547.
2. **TRANSFER OF SUBJECT-MATTER OF TRUST IS NOT NECESSARY**, if the owner thereof makes himself trustee; but if he selects a third party, the subject of the trust must be transferred to him in such mode as will be effectual to pass the legal title. *Id.*
3. **TRUST IN PERSONAL PROPERTY IS VALID AGAINST EVERYBODY EXCEPT CREDITORS**, where the facts show an executed intention or purpose, coupled with an express trust in the donor, for the benefit of the objects of his bounty, unrevoked by him at the time of his death. *Id.*
4. **RESERVED RIGHT OF REVOCATION IS NOT INCONSISTENT WITH CREATION OF VALID TRUST**. If the right is not exercised during the lifetime of the donor, and according to the terms in which it is reserved, the validity of the trust remains unaffected, as though there never had been a reserved right of revocation. *Id.*
5. **ABSOLUTE AND UNCONDITIONAL TRUSTS CREATED BY FATHER IN FAVOR OF CHILDREN, DESIGNATING HIMSELF TRUSTEE, CANNOT BE REVOKED** by the donor undertaking to annex thereto special terms and qualifications not expressed in the original declarations of trust. *Id.*

6. TO CREATE VALID TRUST, DESTINED BENEFICIARY is essential, except in the cases of certain "charitable" trusts. *Holland v. Alcock*, 420.
7. VALIDITY OR INVALIDITY OF TRUST cannot be dependent on the will of the trustee. *Id.*
8. THERE CAN BE NO VALID TRUST unless it is capable of being enforced even against the wish of the trustee. A mere honorary obligation which the trustee may perform or not at his will does not create a trust, and the legal representatives of the donor may compel the surrender of the property sought to be charged with such trust. *Id.*
9. DISTINGUISHING FEATURES OF CHARITABLE TRUSTS were, as they were administered in England, that they might be established through trustees, who might consist either of individuals or corporations, and in case of individual trustees, they might hold an indefinite succession, and be self-perpetuating, and the funds might be devoted in perpetuity to the charitable purposes indicated by the donor, while private trusts were not permitted to continue longer than a life or lives in being, and twenty-one years and a fraction afterwards. The persons to be benefited might consist of a class the individual members of which were uncertain, and the scheme of charity might be wanting in sufficient definiteness or details to admit of its practical administration. *Id.*
10. CY-PRES, DOCTRINE OF. — If a charitable trust were not sufficiently definite to admit of its practical administration, courts of equity would order a reference to a master in chancery to devise a scheme for its administration which should as nearly as possible conform to the intentions of its founder. *Id.*
11. CHARITABLE TRUSTS WERE IN ENGLAND MATTERS OF PUBLIC CONCERN, enforceable at the instance of the attorney-general; and in some cases they were enforced without his intervention, at the instance of a town or parish, or of its inhabitants, or of an individual of the class intended to be benefited. *Id.*
12. CHARITABLE USES, ENGLISH STATUTES concerning, mentioned and considered. *Id.*
13. USES ARE NOT PROHIBITED AS SUPERSTITIOUS BY LAWS OF NEW YORK, when they are for the observance of any ceremonial, the efficiency of which is recognized by the church of which the donor is a member. All religious beliefs are recognized and tolerated by the constitution of the state and of the United States; and no religious observance can be condemned, as a matter of law, as superstitious. *Id.*
14. DOCTRINE OF CY-PRES AND ENGLISH LAW of charitable uses do not prevail in New York. The laws of that state governing such uses must be sought in its statutes and in its corporation laws, general and special. Bequest to executors of personalty "to be by them applied for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of the testator's soul and the souls of his family, and also for the souls of all other persons who may be in purgatory," is void in New York for want of a definite beneficiary. *Id.*

See STATUTE OF LIMITATIONS, 5, 6.

UNDUE INFLUENCE.

See FRAUD, 4-7.

USES.

See TRUSTS.

- lic; and if so, it is immaterial that he had no intention or thought of fraud, so far as the law of the case is concerned. *Pratt's Appeal*, 676.
6. MERE NAME OF PERSON OR PLACE CANNOT, AS GENERAL RULE, BE APPROPRIATED as a trade-mark, nor can any word, which is generally used to designate the name or quality of an article, be so appropriated. *Id.*
 7. USE OF DEFENDANT'S NAME ON SPURIOUS TRADE-MARK IS NO DEFENSE to a bill for an injunction to restrain the piracy. *Id.*
 8. ONE WHO ADOPTS DEVICE OR SYMBOL TO MARK HIS GOODS ACQUIRES a property in such device or symbol of which he cannot be deprived by any other person whatever. *Id.*
 9. BUSINESS AND ITS ACCOMPANYING TRADE-MARK MAY PASS FROM PARENT TO HIS CHILDREN without administration; and the business may be divided among the children, and each will have the right to the trade-mark to the exclusion of all the world except his co-heirs. *Id.*
 10. TRADE-MARK, INJUNCTION TO RESTRAIN INFRINGEMENT OF. — The plaintiffs were engaged in the dairy business, and made butter of superior quality and established reputation. At rare intervals they purchased milk and cream from others to enable them to supply their customers with butter, and in some instances purchased small amounts of butter for the same purpose. *Held*, that this fact was not such a fraud upon the public as would lead a court of equity to refuse an injunction restraining an infringement of the plaintiffs' trade-mark. *Id.*

TRESPASS.

TRESPASS. — REFUSAL TO REMOVE STONE FROM PLAINTIFF'S LAND, by one whose license to keep them there has terminated, is a continuing trespass, for which an action at law can be maintained; but the remedy at law is inadequate, and is not exclusive. *Wheelock v. Noonan*, 405.

See EQUITY, 10, 11; RECEIVERS, 5.

TRUSTS AND TRUSTEES.

1. OWNER OF PERSONAL PROPERTY MAY IMPRESS UPON IT VALID PRESENT TRUST, either by a declaration that he holds the property in trust, or by a transfer of the legal title to a third party upon certain specified trusts. *Dickerson's Appeal*, 547.
2. TRANSFER OF SUBJECT-MATTER OF TRUST IS NOT NECESSARY, if the owner thereof makes himself trustee; but if he selects a third party, the subject of the trust must be transferred to him in such mode as will be effectual to pass the legal title. *Id.*
3. TRUST IN PERSONAL PROPERTY IS VALID AGAINST EVERYBODY EXCEPT CREDITORS, where the facts show an executed intention or purpose, coupled with an express trust in the donor, for the benefit of the objects of his bounty, unrevoked by him at the time of his death. *Id.*
4. RESERVED RIGHT OF REVOCATION IS NOT INCONSISTENT WITH CREATION OF VALID TRUST. If the right is not exercised during the lifetime of the donor, and according to the terms in which it is reserved, the validity of the trust remains unaffected, as though there never had been a reserved right of revocation. *Id.*
5. ABSOLUTE AND UNCONDITIONAL TRUSTS CREATED BY FATHER IN FAVOR OF CHILDREN, DESIGNATING HIMSELF TRUSTEE, CANNOT BE REVOKED by the donor undertaking to annex thereto special terms and qualifications not expressed in the original declarations of trust. *Id.*

6. TO CREATE VALID TRUST, DEFINED BENEFICIARY is essential, except in the cases of certain "charitable" trusts. *Holland v. Alcock*, 420.
7. VALIDITY OR INVALIDITY OF TRUST cannot be dependent on the will of the trustee. *Id.*
8. THERE CAN BE NO VALID TRUST unless it is capable of being enforced even against the wish of the trustee. A mere honorary obligation which the trustee may perform or not at his will does not create a trust, and the legal representatives of the donor may compel the surrender of the property sought to be charged with such trust. *Id.*
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See STATUTE OF LIMITATIONS, 5, 6.

UNDUE INFLUENCE.

See FRAUD, 4-7.

USES.

See TRUSTS.

USURY.

USURY LAW CANNOT AFFECT PRE-EXISTING INDEBTEDNESS. *Smith v. Carr*, 44.

VENDOR AND VENDEE.

1. WHERE VENDOR CONVEYS SAME LAND TO TWO SUCCESSIVE GRANTEEES, in an action by the second grantee for a breach of covenant of warranty the vendor will be estopped to deny that the first grantee obtained the title. *Hodges v. Latham*, 333.
2. PURCHASER OF LAND NEED NOT SHOW ACTUAL EVICTION BY LEGAL PROCESS to enable him to recover for a breach of covenant of warranty. If it appears that he yielded possession to the rightful owner, or that the premises, being vacant, the rightful owner took possession, it is such an eviction as will entitle him to recover. *Id.*
3. EQUITIES OF VENDEE WHO PAYS MONEY ON CONTRACT OF SALE ARE AS STRONG AS THOSE OF VENDOR who does not receive full payment for the land he sells. *Stullis v. Brown*, 190.

See INSURANCE, 8; SPECIFIC PERFORMANCE, 6.

VERDICT.

See DAMAGES; JURY AND JURORS.

WATERS.

1. WATERCOURSE. — WATER FLOWING IN NO DEFINED CHANNEL, and the course of which can be traced only by the deeper green of the grass which it moistens, does not constitute a watercourse. *Bloodgood v. Ayers*, 443.
2. SPRING WHOSE WATERS FLOW UNDERGROUND, CONCEALED, and the place of whose flow is a matter of uncertainty, belongs to the land-owner, and the rules to watercourses and their diversion do not apply. *Id.*
3. PERCOLATING WATERS, UNLESS FLOWING IN NATURAL CHANNELS and between defined banks, may be lawfully intercepted by him through whose land they flow. *Id.*
4. REPEAL OF ACT OF CONGRESS DECLARING RIVER PUBLIC HIGHWAY does not extend the boundaries of the land of the riparian owners, nor invest them with title to the middle of the stream. *Steele v. Sanchez*, 233.
5. TITLE OF RIPARIAN OWNER ON NAVIGABLE STREAM IS BOUNDED BY ORDINARY HIGH-WATER MARK, and if the line of ordinary high-water mark changes, the line of his land changes with it. *Id.*
6. RIGHTS OF RIPARIAN OWNER ON NAVIGABLE STREAM IN LAND BETWEEN HIGH AND LOW WATER MARK are peculiar to himself, and cannot be sold or transferred by him independently of a conveyance of the land to which they are appurtenant. He cannot confer upon another the right to quarry stone in the bed of the river, although the stone was, at the time when the government of the United States disposed of the land, underneath his land, and was only brought within the high-water mark by the subsequent washing away of the bank. *Id.*
7. RECLAMATION DISTRICT ORGANIZED AND EXISTING under the laws of California for the purpose of reclaiming swamp and overflowed lands has the right to maintain a levee along the banks of a navigable river to protect such lands from overflow, and is not liable in damages to one who owns land on the opposite side of the river two miles away, which land is overflowed in time of high water by reason of the erection of such levee;

and when such overflow occurs seven years after the erection of the levee, the damage is too indirect, remote, and consequential in point of time and distance to constitute a "taking" of the property for public use, so as to entitle the owner to compensation, within the meaning of the constitution. *Lamb v. Reclamation District No. 103*, 775.

8. RECLAMATION DISTRICT FORMED AND EXISTING under the laws of California for the purpose of reclaiming swamp and overflowed lands has the right to maintain a levee along a navigable river, and in so doing to dam the mouth of a slough which in time of flood acts as an escape for part of the waters of such river upon adjoining lands, but which carries no water except in time of flood, and the district does not thereby render itself liable in damages for the overflow of lands caused thereby, when such lands are on the opposite side of the river, and two miles below the mouth of such slough. *Id.*
9. SLOUGH WHICH ORIGINALLY CARRIES NO WATER of its own, but simply acts as a conduit by which occasionally some of the flood water of a navigable river escapes into the lower lands adjoining, does not come within the legal definition of a "watercourse," so as to apply the doctrine that one land-owner on a watercourse cannot dam it so as to flood the land of the owner below. *Id.*

WAYS.

1. GATES MAY BE LAWFULLY MAINTAINED ACROSS RIGHT OF WAY by the party who granted such right, when the grant declares that the property granted is a "mere easement of travel and private road privilege, but no other or greater or further estate whatever, or title or interest of any kind whatever." *Whaley v. Jarrett*, 764.
2. GRANT OF RIGHT OF WAY ACROSS GRANTOR'S LANDS DOES NOT IMPLY that it is to be open or free from gates or bars. *Id.*

WILLS.

1. WILL — PRECATORY PAPER ACCOMPANYING BEQUEST OF TRUNK AND CONTENTS, EFFECT OF. — A married woman died, leaving a will, and in a codicil thereto bequeathed her trunk and its contents to her sister. The trunk was opened after the death of the testatrix, and was found to contain, among other things, a savings bank book, with a credit of \$765, and a large envelope addressed to the sister, inclosing \$1,800 in money, and a letter in the handwriting of the testatrix, also addressed to the sister, and written subsequently to the will. A part of the letter was in these words: "Now, as to what I want done with the money, for God's sake do the following: In case my child lives, save the principal for it, and use the interest as you please; see that the child gets a proper education, and do not let it want for anything you can give it. In case it dies, you will have the money, and no one will know anything about it." The child died in a few months after the death of the testatrix. *Held*, — 1. That the letter not being attested, as required by statute, nor referred to in the original will, it could not be treated as a part of the will itself, nor as a codicil thereto, and the eighteen hundred dollars in money passed to the sister, but that the money represented by the savings bank book passed to the surviving husband of the testatrix; 2. That the alleged fraud of the testatrix on her husband, in concealing from him the ownership of the money, would not affect the rights of the sister, as she was ignorant of it. *Mayoohan's Appeal*, 660.

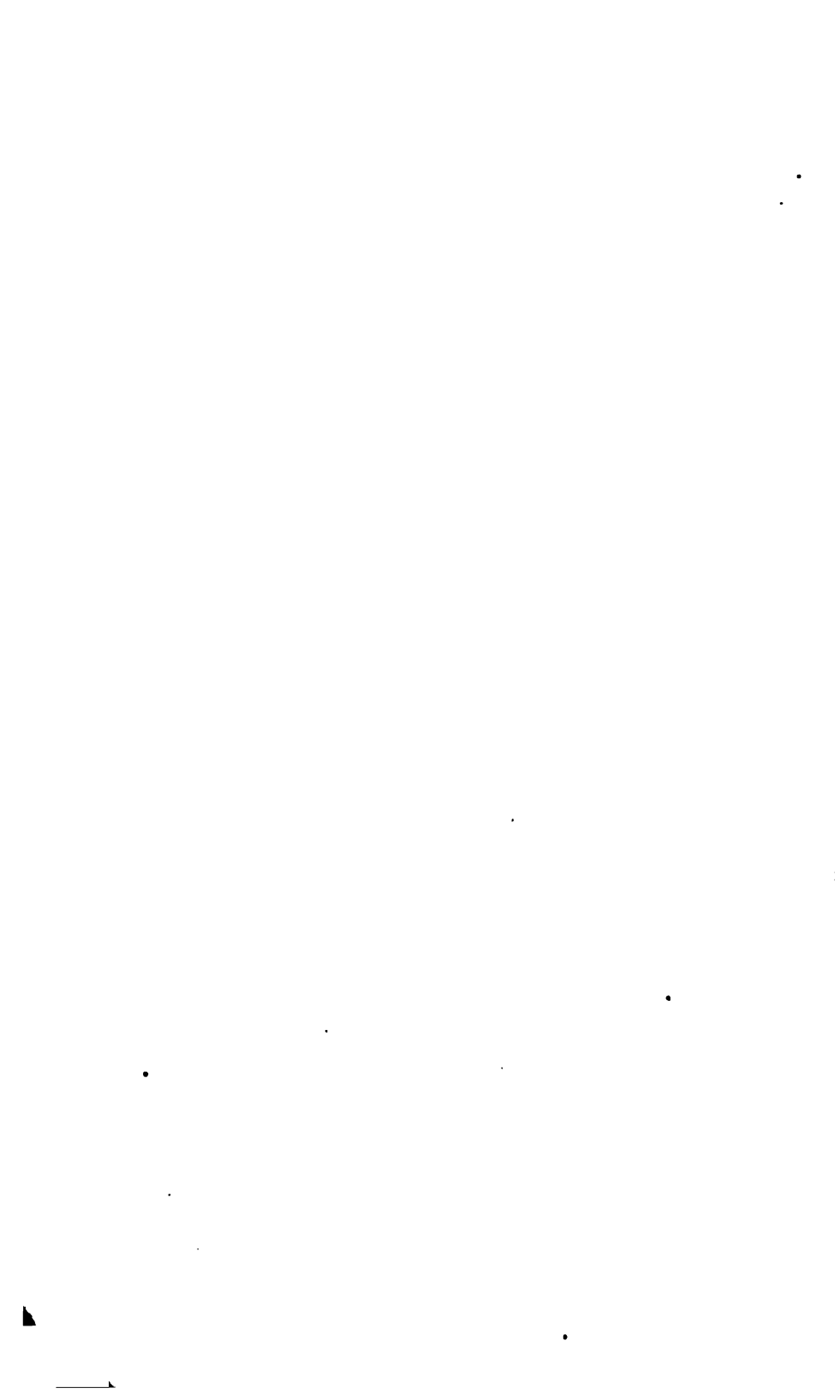
2. TESTAMENTARY PAPER, BY ITS TERMS TO TAKE EFFECT ONLY ON HAPPENING OF CERTAIN CONTINGENCY, CANNOT BE ADMITTED TO PROBATE as a will if the contingency does not happen. *Morrow's Appeal*, 616.
3. TESTAMENTARY PAPER, WHEN INEFFECTUAL AS WILL. — One who was about to leave home for a neighboring town wrote and signed a paper, commencing: "I am going to town with my drill and i aint feeling good and in case if i shouldend get back do as i say on this paper," etc. He went to town, where he became ill, but was taken home, and died soon afterwards. *Held*, that said paper could not be admitted to probate as the will of the decedent. *Id.*
4. IN RHODE ISLAND, WITNESSES TO WILL MUST SUBSCRIBE THEIR NAMES IN PRESENCE of the testator, and the acknowledgment in his presence of their signatures, affixed without his presence, is not sufficient. *Town of Pawtucket v. Ballou*, 868.
5. PERSON OF SOUND MIND, EVEN IN EXTREMIS, may make a partial will or gift; and the fact that he attempts at the same time, and as part of the same transaction, to dispose of the whole of his property, but for some cause the disposition is ineffectual as to part of it, will not prevent its being effectual as to the other part. *Henschel v. Mawrer*, 757.
6. BURDEN OF CASE RESTS UPON CONTESTANT OF WILL to the conclusion of the trial, upon an issue *deixavit vel non*, and his counsel has the right to close the argument to the jury. *Blaine v. Hartman*, 525.
7. BURDEN OF PROOF RESTS UPON STRANGER WHO WRITES WILL, by the terms of which he is the principal beneficiary, of showing that the testatrix was acquainted with its contents, and had an intelligent consciousness of the proportion of the estate to be taken by him; but the burden of proof in this respect rests upon the contestant, where the will is written by the son of the testatrix, who is the principal beneficiary. *Id.*
8. BURDEN OF PROOF RESTS UPON CONTESTANT OF WILL of showing that the testatrix was not acquainted with its contents, and had not an intelligent consciousness of the proportion of the estate to be taken by the beneficiary, where the will is written by the son of the testator, who is, by its terms, the principal beneficiary; but the burden of proof is upon the son if the will was not read by the testatrix, nor read or explained to her before its execution, nor read by her afterwards before her death. *Id.*
9. QUESTIONS WHETHER FRAUD AND UNDUE INFLUENCE WERE USED BY PROPONENT IN PROCURING WILL, and whether the will was executed by the testatrix without a knowledge of its contents, are properly submitted to the jury, where the will was written by a son of the testatrix, who was inequitably preferred over the other children, and there is evidence to show that the testatrix had repeatedly declared her intention to divide her property equally among her children, that she was in a state of excessive physical feebleness and exhaustion when she signed the will, and that she was not acquainted with its contents. *Id.*
10. SUPREME COURT MAY, ON APPEAL FROM PROBATE COURT OF TOWN, ALLOWING OR REFUSING PROBATE of a will, try and determine the question whether the testator was, at the time of his death, a resident of that town, so as to give the court appealed from jurisdiction, and its determination that the testator was a resident of the town, and its decree on the merits affirming the decree of the lower court, are conclusive on the parties to the proceeding in all the courts of the state. *Thornton v. Baker*, 925.

11. **WHERE PERSON PRESENTS WILL TO PROBATE COURT OF TOWN, WHICH REFUSES TO ADMIT IT TO PROBATE**, and the supreme court on appeal affirms the decree of the probate court on the merits, the petitioner is concluded by the decree of the supreme court, although it be not formally adjudged therein that the testator was resident in that town at the time of his death, and cannot offer the same will for probate to the probate court of another town. *Id.*
12. **HUSBAND WHO SUCCEEDS TO WIFE'S REAL ESTATE** under her will takes title thereto subject to its obligation to be applied to the payment of her debts. *Smith v. Seaton*, 668.
13. **DEVISEE'S TITLE, INTEREST ACQUIRED BY PURCHASER OF.** — A devisee's title to land under the will of his wife was sold at sheriff's sale, under an execution for his individual debt. Subsequently, the land was sold under process from the orphans' court to enforce payment of a debt of his wife. The devisee, as executor of his wife's estate, had full notice of the proceeding in the orphans' court, and the purchaser of the devisee's title at the sheriff's sale was fully notified of such proceeding at the time of his purchase. *Held*, that such purchaser took only the interest of the devisee, namely, the interest in the surplus after payment of his wife's debt, and that the purchaser under process from the orphans' court acquired true title to the land. *Id.*
14. **RULE OF ADEMPMENT IS NOT APPLICABLE TO DEVISES** of real estate. *Burnham v. Comfort*, 462.
15. **ADEMPMENT IS EXTINCTION OR SATISFACTION OF LEGACY** by some act of the testator, which indicates either a revocation, or an intention to revoke the bequest. *Id.*
16. **BEFORE DECLARING THAT ADEMPMENT HAS TAKEN PLACE**, the mind of the court should be wholly satisfied as to the meaning of the testator's act. *Id.*
17. **REVOCATION OF SPECIFIC DEVISE OF REAL PROPERTY MAY ARISE ONLY** from the alteration or alienation of testator's estate during his lifetime, or by some writing executed with all the formalities required for a valid will. Hence a devisee of real estate is entitled thereto, notwithstanding she received from the testator in his lifetime a sum of money, and executed a receipt therefor, which stated that it was received as her part of the testator's estate "up to this time, and all such other property as he may accumulate up to his decease." *Id.*

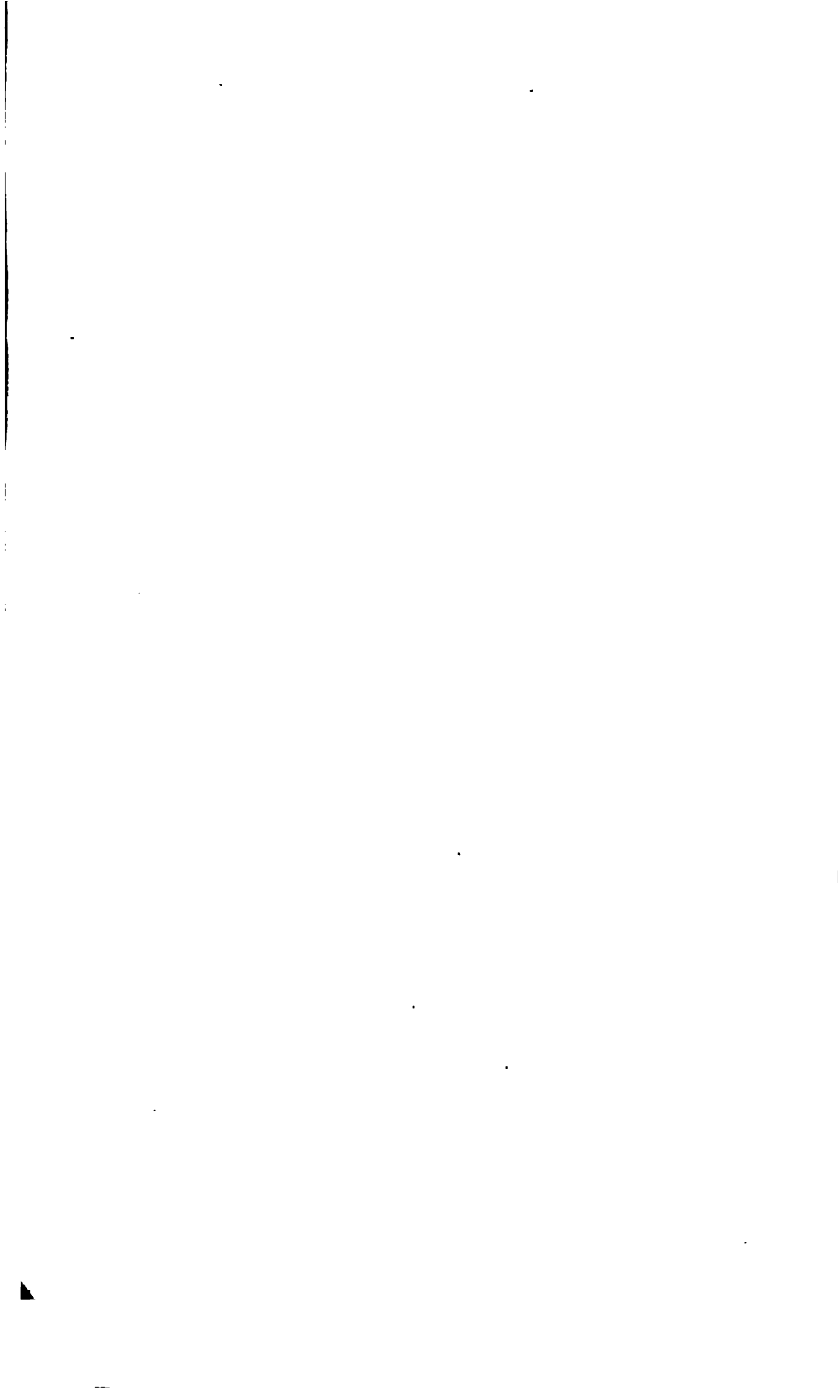
See ESTATES OF DECEDENTS; EXECUTORS AND ADMINISTRATORS.

WITNESSES.

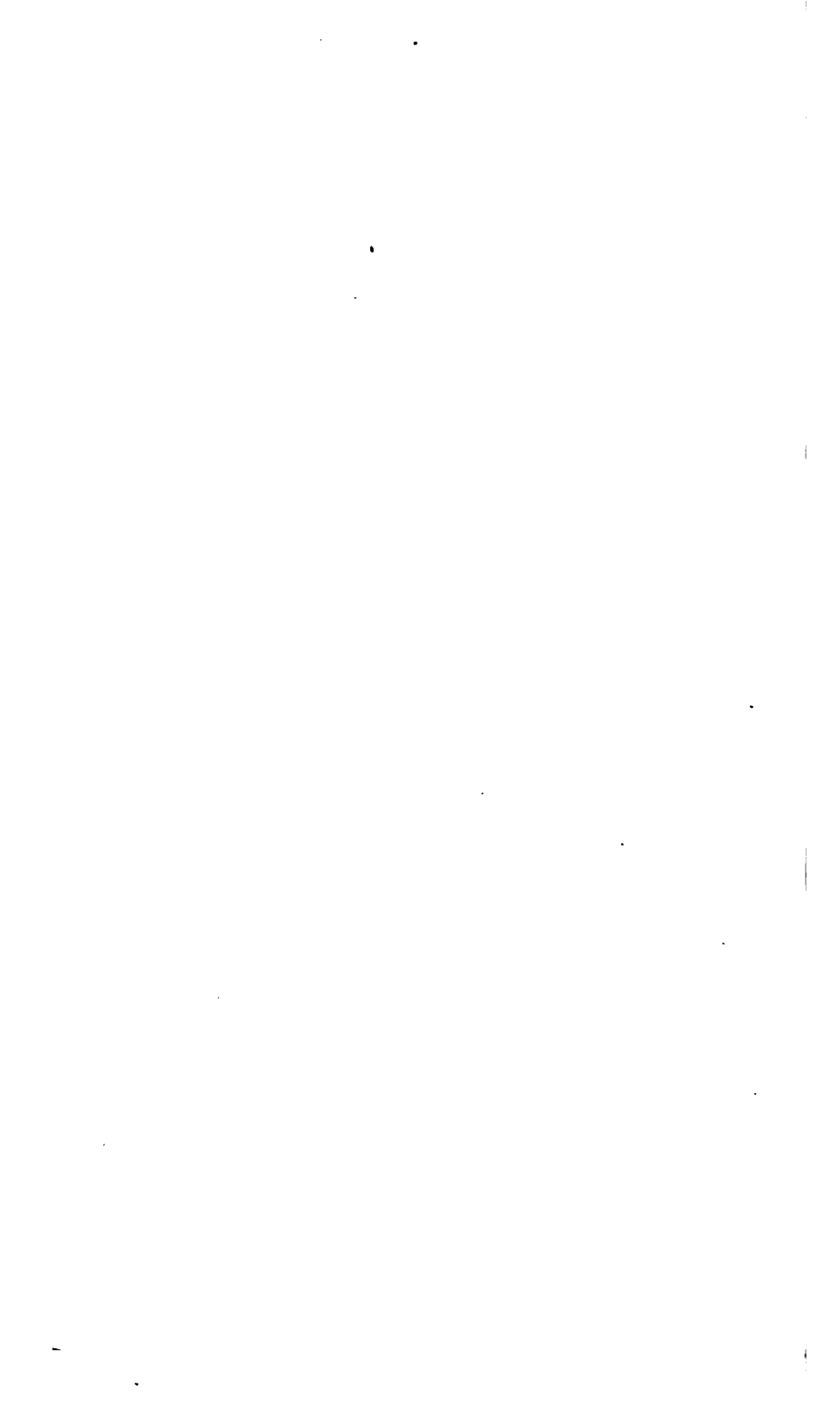
1. **CREDIBILITY OF WITNESS IS TO BE DETERMINED BY JURY.** *State v. Hozie*, 838.
2. **PARTY ALLOWING WITNESS TO TESTIFY** without being sworn thereby waives any objection to it on that account. *Trammell v. Mount*, 479.
3. **PEOPLE ARE BOUND BY ANSWER GIVEN ON CROSS-EXAMINATION** of the defendant in respect to collateral matters. They cannot ask him about such matters for the purpose of impeaching or contradicting him in regard thereto. *People v. Greenwall*, 415.

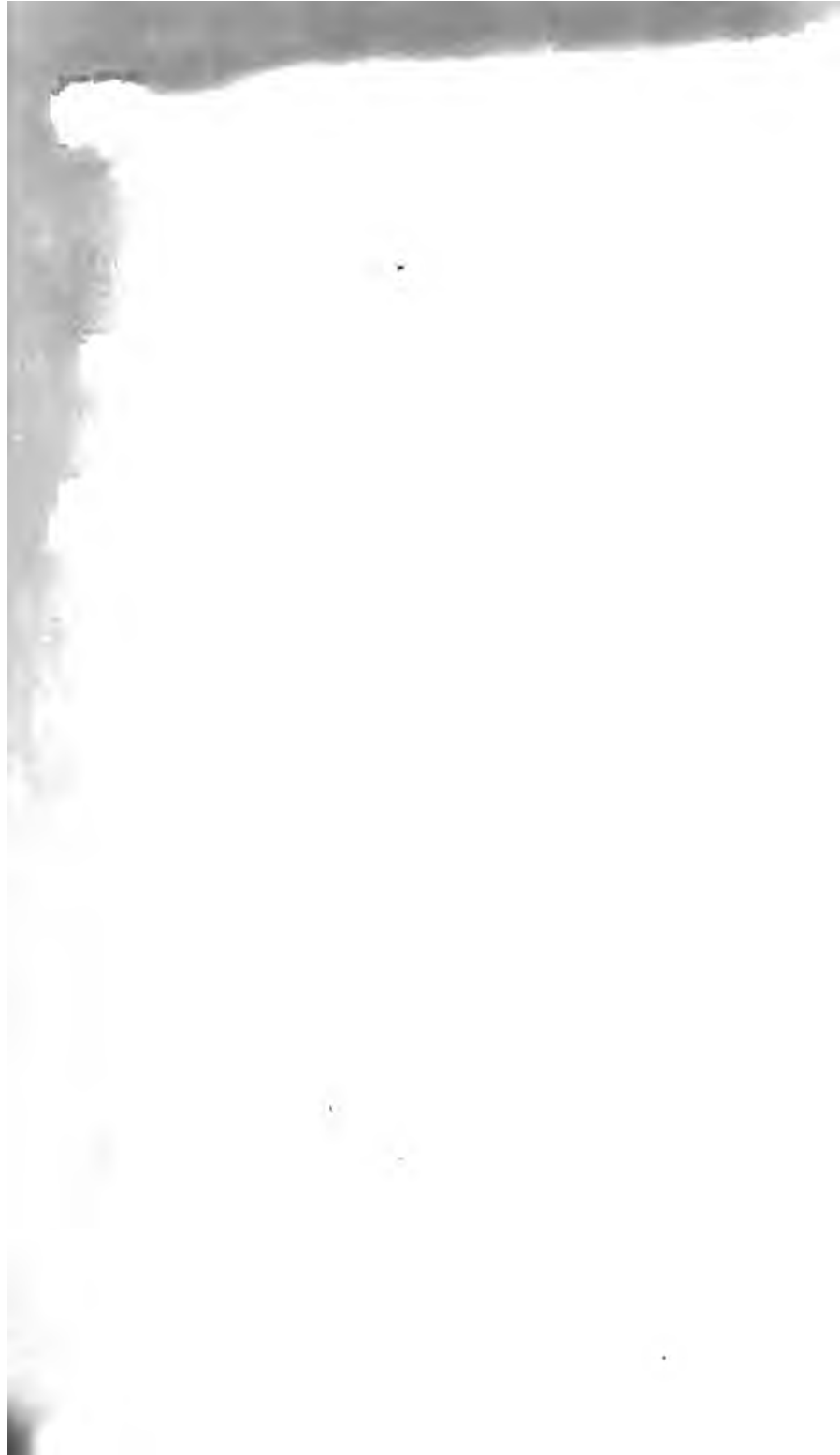
















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